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Wholey v. Sears Roebuck: Terminating Employees for Reporting Suspected Criminal Activity to the Appropriate Authorities Constitutes Wrongful Discharge

By: Julie A. Mallis

The Court of Appeals of Maryland held that terminating employees for reporting suspected criminal activity to the appropriate authorities constitutes wrongful discharge. *Wholey v. Sears*, 370 Md. 38, 803 A.2d 482 (2002). In so holding, the court refused Wholey's invitation to adopt an all-encompassing public policy mandate for investigating and reporting criminal activity, stating that changing the law in such a way is a task better suited for the Legislature. *Wholey*, 370 Md. 38, 70, 803 A.2d 482, 501.

Beginning in February 1972, Edward L. Wholey ("Wholey") worked as a security officer for Sears, Roebuck and Co. ("Sears") at its store in Glen Burnie, Maryland. His duties included investigating and reporting thefts by both employees and customers.

In March of 1995, Wholey observed the manager of the store in Glen Burnie taking items into his personal office from the store floor. The items would then disappear from his office. After this happened several times, Wholey reported this behavior to his superior, John Eiseman ("Eiseman"), who told him to "maintain his scrutiny." As this type of activity continued, Wholey again informed Eiseman and was given the use of a surveillance van

to observe the manager outside of the store and permission to install a camera. Later that day, he informed Eiseman the camera was installed and suggested that Eiseman inform the District Store Manager about it. Shortly thereafter, he was ordered to remove the camera.

On February 6, 1996, Sears fired Wholey from his job because his superiors did not like his "cop mentality" or the way he handled the situation with the manager. In September, Wholey filed a complaint in Anne Arundel County against Sears and Eiseman, alleging wrongful discharge and defamation.

With respect to the wrongful discharge and defamation claims, the jury found for the defendants. The jury returned a verdict for Wholey on the wrongful discharge claim and for Sears on the defamation claim. Sears appealed the wrongful discharge judgment to the court of special appeals, which reversed, holding, as a matter of law, Sears did not violate public policy by terminating Wholey. The Court of Appeals of Maryland granted certiorari to consider whether a public policy mandate exists in Maryland to ensure that an at-will employee will not be terminated for investigating and reporting suspected criminal activity.

The court began its discussion

by defining an at-will employee, such as Wholey, as one who has "an employment contract of infinite duration which is terminable for any reason by either party." *Id.* at 48, 803 A.2d at 487. One exception to this rule is the tort of wrongful discharge. *Wholey*, 370 Md. 38, 48, 803 A.2d 482, 487. In the case of *Adler v. Am. Standard Corp.*, 291 Md. 31, 35, 432 A.2d 464, 467 (1981), the court held that even an at-will employee may maintain a cause of action for wrongful termination for public policy reasons. *Id.* Therefore, to establish a wrongful discharge, the basis for the discharge must violate a "clear mandate of public policy" and there must be a connection between the conduct of the employee and the reason for which he was fired. *Id.* at 50-51, 803 A.2d at 489.

The court discussed two limiting factors with respect to adopting new public policy mandates. *Id.* at 52, 803 A.2d at 490. The first is to "provide a remedy for an otherwise unremedied violation of public policy." *Id.* Second, public policy should be distinguishable from statutory and constitutional mandates. *Id.* at 52, 803 A.2d at 490. The court did not limit itself strictly to prior judicial opinions, legislative en-

actments, or administrative regulations in determining public policy. *Wholey*, 370 Md. 38, 54, 803 A.2d 482, 491. However, it did recognize that declaration of public policy is usually a function of the Legislature. *Id.* After discussing what defines the public policy mandate under which a wrongful discharge claim may be pursued, the court concluded that such a public policy mandate for the wrongful discharge of at-will employees does exist, however, *Wholey* was ineligible. *Id.* at 57, 803 A.2d at 492.

A wrongful discharge tort exists for at-will employees for two reasons. *Id.* First, the Legislature has refused to provide a statutory remedy for private employees who report criminal activity. *Id.* Second, under Md. Code, Art. 27, §762, the Criminal Law Article, the Legislature created a misdemeanor offense for one who retaliates against a person who reports a crime. *Wholey*, 370 Md. 38, 57, 803 A.2d 482, 492.

To fall into the category of persons who qualify for this public policy exception to at-will employment, the employee must report the suspected activity to appropriate law enforcement or judicial officials. *Id.* at 62, 803 A.2d at 496. Simply investigating the suspected activity and reporting it to co-employees or supervisors did not put *Wholey* into that category. *Id.*

Wholey cannot argue that he was acting in the “public good” by investigating the criminal activity. *Id.* at 65, 803 A.2d at 498. The court

held the “public good” is best served by reporting criminal activity, not merely investigating it. *Id.* This holding is justified by the fact that the Legislature has declined to hold citizens criminally responsible for failing to investigate or report criminal activity. *Wholey*, 370 Md. 38, 65, 803 A.2d 482, 498. The court simply refused to create a blanket exception to the notion of at-will employment, which would state that investigating criminal activity is a “*per se* public benefit, the termination for which, is actionable in tort law.” *Id.* at 67, 803 A.2d at 499.

The Court of Appeals of Maryland did not hold there is a legal duty to report criminal activity in Maryland. *Id.* at 70, 803 A.2d at 500-501. However, should one decide to report criminal activity to the appropriate authorities, the Legislature determined that they should be protected from retaliation for public policy reasons. *Id.* It is not fair to punish a person for reporting criminal activity, *Wholey*, 370 Md. 38, 59, 803 A.2d 482, 494, but in order to qualify for this protection, the criminal activity must be reported to the appropriate authorities. *Id.* at 62, 803 A.2d at 496. Therefore, while a public policy mandate exists for those employees that report criminal activity, *Wholey* was not entitled to the protection because he did not report this activity to the appropriate authorities. *Id.* at 70, 803 A.2d at 500-501.

Following the decision in this case, the court did not purport to

create a blanket provision that allows a public policy exception to the at-will employment doctrine in all circumstances. This case demonstrates that the Court of Appeals of Maryland respects the concept of separation of powers by its recognition that a court’s task is to interpret the law and not to create or change it. Holding that such an all-encompassing provision exists would, in effect, be creating law, which is a function of the Legislature, not the court of appeals.