FOLLOWING THE PUBLIC POLICY EXCEPTION: DOES THIS EXCEPTION STILL ACCOMPLISH ITS ORIGINAL GOAL?

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I. INTRODUCTION

Most American workers are familiar with the terminable at-will employment doctrine.[1] The doctrine is designed to protect the employer and the employee from legal liability when either terminates the "employment relationship."[2] There is much debate, however, about whether or not this doctrine actually gives both sides "equal power."[3] In an attempt to balance the power and to prevent employers from violating public policy when discharging employees, the judiciary implemented a "public policy exception to the at-will [employment]" doctrine.[4] In the years since adopting this exception, courts have grappled with the problem of defining *well-established* and *clearly articulated* public policy.[5] This

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1. *See The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. OF ST. LEGIS., http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspxLegislatures [https://perma.cc/MN9H-TKAA] (stating the at-will "presumption remains an important feature of the U.S. employment landscape").

2. Katherine R. Morelli, Note, *A Misguided Reversal: Why the Oklahoma Supreme Court Should Not Have Interpreted* Saint v. Data Exchange, Inc. *to Provide a* Burk *Tort Cause of Action to Plaintiffs Alleging Age Discrimination in Employment*, 62 OKLA. L. REV. 329, 329 (2010).

3. *Id.*

4. Burk v. K-Mart Corp., 1989 OK 22, ¶ 17, 770 P.2d 24, 28, *superseded in part by statute*, OKLA. STAT. tit. 25, § 1350(A) (2011 & Supp. I 2016). Section 1350(A) of the Oklahoma Civil Code abolishes any common-law remedy pertaining to a cause of action for employment discrimination. § 1350(A).

5. *Burk*, 1989 OK 22, ¶ 18, 770 P.2d at 28–29; *see also* David W. Lee, *Three Steps Forward in the Continuing Search for the Parameters of the Public Policy Exception to the At-Will Employment Doctrine in Oklahoma:* Wilburn v. Mid-South Health Development Inc., Barker v. State Insurance Fund, *and* Crain v. National American Insurance Co., 29 OKLA. CITY U. L. REV. 95, 103 (2004).

Case Comment highlights the consistent and legitimate approach the Oklahoma Supreme Court has taken in trying to remedy the problem.

Part II discusses the history of the public policy exception and how courts have defined it; it also introduces the Oklahoma Supreme Court's latest opinion involving the subject. Part III examines this recent opinion and the court's reasoning for its decision, including an examination of what constitutes public policy under the exception. Furthermore, Part IV advances the argument that the Oklahoma Supreme Court continues to uphold tradition, while protecting the public, when deciding what falls under the public policy exception. Finally, Part V concludes by suggesting that while the determination of what constitutes public policy is a delicate issue often criticized, caselaw reflects the court's honest attempts to represent each side fairly and still remain true to the original goal of the public policy exception.

II. AT-WILL EMPLOYMENT MEETS THE PUBLIC POLICY EXCEPTION

Oklahoma, like the majority of states, enforces the at-will employment doctrine.[6] "The longstanding employment at-will rule is generally that an employment contract is of an indefinite duration and may be terminated without cause at any time without the employer incurring liability for breach of contract."[7] This common-law rule was adopted, "theoretically[, to] benefit[] both the employer and employee for a number of reasons, but principally because each party has an equal right to end the employment relationship whenever he or she desires without facing legal consequences."[8] Critics of the doctrine, however, argue that the rule "unrealistically assumes that both the employer and employee have equal power," pointing to the fact that "[e]mployee power decreases as corporations grow larger and job shortages abound."[9] As a result, the courts have determined that the terminable at-will doctrine is "not absolute . . . , and the interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of

6. Moore v. Warr Acres Nursing Ctr., L.L.C., 2016 OK 28, ¶ 1, 376 P.3d 894, 895; *see also* Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 MERCER L. REV. 551, 554 (2009).

7. Shero v. Grand Sav. Bank, 2007 OK 24, ¶ 6, 161 P.3d 298, 300.

8. Morelli, *supra* note 2, at 329.

9. *Id.*

the jungle is thinly clad in contractual lace."[10] "[C]ourts recognized that certain [employee] terminations were counterproductive to the broader social welfare and with that came the rise of the public policy exception to the doctrine of at-will employment."[11]

The Oklahoma Supreme Court officially adopted the public policy exception in *Burk v. K-Mart Corp*.[12] The *Burk* court argued, "[t]hose jurisdictions which have adopted the public policy exception have done so to accommodate the competing interests of society, the employee and the employer."[13] Quoting the Illinois Supreme Court, the court explained the need for the accommodation:

> "With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole . . . ."[14]

"*Burk* was [a] landmark case wherein the Court adopted a public policy exception to the at-will termination rule in a narrow class of cases in which the discharge of an employee is contrary to the clear mandate of public policy as articulated by constitutional, statutory, or decisional law."[15] Whether public policy exists "is a question of law to be resolved by the courts."[16] In an attempt to cautiously apply such an impactful

10. Hall v. Farmers Ins. Exch., 1985 OK 40, ¶ 13, 713 P.2d 1027, 1029.

11. Swift, *supra* note 6, at 556.

12. Burk v. K-Mart Corp., 1989 OK 22, ¶ 17, 770 P.2d 24, 28, *superseded in part by statute*, OKLA. STAT. tit. 25, § 1350(A) (2011 & Supp. I 2016).

13. *Id.* ¶ 16, 770 P.2d at 28. "The public policy exception to the employment-at-will rule seeks to maintain a proper balance 'among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.'" Kruchowski v. Weyerhaeuser Co., 2008 OK 105, ¶ 27, 202 P.3d 144, 152 (quoting McGehee v. Florafax Int'l, Inc., 1989 OK 102, ¶ 11, 776 P.2d 852, 854).

14. *Burk*, 1989 OK 22, ¶ 16, 770 P.2d at 28 (quoting Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981)).

15. Moore v. Warr Acres Nursing Ctr., L.L.C., 2016 OK 28, ¶ 17, 376 P.3d 894, 899.

16. Hayes v. Eateries, Inc., 1995 OK 108, ¶ 19, 905 P.2d 778, 785 (citation omitted); *see also* Shero v. Grand Sav. Bank, 2007 OK 24, ¶ 6, 161 P.3d 298, 300.

exception, courts also "note[] that because the term 'public policy' [i]s vague, the exception ha[s] to be tightly circumscribed."[17] Agreeing with the Supreme Court of Hawaii, the *Burk* court makes clear that "[p]rior judicial decisions may also establish the relevant public policy" underlying an exception, but it warned "courts [to] proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject."[18]

An actionable *Burk* tort only arises in circumstances "where an employee is discharged for refusing to act in violation of an established and well-defined public policy, or for performing an act consistent with a clear and compelling public policy."[19] If the claim does not align with one of these two circumstances, it cannot be brought as a *Burk* claim.[20] In *Vasek v. Board of County Commissioners of Noble County*,[21] the court articulated the requirements of a "viable *Burk* claim"[22]:

> [The] claim must allege (1) an actual or constructive discharge (2) of an at-will employee (3) in significant part for a reason that violates an Oklahoma public policy goal (4) that is found in Oklahoma's constitutional, statutory, or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma and (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.[23]

Courts recognize that "[t]he public-policy exception to the at-will employment rule is not easily applied . . . because (1) a wide variety of scenarios potentially comprise this common-law tort and (2) it is not always easy to identify what is a specific, well-established, clear and compelling public policy."[24] The Oklahoma Supreme Court clarified the exception in *Hayes v. Eateries, Inc.*,[25] holding that "to support a viable

17. *Moore*, 2016 OK 28, ¶ 17, 376 P.3d at 899.

18. *Burk*, 1989 OK 22, ¶ 18, 770 P.2d at 29 (quoting Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982)).

19. *Id.* ¶ 19, 770 P.2d at 29.

20. *See id.*

21. Vasek v. Bd. of Cty. Comm'rs, 2008 OK 35, 186 P.3d 928.

22. *Moore*, 2016 OK 28, ¶ 19, 376 P.3d at 899 (quoting *Vasek*, ¶ 14, 186 P.3d at 932).

23. *Id.*

24. Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 10, 176 P.3d 1204, 1210 (footnotes omitted).

25. Hayes v. Eateries, Inc., 1995 OK 108, 905 P.2d 778.

[*Burk*] tort claim," the claim must involve "the direct interests of the general public."[26]

In *Vasek*, the plaintiff sued her employer for wrongful termination, alleging her employer fired her for filing a complaint with the Department of Labor about "mold at the courthouse."[27] Basing her argument on two Oklahoma acts, the Oklahoma Occupational Health and Safety Standards Act (OOHSSA)[28] and the Oklahoma Personnel Act,[29] the plaintiff asserted that "the two acts express the policy of maintaining the health and safety of those who work in public buildings and the policy against discharging workers for reporting health and safety violations."[30] The court stated that "OOHSSA contains [language] . . . which applies specifically to the conduct that forms the basis of Plaintiff's *Burk* claim."[31] The court concluded that "[i]t [would be] difficult to imagine a statement of public policy more specific or more applicable to the conduct Plaintiff alleged."[32]

When beginning its analysis, the court used language from *Darrow v. Integris Health Inc.*,[33] which held that "[e]mployees who report and complain of an employer's unlawful or unsafe practices whose actions seek to further public good by unmasking these breaches should be protected from an employer's retaliation."[34] According to the court, the plaintiff was an at-will employee who could be terminated "'for any reason or no reason' . . . . However, [an e]mployer [could] not avoid a *Burk* claim, if [plaintiff's] discharge was motivated in significant part by a reason that conflicts with an Oklahoma public policy goal."[35] The majority held that the plaintiff's claim was a sufficient *Burk* claim.[36] *Vasek* illustrates the

26. *Id.* ¶ 24, 905 P.2d at 786–87.

27. Vasek v. Bd. of Cty. Comm'rs, 2008 OK 35, ¶ 7, 186 P.3d 928, 930–31.

28. Oklahoma Occupational Health and Safety Standards Act, OKLA. STAT. tit. 40, §§ 401–435 (2001 & Supp. II 2007).

29. Oklahoma Personnel Act, OKLA. STAT. tit. 74, §§ 840–1.1 to –7.1 (2001 & Supp. III 2007).

30. *Vasek*, 2008 OK 35, ¶ 21, 186 P.3d at 933.

31. *Id.* ¶ 24, 186 P.3d at 933. "No person shall discharge, discriminate or take adverse personnel action against any employee because such employee has filed any complaint, or instituted or caused to be instituted any proceeding under or related to this act." *Id.* (quoting OKLA. STAT. tit. 40, § 403(B) (2001)).

32. *Id.* ¶ 25, 186 P.3d at 933.

33. Darrow v. Integris Health, Inc., 2008 OK 1, 176 P.3d 1204.

34. *Vasek*, 2008 OK 35, ¶ 22, 186 P.3d at 933 (quoting *Darrow*, ¶ 19, 176 P.3d at 1215–16).

35. *Id.* ¶ 18, 186 P.3d at 932 (quoting McCrady v. Okla. Dep't of Pub. Safety, 2005 OK 67, ¶ 6, 122 P.3d 473, 475).

36. *Id.* ¶ 28, 186 P.3d at 934.

court's efforts to recognize a *Burk* claim only if it truly violates a state public policy that affects the general public.

There are other examples where the court has invoked the public policy exception and upheld a *Burk* claim. In one case, an employer's termination of an employee for reporting the employer's falsification of records and public-safety violations was found to be a breach of public policy[37] and in another an employer's termination of an employee for his "refusal to dismiss [a] . . . negligence action against a third party, who was a customer of the employer" was also found to breach a public policy goal.[38] In these actions, the court recognized a violation of "well-defined, firmly established"[39] public policy "articulated in state constitutional, statutory or decisional sources."[40]

In *Moore v. Warr Acres Nursing Center, L.L.C.*,[41] the Oklahoma Supreme Court was once again tasked with determining whether public policy supported a terminated employee's *Burk* claim.[42] The plaintiff, Donald Moore, a licensed practical nurse, brought a *Burk*-tort action against his employer, Warr Acres Nursing Center, "alleging that he was discharged for not being at work while suffering from influenza."[43] "He insisted that his discharge was unlawful and wrongful as against public policy" and supported his claim with numerous state and federal regulations.[44] Like in every other *Burk*-tort case, the scrutiny of the court in *Moore* focused on the public policy underlying the plaintiff's claim.[45] The defendant argued that the plaintiff did not identify "a clear public policy which the employer violated."[46] Ultimately, the court had to answer the question of whether federal and state regulations could "articulate a

37. *Darrow*, 2008 OK 1, ¶¶ 8, 21, 176 P.3d at 1216.
38. Groce v. Foster, 1994 OK 88, ¶¶ 1, 19, 880 P.2d 903, 908.
39. Moore v. Warr Acres Nursing Ctr., L.L.C., 2016 OK 28, ¶ 23, 376 P.3d 894, 900.
40. *Darrow*, 2008 OK 1, ¶ 9, 176 P.3d at 1210.
41. *Moore*, 2016 OK 28, 376 P.3d 894.
42. *Id.* ¶ 1, 376 P.3d at 895.
43. *Id.* ¶¶ 3, 5, 376 P.3d at 895–96.
44. *Id.* ¶¶ 5, 9, 376 P.3d at 896.
45. *See id.* ¶¶ 9, 23–30, 376 P.3d at 896, 900–05; Melissa McDuffey, *Recent Oklahoma Supreme Court Decision May Make It More Difficult to Terminate At-Will Employees*, OKLA. CITY HUM. RESOURCES SOC'Y (Aug. 12, 2016), https://www.ochrs.org/news/m.blog/32/recent-oklahoma-supreme-court-decision-may-make-it-more-difficult-to-terminate-at-will-employees [https://perma.cc/T2XW-4XBF] (criticizing *Moore*'s holding as over-broadening *Burk*'s scope by now requiring employers to "consult [administrative] rules and regulations before exercising the decision to terminate an employee").
46. *Moore*, 2016 OK 28, ¶ 6, 376 P.3d at 896.

well-defined, firmly established . . . state public policy," as required for a *Burk* claim.[47]

III. *MOORE V. WARR ACRES NURSING CENTER, L.L.C.*

A. Facts

The undisputed facts of *Moore* might indicate a correlation between the plaintiff contracting the flu and being discharged.[48] The dispute, however, was not about *why* the plaintiff was terminated, but instead, it was about whether the termination was *wrongful* because it violated public policy.[49] Moore argued that after "bec[oming] acutely ill with . . . influenza" while working at the nursing home facility, he left, at the urging of the Center's director, and "went directly to his physician," where he was "issued a written notice taking him off work for three days due to his illness."[50] After reporting the diagnosis to the on-call scheduler, Moore returned to the facility a few days later to find he had been removed from the work schedule; he was discharged three days later.[51] Moore "insisted that his discharge was unlawful and wrongful as against public policy and against the Workers Compensation Act."[52]

B. Procedural History

The trial court disagreed with Moore, granting summary judgment to Warr Acres Nursing Center "for [Moore's] failure to state a claim under the [Workers' Compensation] Act for which relief could be granted and [for his] failure to articulate a clear public policy which the employer violated."[53] Moore appealed, and the Oklahoma Court of Civil Appeals affirmed in part and reversed in part.[54] Although the court of appeals "upheld the trial judge's dismissal of the workers' compensation claim," it stated that while Moore "had neglected to provide the specific legal

47. *Id.* ¶¶ 21, 29–30, 376 P.3d at 900, 904–05 (quoting Silver v. CPC-Sherwood Manor, Inc., 2004 OK 1, ¶ 7, 84 P.3d 728, 730).
48. *See id.* ¶¶ 4–5, 12, 376 P.3d at 896–97.
49. *Id.* ¶ 1, 376 P.3d at 895.
50. *Id.* ¶ 3, 376 P.3d at 895.
51. *Id.* ¶¶ 4, 5, 376 P.3d at 896.
52. *Id.* ¶ 5, 376 P.3d at 896.
53. *Id.* ¶ 6, 376 P.3d at 896.
54. *Id.* ¶¶ 6–7, 376 P.3d at 896.

authorities which could support such a public policy," he "should have been given the opportunity to amend his petition and be[en] afforded the opportunity to show with particularity the public policies upon which he relied and which he contended were violated by his termination."[55]

Thereafter, the plaintiff referenced numerous "statutes, state and federal regulations and guidelines as well as caselaw" to support his claim.[56] Once again, the trial court granted summary judgment to the employer, concluding that "because the defendant, Warr Acres Nursing Center, no longer [was] a[n] ongoing facility[,] . . . there [was] no public policy to prevent the termination of Mr. Moore."[57] The plaintiff appealed, and the Oklahoma Supreme Court "retained the cause[,] . . . addressing the public policy exception to at-will employment"[58]: "[T]he dispositive issue [was] whether terminating a licensed practical nurse for missing work in a nursing center based on vomiting on the job and a doctor's note admitting that he should not work for three days due to an infection with influenza would violate public policy."[59]

C. Majority Opinion

The majority's analysis in *Moore* reflects a comprehensive evaluation of Oklahoma public policy and the state regulations that prohibit a nurse from working while infected with a communicable disease.[60] In beginning its analysis, the court referenced *Burk*, where it originally "adopted [the] public policy exception to the at-will termination rule."[61] The court then discussed the *Burk* tort, describing it as one "in which the discharge of an employee is contrary to the clear mandate of public policy as articulated by constitutional, statutory or decisional law."[62] The court stated that "the precise question of law [in *Moore* was] . . . whether Oklahoma's constitutional, statutory, or decisional law or . . . a federal constitutional provision even prescribes a norm of conduct for Oklahoma that was violated."[63] The court answered in the affirmative, stating: "The answer is

55. *Id.* ¶¶ 7–8, 376 P.3d at 896.
56. *Id.* ¶ 10, 376 P.3d at 897.
57. *Id.* ¶ 12, 376 P.3d at 897.
58. *Id.*
59. *Id.* ¶ 1, 376 P.3d at 895.
60. *See id.* ¶¶ 23–25, 376 P.3d at 900–02.
61. *Id.* ¶ 17, 376 P.3d at 899.
62. *Id.*
63. *Id.* ¶ 20, 376 P.3d at 900.

overwhelmingly and clearly yes."[64]

In supporting this holding, the court first cited *Silver v. CPC-Sherwood Manor, Inc.*[65] Like the plaintiff in *Moore*, the plaintiff in *Silver* was "a cook for a nursing home who was fired" for leaving during his shift to go to the emergency room because he had flu symptoms.[66] In *Moore*, the court recognized that in *Silver*, it had previously noted:

> [T]he Oklahoma Administrative Code provisions of the Oklahoma State Department of Health[,] . . . "in a clear and compelling fashion," articulated a well-defined, firmly established, state public policy prohibiting the holding, preparing, or delivering of food prepared [by an employee who] may have been rendered diseased, unwholesome, or injurious to health."[67]

The court drew another comparison to *Silver* when it pointed to the fact that the only reason the "dissenters in *Silver* . . . did not join the majority opinion [was] because there was no doctor's diagnosis of a communicable disease"; yet in *Moore*, the plaintiff did produce such a note.[68] The reference to *Silver* demonstrated that the court had already acknowledged administrative codes and Oklahoma State Department of Health provisions might support public policy for a *Burk* claim.[69]

The court cited article V, section 39 of the Oklahoma Constitution to defend its use of health codes and regulations to interpret public policy.[70] According to the court, article V "directs the legislature to create the Board of Health and . . . vests the [l]egislature the power to establish agencies such as the Oklahoma Health Department and to designate agency functions."[71] Article V, section 39 provides that the "Legislature delegates

64. *Id.*

65. Silver v. CPC-Sherwood Manor, Inc., 2004 OK 1, 84 P.3d 728.

66. *Moore*, 2016 OK 28, ¶ 21, 376 P.3d at 900; *see also Silver*, 2004 OK 1, ¶ 2, 84 P.3d at 729.

67. *Moore*, 2016 OK 28, ¶ 21, 376 P.3d at 900 (quoting *Silver*, 2004 OK 1, ¶ 7, 84 P.3d at 730). Note that in *Silver* the court declined to address the issue of "whether certain agency rules promulgated by the Oklahoma Department of Health provide[d] a permissible source of public policy" because "Oklahoma ha[d] enunciated the . . . public policy relating to food in Title 63 of the Oklahoma Code." *Silver*, 2004 OK 1, ¶ 6, 84 P.3d at 730 (citing OKLA. STAT. tit. 63, §§ 1–1102, 1–1109 (2001)); *see also* discussion *infra* Section III.D.

68. *Moore*, 2016 OK 28, ¶ 22, 376 P.3d at 900.

69. *See id.* ¶¶ 21–23, 376 P.3d at 900.

70. *Id.* ¶ 23, 376 P.3d at 900 (citing OKLA. CONST. art. V, § 39).

71. *Id.*

rule making authority to [agencies in order] . . . to eliminate the necessity of establishing every administrative aspect of general public policy by legislation."[72] These "[a]dministrative agencies create rules which are binding similar to a statute and are only created within legislatively-granted authority and approval," adding that "[s]uch rules are necessary in order to make a statutory scheme fully operative."[73] In addition, the court cited an earlier case where it had held "that: 1) pursuant to the Administrative Procedures Act, the Legislature may delegate rulemaking authority to agencies, boards, and commissions to facilitate the administration of legislative policy; and 2) Administrative rules are valid expressions of lawmaking powers having the force and effect of law."[74]

After establishing the legal sufficiency of agency regulations and codes, the court discussed the Nursing Home Care Act,[75] which was implemented "to [address] infection control and require nursing home facilities to [acquire] . . . polic[ies] . . . excluding personnel and visitors with communicable infections [in order] to [protect] the health of its residents."[76] The court also cited the Residential Care Act,[77] which states that "[a] nurse's license may be withdrawn for" not complying with these standards.[78] In addition to the state provisions, the court argued, "[f]ederal law [also] regulates the states, including Oklahoma, when it comes to infectious disease control."[79] Using "the regulation governing [M]edicare and [M]edicaid services" as an example, the majority noted that those regulations bind Oklahoma and "require facilities to control infectious diseases by prohibiting employees with communicable disease to come in direct contact with residents."[80] Furthermore, the court cited federal quality-of-care standards, which "require . . . procedures to ensure that residents in a nursing home are protected from influenza and

72. *Id.*

73. *Id.*

74. *Id.* ¶ 24, 376 P.3d at 901 (citing Estes v. ConocoPhillips Co., 2008 OK 21, ¶ 10, 184 P.3d 518, 523).

75. *Id.* n.18, 376 P.3d at 901 n.18 (noting that the "Oklahoma Department of Health Regulation . . . provides: The purpose of this Chapter is to implement the 'Nursing Home Care Act' [a]nd to establish the minimum criteria for the issuance or renewal of a nursing or specialized facility license." (citation omitted) (quoting OKLA. ADMIN. CODE § 310:675-1-1 (2011))).

76. *Id.* ¶ 25, 376 P.3d at 901–02 (footnote omitted).

77. Residential Care Act, OKLA. STAT. tit. 63, §§ 1–819 to –840 (2011).

78. OKLA. STAT. tit. 63, § 1–825 (2011); *Moore*, 2016 OK 28, ¶ 25, 376 P.3d at 902.

79. *Moore*, 2016 OK 28, ¶ 26, 376 P.3d at 903.

80. *Id.*

pneumonia."[81]

Considering all of these state and federal policies, the court asserted there were clear "constitutional, statutory, [and] caselaw public policy manifestations [that] would prohibit a registered nurse from working with the flu."[82] The court acknowledged the reality that "[t]here were over 100 people who died in Oklahoma from the flu" in 2015, which only re-enforces the importance of any precautions "to prevent the transfer of such a communicable and potentially deadly disease."[83] After reviewing the "constitution, the statutes, the regulations approved by Congress and the Oklahoma Legislature, and the Nursing Center's rules, regulations and handbook,"[84] the court held that "terminating a licensed practical nurse for missing work in a nursing center based on vomiting on the job and a doctor's note admitting that he should not work for three days due to an infection with influenza . . . violate[s] public policy."[85] The court reasoned that "[t]o hold otherwise would exacerbate communicable disease and expose the most vulnerable people."[86]

In addition to the question of the public policy exception, the court also addressed the trial court's grant of summary judgment.[87] "[A] motion for summary judgment may be filed if the pleadings, depositions, interrogatories, affidavits, and other exhibits reflect that there is no substantial controversy pertaining to any material fact."[88] Here, the court recognized that "disputed facts show[ed] that [Moore's] firing may have had very little to do with his three-day absence from work with the flu."[89] Under the at-will employment doctrine, Moore "could have been legally terminated" due to his extensive employee disciplinary record.[90] In fact, the court even stated, "the [plaintiff's] termination likely was neither pretextual, post hoc rationalization, nor a violation of public policy."[91]

Because "Oklahoma follows the at-will employment doctrine[,] . . . an employer [can] discharge an employee for good cause [or] for no cause

81. *Id.*
82. *Id.* ¶ 27, 376 P.3d at 904.
83. *Id.* ¶ 29, 376 P.3d at 904.
84. *Id.* ¶ 30, 376 P.3d at 905.
85. *Id.* ¶ 1, 376 P.3d at 895.
86. *Id.*
87. *Id.* ¶ 14, 376 P.3d at 898.
88. *Id.* ¶ 13, 376 P.3d at 898.
89. *Id.* ¶ 30, 376 P.3d at 905.
90. *Id.* ¶ 2, 376 P.3d at 895.
91. *Id.* ¶ 14, 376 P.3d at 898.

without being guilty of [a] legal wrong."[92] Initially, the defendant, "insisted no cause of action existed," and "filed a motion to dismiss the [plaintiff's] lawsuit . . . for failure to state a claim . . . for which relief could be granted [as well as] failure to articulate a clear public policy which the employer violated."[93] The motion effectively undercut its own no-cause argument for termination and focused the court's attention on the public policy question.[94]

After losing its motions to dismiss on appeal, the defendant filed a motion for summary judgment in which it "admit[ted] and accept[ed] the employee's version of the facts" but "argue[d], that as a matter of law, the employee ha[d] no claim against it because the employee was an at-will employee."[95] The nursing center's strategy of denying that Moore had any claim ultimately precluded it from introducing evidence about Moore's delinquent practices as an employee, and without any evidence to support the lawfulness of Moore's termination, the court was forced to only address the issue under the public policy exception.[96] "Even when basic facts are undisputed, motions for summary judgment should be denied, if under the evidence, reasonable persons might reach different inferences or conclusions from the undisputed facts."[97] Here, the plaintiff's termination "may have had nothing to do with whether he missed work with the flu,"[98] but that question was a "question[] of fact for the jury to decide" because reasonable minds could differ.[99]

D. Dissenting Opinion

Although the majority found the question of the public policy exception rather straightforward based on the plaintiff's cited authorities,[100] Justice Winchester asserted in his dissent that the employee's claim was not clearly based on public policy "existing [in] Oklahoma constitutional, statutory, or jurisprudential law."[101] Justice

92. *Id.*
93. *Id.* ¶¶ 12, 6, 376 P.3d at 897, 896.
94. *Id.* ¶ 14, 376 P.3d at 898–99.
95. *Id.* ¶ 15, 376 P.3d at 899.
96. *See id.* ¶ 11, 376 P.3d at 897.
97. *Id.* ¶ 13, 376 P.3d at 898.
98. *Id.* ¶ 1, 376 P.3d at 895.
99. *Id.* ¶ 14, 376 P.3d at 899.
100. *See id.* ¶¶ 9, 21, 25–27, 376 P.3d at 896, 900–04.
101. *Id.* ¶ 3, 376 P.3d at 906 (Winchester, J., dissenting) (quoting *id.* ¶ 18, 376 P.3d at

Winchester first criticized the majority's opinion for incorrectly citing the *Silver* holding.[102] Instead of finding the plaintiff's cause of action well-supported by public-health codes, which "'in a clear and compelling fashion' articulate a well-defined, firmly established[] state public policy," Justice Winchester offered evidence that the court "specifically disclaim[ed] such a position."[103] The court in *Silver* stated, "This Court need not mire itself in the controversy which confronted the Court of Civil Appeals concerning whether certain agency rules promulgated by the Oklahoma Department of Health provide a permissible source of public policy in this matter."[104] The quote casts some doubt on the court's reasons for relying on *Silver*.

Furthermore, the dissent argued the majority's use of article V, section 39 of Oklahoma's constitution to support an idea that public-health codes are equivalent to statutory law was "faulty" reasoning.[105] Justice Winchester used language from article IV, section 1 to illustrate why he believed "[p]ublic policy cannot be delegated to an administrative agency."[106] "[T]he Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."[107] Additionally, he quoted article V, section 1, which "requires that '[t]he Legislative authority of the State shall be vested in a Legislature consisting of a Senate and House of Representatives.'"[108] According to Justice Winchester, it is "these constitutional provisions [that prohibit] the . . . delegation of legislative power" to state agencies.[109]

Besides the constitution, the dissent also quoted *Democratic Party of Oklahoma v. Estep*[110] to dispute the idea of delegating public policy to an administrative agency.[111] "[T]his prohibition against the delegation of legislative power 'rests on the premise that the legislature must not abdicate its responsibility to resolve fundamental policy making by [1]

899 (majority opinion)).

102. *Id.* ¶¶ 5–6, 376 P.3d at 906.

103. *Id.* ¶ 5, 376 P.3d at 906 (quoting *id.* ¶ 21, 376 P.3d at 900 (majority opinion)).

104. *Id.* ¶ 6, 376 P.3d at 906 (quoting Silver v. CPC-Sherwood Manor, Inc., 2004 OK 1, ¶ 6, 84 P.3d 728, 730).

105. *Id.* ¶ 8, 376 P.3d at 906.

106. *Id.* ¶ 9, 376 P.3d at 906.

107. *Id.* (quoting OKLA. CONST. art IV, § 1).

108. *Id.* ¶ 10, 376 P.3d at 906 (quoting OKLA. CONST. art. V, § 1).

109. *Id.*

110. Democratic Party of Okla. v. Estep, 1982 OK 106, 652 P.2d 271.

111. *Moore*, 2016 OK 28, ¶ 11, 376 P.3d at 906–07.

delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy.'"[112] The dissent's illustration using *Democratic Party of Oklahoma*, suggests that the majority's holding, that "a violation of the Oklahoma Administrative Code provisions of the Oklahoma State Department of Health is a violation of public policy and therefore fits within the exception to at-will employment[,] . . . is not supported by our case law."[113]

Finally, the dissent argued that adding administrative rules "to the list of sources for finding a violation of a clear mandate of public policy . . . expands the *Burk* tort."[114] In turn, this expansion will ultimately put a "greater burden" on employers because it will require them to be familiar with all administrative rules before terminating an employee.[115] This new "burden" effectively requires employers "to terminate employees only if an articulable and provable good cause can be shown."[116] The dissent concluded that the majority's holding expanded public policy for purposes of a *Burk* claim and, inevitably, disrupted employers' ability to "manage their businesses on a day-to-day basis."[117] For these reasons, Justice Winchester "would [have] affirm[ed] the summary judgment of the trial court."[118]

Although Justice Winchester voiced concerns about the constitutionality of the majority's holding,[119] the majority's reasoning in *Moore* prevailed. The court held that Oklahoma's public policy prohibits firing a nurse working in a nursing-home facility solely because the nurse misses work with the flu.[120] This public policy is well-supported by "the constitution, the statutes, the regulations approved by Congress, and the Oklahoma Legislature."[121]

112. *Id.* (alteration in original) (quoting *Democratic Party of Okla.*, 1982 OK 106, n.23, 652 P.2d at 277 n.23).
113. *Id.* ¶ 11, 376 P.3d at 907.
114. *Id.* ¶ 13, 376 P.3d at 907.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* ¶ 14, 376 P.3d at 907.
119. *See id.* ¶¶ 1–14, 376 P.3d at 905–07 (expressing his misgivings regarding the majority's holding).
120. *Id.* ¶ 30, 376 P.3d at 905 (majority opinion).
121. *Id.*

IV. THE OKLAHOMA SUPREME COURT UPHOLDS A TRADITION AND PROTECTS THE PUBLIC

The inescapable question for the court in *Moore* was whether regulatory law could establish public policy.[122] Perhaps the most poignant aspect of that question lies in determining if those regulations clearly convey the legislature's purpose. The California Supreme Court held in *Green v. Ralee Engineering Co.*[123] that there are "fundamental public polic[ies] . . . enunciated in administrative regulations that serve the statutory objective[s]," and that these regulations are thus "tethered to fundamental policies . . . delineated in constitutional or statutory provisions."[124] The court further acknowledged that one of the most important motivations for mandating the public policy driving a wrongful termination action is "to limit 'judicial policymaking.'"[125] The court reasoned, however, that "when courts discover public policy in regulations enacted under statutory authority, they are not 'mistak[ing] their own predilections for public policy,' but rather are recognizing a public policy that the Legislature has formulated and the executive branch has implemented."[126] Although the California Supreme Court asserted that "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state," it did not think this distinction was an excuse "to ignore the fact that statutorily authorized regulations [are] effectuate[d by] the Legislature's purpose."[127]

Much like the court in *Moore*, the court in *Green* confronted the question of whether regulations that protect the health and well-being of the public form the basis for well-established public policy.[128] For example, in *Moore*, the court had to determine if the Nursing Home Care Act's public-health codes and regulations "articulate a well-defined, firmly established[] state public policy."[129] In *Green*, the court addressed

122. *Id.* ¶ 1, 376 P.3d at 895.

123. Green v. Ralee Eng'g Co., 960 P.2d 1046 (Cal. 1998).

124. *Id.* at 1054, 1048 (quoting second Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992), *overruled on other grounds by Green*, 960 P.2d 1046). "To the extent one can read *Gantt* to conclude that important administrative regulations implementing fundamental public policies as reflected in their enabling statutes are not 'tethered to' legislative enactments, we overrule it." *Id.* at 1054 n.6 (citation omitted).

125. *Id.* at 1054 (quoting *Gantt*, 824 P.2d at 687).

126. *Id.* (alteration in original) (quoting *Gantt*, 824 P.2d at 687).

127. *Id.* at 1049.

128. *Id.* at 1050–51.

129. Moore v. Warr Acres Nursing Ctr., L.L.C., 2016 OK 28, ¶¶ 23, 25, 376 P.3d 894,

whether "particular administrative regulations implementing the Federal Aviation Act of 1958 . . . should be included as a source of fundamental public policy that limits an employer's right to discharge an at-will employee."[130] A California Court of Appeal found airline safety "so closely tied to the statutory and regulatory purpose" of several Federal Aviation Administration regulations that it "concluded [the] plaintiff had established a sufficient connection between the public policy favoring safe manufacture of passenger aircraft and federal law to satisfy [the] rule that the public policy be based on either a statute or constitutional provision."[131] On appeal, the California Supreme Court agreed with the Court of Appeal and held the regulations could "serve as a source of fundamental public policy."[132]

The Oklahoma Supreme Court made similar findings in *Moore* when considering whether the codes and regulations promulgated from the Nursing Home Care Act could form the basis of fundamental public policy.[133] "The Oklahoma Department of Health Regulations [§ 310:675-7-17.1] . . . were statutorily mandated to implement the Nursing Home Care Act."[134] These regulations were intended "to [address] infection control and require nursing home [centers] to have an infection control policy to provide a safe and sanitary environment."[135] Like *Green*, the court found the regulations' safety measures prevented the spread of communicable disease to residents of nursing facilities, which was a clear mandate of Oklahoma public policy.[136]

Courts, like those in *Green* and *Moore*, note it "is not unusual or surprising" that legislatures delegate rule-making responsibilities to administrative agencies.[137] "A substantial body of law, advancing significant public policy objectives, is found in administrative regulations that promulgate important legislative objectives. This is especially true of

900–02.

130. *Green*, 960 P.2d at 1049.

131. *Id.* at 1050.

132. *Id.*

133. *See Moore*, 2016 OK 28, ¶¶ 25, 30–31, 376 P.3d at 901–02, 905 (holding the regulations promulgated from the Nursing Home Care Act, among other statutes and administrative codes, illustrates "that a nurse in a nursing center cannot be fired for not working with the flu").

134. *Id.* ¶ 25, 376 P.3d at 901.

135. *Id.*

136. *Id.* ¶ 1, 376 P.3d at 895.

137. *Green*, 960 P.2d at 1055.

laws pertaining to the protection of public health and safety."[138] Even the United States Supreme Court weighed in on this issue when it decided *Mistretta v. United States*.[139] As *Green* explained when discussing *Mistretta*:

> [T]he development of its jurisprudence regarding congressional delegation of rulemaking authority to administrative and executive agencies "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[140]

Mistretta further strengthens the idea that "if a statute that seeks to further a public policy objective delegates the authority to adopt administrative regulations to an administrative agency in order to fulfill that objective, and that agency [promulgates those] regulations[,] . . . then those regulations may be manifestations of important public policy."[141] Not only does the United States Supreme Court acknowledge the official capacity given to those agencies by the legislature,[142] but other relevant caselaw supports the theory as well.[143]

Both the FAA in *Green* and the Nursing Home Care Act in *Moore* specifically advanced "important safety policies affecting the public at large."[144] Those authorities recognize agencies as important components in issuing and regulating public policy, and as the court in *Green* stated, "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens."[145]

The *Moore* dissent, citing *Democratic Party of Oklahoma*, argued "the

138. *Id.*
139. Mistretta v. United States, 488 U.S. 361, 372 (1989).
140. *Green*, 960 P.2d at 1056 (quoting *Mistretta*, 488 U.S. at 372).
141. *Id.*
142. *See Mistretta*, 488 U.S. at 372.
143. *See Green*, 960 P.2d at 1056 (finding that "regulations may be manifestations of important public policy").
144. *Id.*; *see also* Moore v. Warr Acres Nursing Ctr., L.L.C., 2016 OK 28, ¶ 1, 376 P.3d 894, 895 (finding a public policy in regulations prohibiting employees from working while infected with influenza).
145. *Green*, 960 P.2d at 1056 (alteration in original) (quoting General Dynamics Co. v. Superior Court, 876 P.2d 487, 499 (Cal. 1994)).

legislature must not abdicate its responsibility" of establishing fundamental public policy by delegating that power to administrative agencies.[146] The dissent, however, ignored an important part of the *Democratic Party of Oklahoma* opinion. Previously, the Oklahoma Supreme Court noted "the constitutional doctrine of non-delegation . . . teaches that the legislature must establish its policies and set out definite standards for the exercise of an agency's rulemaking power."[147] In *Democratic Party of Oklahoma*, the court found the Oklahoma Campaign Finance Act, which created the Campaign Commission, "expresse[d] no legislative policy."[148] Consequently, the Campaign Commission's rules "ha[d] not been articulately structured" by legislative purpose.[149] *Democratic Party of Oklahoma* does not prevent the legislature from delegating rulemaking authority to state administrative agencies as long as it first "establish[es] . . . policies and set[s] out definite standards for the exercise of an agency's rulemaking power."[150]

"The Oklahoma Department of Health Regulations . . . , which were statutorily mandated to implement the Nursing Home Care Act," were specifically designed, in part, "to cover infection control and require nursing home facilities to have an infection control policy to provide a safe and sanitary environment."[151] Accordingly, the legislative purpose is clearly established and those regulations "set out definite standards"[152] for the Oklahoma Department of Health Regulations to enforce.[153] Contrary to *Moore*'s dissenting opinion, caselaw does support the legislature's power to delegate fundamental public policy as long as there is clear proof of legislative directive.[154] Article V of the Oklahoma Constitution "vests the Legislature [with] the power to establish agencies such as the Oklahoma Health Department and to designate agency functions."[155] In addition, the statutory mandate for the Oklahoma Department of Health

146. *Moore*, 2016 OK 28, ¶ 11, 376 P.3d at 906 (Winchester, J., dissenting) (quoting Democratic Party of Okla. v. Estep, 1982 OK 106, n.23, 652 P.2d 271, 277 n.23).

147. *Democratic Party of Okla.*, 1982 OK 106, ¶ 16, 652 P.2d at 277–78.

148. *Id.* ¶ 18, 652 P.2d at 278.

149. *Id.* ¶ 15, 652 P.2d at 277.

150. *Id.* ¶ 16, 652 P.2d at 277–78.

151. *Moore*, 2016 OK 28, ¶ 25, 376 P.3d at 901 (majority opinion) (footnote omitted).

152. *Democratic Party of Okla.*, 1982 OK 106, ¶ 16, 652 P.2d at 278.

153. *See Moore*, 2016 OK 28, ¶ 25, 376 P.3d at 901–02 (discussing the health regulations in Oklahoma covering "infection control").

154. *See Democratic Party of Okla.*, 1982 OK 106, ¶ 16, 652 P.2d at 277–78.

155. *Moore*, 2016 OK 28, ¶ 23, 376 P.3d at 900; *see also* OKLA. STAT. tit. 75, § 250.2 (2011 & Supp. II 2016).

Regulations to implement the Nursing Home Act further illustrates legislative support.[156]

Critics of the public policy exception to at-will employment, such as the *Moore* dissent, argue that these cases further expand the *Burk* claim and threaten the at-will-employment doctrine.[157] One of the leading concerns of a ruling like *Moore* is that employers will not be put on notice for what violates public policy when terminating an employee.[158] Including administrative rules and regulations as public policy means the employer is forced to have specific knowledge of all rules and regulations before exercising its right to terminate an employee.[159] Those critics, however, overlook the purpose of the public policy exception. This exception to the at-will-employment doctrine "vindicate[s] a public wrong where the victim of the crime could in any real . . . sense be said to be the general public."[160] The purpose of the exception is to safeguard "[e]mployee job security interests . . . against employer actions that undermine fundamental policy preferences."[161] Considering the gravity of the court's interests in protecting public policy, employers should be well aware of the fundamental public policy connected to their specific industry.

Furthermore, the courts are careful to ensure the public policy exception is "tightly circumscribed."[162] Prior Oklahoma Supreme Court rulings applying the exception illustrate its "narrow scope."[163] Therefore, there is no risk of employees winning a *Burk* claim using obscure policies protecting "private or . . . proprietary interests."[164] The court's consistent

156. *See Moore*, 2016 OK 28, ¶ 25, 376 P.3d at 901–02.

157. *See, e.g.*, *id.* ¶ 13, 376 P.3d at 907 (Winchester, J., dissenting) (claiming *Moore*'s holding "plac[es] a greater burden on employers" by now requiring employers to "search through those rules to determine whether termination of an employee will be against public policy").

158. *See* Green v. Ralee Eng'g Co., 960 P.2d 1046, 1057 (Cal. 1998).

159. *Moore*, 2016 OK 28, ¶ 2, 376 P.3d at 905.

160. Hayes v. Eateries, Inc., 1995 OK 108, ¶ 24, 905 P.2d 778, 786.

161. Burk v. K-Mart Corp., 1989 OK 22, ¶ 21, 770 P.2d 24, 29 (quoting Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983)), *superseded in part by statute*, OKLA. STAT. tit. 25, § 1350(A) (2011 & Supp. I 2016).

162. *Id.* ¶ 18, 770 P.2d at 29.

163. *See* Griffin v. Mullinix, 1997 OK 120, ¶ 9, 947 P.2d 177, 178. In *Griffin*, the Oklahoma Supreme Court held that neither "the Federal Occupational Safety and Health Act of 1970" nor its Oklahoma counterpart, the "Oklahoma[] Occupational Safety and Health Act," created "a clear mandate of public policy" for plaintiff recovery under a wrongful termination suit. *Id.* ¶ 2, 947 P.2d at 177.

164. Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 16, 176 P.3d 1204, 1214.

focus on public policy in applying this exception does not put the employer at a disadvantage. Instead, it encourages a "proper balance . . . be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."[165]

There are cases where the Oklahoma Supreme Court refused to apply the public policy exception, which further illustrates the court's clear intent to protect only public interests. For example, in *Hayes v. Eateries, Inc.*,[166] the court found no *Burk* claim where an "employee claim[ed] his termination was motivated by his refusal to ignore a duty of loyalty to his employer" when he "investigate[d] and/or report[ed] . . . criminal activity perpetrated by a co-employee against the interest of the employer,"[167] and in *Reynolds v. Advance Alarms, Inc.*,[168] the plaintiff was denied a *Burk* claim for wrongful termination because "Oklahoma does not have a clear and well-defined public policy protecting an employee's right to a lunch break or requiring an employer to pay wages to the employee for work performed during the lunch break without the employer's permission."[169]

In *Darrow*, the court warned employees that its holding was "not to be understood so broadly as to warrant a conclusion that any employee allegation of illegal or unsafe employer's activity will withstand scrutiny in light of [a] *Burk* [claim]."[170] Because of the difficulty of defining public policy, the *Burk* court directly stated that it would make a "determination [of public policy] on a case-by-case basis" in order to avoid applying the exception in cases where public welfare was not threatened.[171]

Contrary to the opinions of those who oppose *Moore*, the Oklahoma Supreme Court has not expanded the public policy exception in a way that threatens the at-will employment doctrine. Instead, the court's holding

165. *Burk*, 1989 OK 22, ¶ 16, 770 P.2d at 28 (quoting Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981)).

166. Hayes v. Eateries, Inc., 1995 OK 108, 905 P.2d 778.

167. *Id.* ¶ 32, 905 P.2d at 790.

168. Reynolds v. Advance Alarms, Inc., 2009 OK 97, 232 P.3d 907.

169. *Id.* ¶ 20, 232 P.3d at 913. Other courts in Oklahoma have also declined to apply the public policy exception. *See, e.g.*, Hetronic Int'l, Inc. v. Rempe, 99 F. Supp. 3d 1341, 1349 (W.D. Okla. 2015) (finding no *Burk* claim for wrongful termination because "[d]efendant d[id] not allege any harm, actual or possible, to the general public, and the Court was unable to find any Oklahoma case law recognizing that the Consumer Protection Act may support a *Burk* tort").

170. Darrow v. Integris Health, Inc., 2008 OK 1, ¶ 20, 176 P.3d 1204, 1216.

171. Burk v. K-Mart Corp., 1989 OK 22, ¶¶ 14, 17, 770 P.2d 24, 28, *superseded in part by statute*, OKLA. STAT. tit. 25, § 1350(A) (2011 & Supp. I 2016).

protects fundamental public policies from employers' actions and, ultimately, fulfills the judiciary's original purpose for adopting the public policy exception.

V. CONCLUSION

Much of the controversy surrounding the public policy exception to the at-will employment doctrine revolves around the court's discretion in deciding what mandates state public policy. With this power, there is always a risk for judicial expansion. The Oklahoma Supreme Court, however, has strictly adhered to the fundamental principles of the public policy exception that were set out in *Burk* twenty-eight years ago. The aim of a *Burk* claim has always been to protect the public welfare, and the Oklahoma Supreme Court has ensured that this concern for the public good is still the focus today.