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EMPLOYMENT

Pennsylvania Superior Court Expands Wrongful-Discharge Law

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The law of wrongful discharge in Pennsylvania changes slowly. The “extremely strong” presumption is that employees in the state are employed “at-will” and courts have consistently found that “an employee will be entitled to bring a cause of action for a termination of that relationship only in the most limited of circumstances where the termination implicates a clear mandate of public policy,” according to *McLaughlin v. Gastrointestinal Specialists*, 750 A.2d 283 (Pa. 2000).

In that light, it is not surprising that the most recent appellate court decision finding a new “mandate of public policy” was *Shick v. Shirey*, 552 A.2d 590 (Pa. 1998), in which the state Supreme Court recognized that termination in retaliation for seeking workers’ compensation benefits stated a viable claim.

RETALIATION FOR REFUSING OVERTIME PROHIBITED

In *Roman v. McGuire Memorial*, No. 239 WDA 2015, 2015 Pa. Super. Lexis 739 (Nov. 9, 2015), the Pennsylvania



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Superior Court expanded wrongful-discharge law when it affirmed judgment in favor of a health care worker who claimed that she was terminated for refusing to work “mandatory” overtime in violation of the Prohibition of Excessive Overtime in Health Care Act—commonly referred to as Act 102.

Brandy Roman worked as a “direct care worker” for McGuire Memorial Home, an intermediate care facility for the mentally disabled, located in Beaver County. McGuire had a mandatory

overtime policy that required its direct care workers to work mandatory overtime, according to the opinion. The policy provided that an employee’s refusal to work mandated overtime on four occasions would lead to termination.

Roman, a mother of three, worked a regular shift of 3:30 p.m. to 11:30 p.m. She worked opposite shifts from her live-in boyfriend so that she would not have to pay for day care. When mandated to work overtime, she would be required to work a second straight

shift, such that she would not leave work until 8 a.m., which would leave her children unattended for a few hours in the morning.

TERMINATION FOR REFUSAL TO WORK OVERTIME

Roman refused to work overtime on four occasions early in 2011 and was terminated in accord with McGuire's policy. Shortly thereafter, she brought suit claiming that her termination "offends the public policy of the commonwealth ... as embodied in Act 102."

Act 102 provides, in part, that "the refusal of an employee to accept work in excess of the limitations set forth in [the act] shall not be grounds for discrimination, dismissal, discharge or any other decision adverse to the employee." Despite the anti-retaliation language, the act provides no remedy for an employee who claims to have had his or her rights violated. The act, however, provides for penalties against facilities that violate it. Further, the act directs the Department of Labor and Industry to implement enforcement regulations.

Roman's case proceeded to trial and, following a verdict in her favor, she was awarded over \$120,000 and was reinstated to her former position. McGuire appealed.

ACT'S REMEDY NOT EXCLUSIVE

After resolving some initial procedural issues, the court addressed whether the trial court had subject-matter jurisdiction. That is, whether the trial court properly heard the case.

McGuire sought to distinguish the *Shick* decision. In *Shick*, the Supreme Court created a public policy "to protect employees against retaliatory

discharge for filing a claim ... because there was no statutory remedy." Under Act 102, as noted, the Department of Labor's regulations provide for both complaints and investigation.

Specifically, McGuire argued that the act vested its "administration and implementation" in the Department of Labor and that the department's regulations specifically identify a complaint and investigation procedure and provide a right to appeal an adverse action to the Commonwealth Court. As such, relying upon precedential cases where the court refused to hear wrongful-discharge claims where the Pennsylvania Human Relations Act was an employee's "exclusive state law remedy," McGuire argued that the trial court did not have jurisdiction because the department already provided a remedy.

The Superior Court rejected the argument that the Department of Labor's remedy was exclusive. Initially, the court found that, unlike the PHRA, Act 102 did not "explicitly [provide] that the avenue for remedy under Act 102 is the department."

FINES DO NOT BENEFIT EMPLOYEES

The court further drew the line between fines that could be levied by the department and those that would specifically benefit an employee subjected to retaliation. The court found that "Act 102 does not provide any administrative or statutory remedies to employees who are fired in retaliation for refusing to work overtime. Rather, it provides for fines to be levied against the facility." The court continued that "Act 102 contains nothing that allows for an employee in Ms. Roman's position to seek any remedy or even what administrative procedure she should

follow to recover from McGuire for its action."

As such, the court affirmed the judgment in favor of Roman.

The case is important for its recognition of an expansion of state wrongful-discharge claims, however slight. It should be recognized, however, that Act 102 may be unique in prohibiting retaliation but providing no remedy to employees for a violation. •

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