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Management Alert

California Court Finds Wrongful Termination Tort Too Desperate, But Permits Statutory Claim For Disparate Treatment

California employees can file tort claims against employers who impose adverse employment actions in violation of public policy. They have used this theory to challenge wrongful terminations and demotions. In *Touchstone Television Productions v. Superior Court (Sheridan)*, the California Court of Appeal rejected an effort to extend this tort theory to an employer's decision not to exercise an option to renew a contract.

The Facts

In 2004, Touchstone Television Productions ("Touchstone") hired actress Nicollette Sheridan ("Sheridan") to appear in a new television series, *Desperate Housewives*. The parties' agreement gave Touchstone the option to annually renew Sheridan's employment for up to six additional seasons. Touchstone exercised its option to renew the agreement with Sheridan for Seasons 2, 3, 4, and 5. During Season 5, Sheridan reported to Touchstone that Marc Cherry, the series' creator, had hit her during the filming of an episode.

Five months after this alleged incident, Touchstone informed Sheridan that it would not exercise its option to renew her contract for Season 6, because her character would be killed during Season 5. Sheridan continued to work during Season 5, filming three more episodes and doing publicity for the series.

Sheridan sued Touchstone and Cherry in April 2010. She asserted various claims, including a claim that Touchstone fired her in retaliation for complaining about Cherry's conduct.

The Trial Court Decision

The matter went to trial in February 2012. The jury deadlocked on the wrongful termination claim and the trial court declared a mistrial. Touchstone moved for a directed verdict on the wrongful termination claim. The trial court denied the motion and set the matter for retrial.

The Court of Appeal's Holding

Rather than await a retrial, Touchstone filed a petition for extraordinary relief with the Court of Appeal. Touchstone argued that Sheridan's wrongful termination claim failed because Touchstone had not terminated her employment but rather had merely declined to renew her contract. Touchstone relied on a 1997 decision, *Daly v. Exxon Corp.*, which held that an employee could not maintain a claim for wrongful termination in violation of public policy when her employer failed to renew her employment contract several months after she complained about various safety violations. The *Daly* court explained that

the expiration of a fixed-term contract is not the same as termination of employment, and held that an employee cannot sue for tort damages where the employment contract expires in accordance with a fixed term. However, the *Daly* court allowed the employee to sue instead under Labor Code section 6310(b), which permits "an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions." *Daly* held that a plaintiff can establish that the employer *discriminated against* the plaintiff by not renewing an employment contract, if the plaintiff can prove that, *but for* her complaints about unsafe work conditions, the employer would have renewed the contract.

The Court of Appeal agreed with Touchstone that *Daly* applied here: a plaintiff cannot sue for wrongful termination in violation of public policy based on an employer's refusal to renew an employment contract, and the trial court thus erred in denying Touchstone's motion for a directed verdict. The Court of Appeal declined the invitation to create a new cause of action for tortious nonrenewal of an employment contract in violation of public policy. Sheridan thus could not pursue a cause of action for wrongful termination in violation of public policy because she was not terminated. Even though Touchstone's decision not to renew her contract *may* have been influenced by her complaints about an unsafe working environment, the court maintained that an employer's decision not to renew a contract set to expire is not actionable as wrongful termination.

The court agreed with Sheridan that a wrongful termination claim should remain available for an employee who is fired before the contract expires, but that was not Sheridan's situation: Touchstone permitted her to serve out the full term of her contract, through Season 5.

The court also followed *Daly* in holding that Sheridan, while unable to base a wrongful termination claim on the failure to renew her contract, could use the non-renewal to support a claim under Section 6310(b) to allege that the non-renewal was a discriminatory act based on her complaint of the alleged assault against her by Cherry. The court noted that in that context, Sheridan could attempt to challenge the legitimacy of Touchstone's explanations for its decision not to renew her contract.

What *Touchstone* Means For Employers

Although an employee can sue for wrongful termination in violation of public policy if the employee suffers an adverse employment action, the employee cannot base such a cause of action on the mere failure to renew an employment contract. Accordingly, an employee cannot maintain a public policy claim where an employer simply chose not to exercise its option to renew a contract.

But an employee claiming retaliation for protesting "unsafe working conditions" has the alternative of recovering under Section 6310(b) if the employer discriminated against the employee by not renewing an employment contract. The potential recovery for a Section 6310 plaintiff would not include the emotional distress and punitive damages traditionally available to a tort plaintiff, but would include lost wages and benefits and could also lead to reinstatement—a remedy that a tort action would not provide.

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