EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE: THE RELATIONSHIP BETWEEN THE COMMON LAW TORT OF RETALIATORY DISCHARGE AND THE TENNESSEE "WHISTLE-BLOWER" ACT

Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528 (Tenn. 2002)

RYAN L. RUSSELL[*]

I. Introduction

Ronald Guy was an at-will employee of Mutual of Omaha insurance company ("Mutual") from June 1992 until April 1995.[1] He served as the general manager of Mutual's Memphis division and his duties included the recruitment, training, and management of Mutual's agents in Western Tennessee.[2] In September 1992, Jerry Roberson applied to become an agent for Mutual.[3] Before Guy finished reviewing Roberson's application, Mutual assigned Roberson an "agent production number" and an "agent's kit."[4] In December 1992, Roberson visited Doris Johnson and represented himself as an agent of both Mutual and John Hancock Insurance Company.[5] During that visit, Roberson sold Johnson a Mutual annuity in exchange for a stock certificate and checks payable to Mutual worth about $70,000.[6] He then deposited the checks into his personal account, retained possession of the stock

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[*] B.A., Unviersity of Tennessee; J.D., University of Tennessee College of Law. In 2005-2006, Mr. Russell will clerk for the Honorable Herschel P. Franks, Tennessee Court of Appeals. The author would like to thank Professors Jeffrey Hirsch and Carl Pierce for their guidance and insights on earlier drafts of this work.

[1] Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 531 (Tenn. 2002).

[2] *Id.*

[3] *Id.*

[4] *Id.* The parties disputed whether Mutual ever officially hired Roberson as an agent. *Id.*

[5] *Id.*

[6] *Id.*

certificate, and began mailing Johnson "annuity checks" which where actually written on Roberson's personal checking account.[7]

When Guy learned of this transaction, he suspected theft and reported the incident to the Tennessee Department of Commerce and Insurance.[8] He did not report the incident to Mutual until October 13, 1994 because until then he was not aware that Roberson had represented himself as a Mutual agent.[9] On November 4, 1994 Guy received a positive evaluation and salary increase from Mutual, but on December 20, 1994 Mutual reduced Guy's salary by half and reduced his bonus income by 25 percent.[10] This reduction in compensation came four days after Mutual agreed to reimburse Doris Johnson for the $63,781.72 in losses she suffered due to Jerry Roberson's fraudulent annuity sale.[11] Mutual fulfilled this agreement in February 1995 when it delivered an annuity in the amount of $63,781.72 to Doris Johnson.[12] On March 1, 1995, Guy was placed on "written notice" and his bonus income was further reduced by 20 percent.[13] Guy's supervisor explained that Guy was placed on "written notice" due to his "'lack of judgment' in (1) his failure to report the Roberson incident to Mutual when he reported it to state authorities, and (2) his mishandling of [an earlier] sexual harassment complaint [made by a female Mutual agent against one of Guy's subordinates]."[14] Mutual terminated Guy's employment on April 19, 1995 due to his "unacceptable performance as demonstrated by failure to use judgment consummate with the position of General Manager."[15] Mutual never mentioned, as a reason for Guy's discharge, Guy's report to the Tennessee Department of Commerce and Insurance regarding Jerry Roberson's fraudulent activity.[16]

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[7] *Id.*

[8] *Id.* at 531-32.

[9] *Id.* at 532.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 532-33.

[14] *Id.* at 532.

[15] *Id.* at 533.

[16] *Id.*

A month later, Guy filed suit against Mutual alleging a common law cause of action for retaliatory discharge in violation of Tennessee state public policy.[17] He asserted that his report of Roberson's fraudulent activity to the Tennessee Department of Commerce and Insurance was a substantial factor in Mutual's decision to discharge him.[18] In support of this allegation, Guy argued that he did not receive negative work evaluations until Mutual accepted liability for Roberson's fraudulent activity.[19] Mutual responded by arguing that Guy's cause of action was preempted by the Tennessee Public Protection Act, which requires a whistle-blower-plaintiff to prove that his or her whistle-blower activity was the sole motivating reason for the plaintiff's discharge.[20] Thus, Mutual filed a motion for summary judgment arguing that Guy could not prevail in the case because he could not prove that his reporting of Roberson's activity was the sole motivation behind his discharge.[21]

The trial court refused to grant the motion, but did not provide any reasoning to support its decision.[22] Mutual received permission to seek an interlocutory review, and the Tennessee Court of Appeals held that the Tennessee Public Protection Act did preempt Guy's common law cause of action for retaliatory discharge in violation of Tennessee's public policy to protect whistle-blowers.[23] The Court of Appeals also held, however, that Guy could still pursue a common law retaliatory discharge claim under an alternative public policy violation—Tennessee's

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[17] *Id.*

[18] *Id.* at 536. In *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552 (Tenn. 1988), the Tennessee Supreme Court first recognized as a legitimate cause of action a plaintiff's claim for retaliatory discharge when the plaintiff's refusal to participate in or remain silent about illegal activities was a *substantial factor* in the employer's decision to discharge the plaintiff.

[19] *Guy*, 79 S.W.3d at 533.

[20] *Id.* at 535; *see also* TENN. CODE ANN. § 50-1-304 (Supp. 2004) (stating that "[n]o employee shall be discharged or terminated *solely* for refusing to participate in, or for refusing to remain silent about, illegal activities") (emphasis added). The Tennesseee Public Protection Act, also called the Tennessee "Whistle-blower" Act, was enacted in 1990. *Guy*, 79 S.W.3d at 535.

[21] *Id.* at 533.

[22] *Id.*

[23] *Id.* at 533-534.

public policy to protect consumers from unethical insurance agents.[24] Under this alternative theory, the Court of Appeals concluded that there was sufficient evidence for a jury to find that Guy's reporting of Roberson's fraud was a substantial factor in Mutual's discharge decision.[25] The Tennessee Supreme Court then granted an appeal "to consider whether the 'Whistleblower' statute, Tenn. Code Ann. § 50-1-304, preempts the common law cause of action for retaliatory discharge when an employee is discharged for reporting illegal or unethical activity."[26]

II. The Emergence of the Employment-At-Will Doctrine in Tennessee

"[M]en must be left, without interference to . . . discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se."[27] With these words the Tennessee Supreme Court adopted the employment-at-will doctrine in 1884[28] in *Payne v. Western & Atlantic Railroad Co.*[29] The employment-at-will doctrine presumes that employees who are not hired for a definite period of time are at-will employees and can thus be discharged by their employers without cause or notice.[30] Although Tennessee was

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[24] *Id.* at 534. The Court of Appeals noted as evidence of this public policy Tennessee Code Annotated § 56-6-155. *Id.* This section authorizes the Commissioner of Commerce and Insurance to "suspend, revoke, or refuse to issue or renew any [insurance agent's] license" if the licensee or prospective licensee engages in various listed unethical activities. TENN. CODE ANN. § 56-6-155 (2000). It also authorizes the Commissioner to assess civil penalties amounting to between $100 and $1,000 for each violation. *Id.*

[25] *Guy*, 79 S.W.3d at 534.

[26] *Id.*

[27] Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884), *rev'd on other grounds*, Hutton v. Watters, 179 S.W. 134, 137 (Tenn. 1915). Employment-at-will is also "a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer." *Id.* at 518-19.

[28] Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 764, 772 (1994) (verifying that *Payne* was the first application of the employment-at-will doctrine in Tennessee).

[29] 81 Tenn. 507 (1884).

[30] Jay M. Feinman, *The Development of the Employment-At-Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976). In Tennessee this rule even applies to employees granted permanent employment. Combs v. Standard Oil Co., 59 S.W.2d 525, 526 (Tenn. 1933).

not the first state to formally adopt the doctrine,[31] its expression of the doctrine is certainly one of the most memorable.[32] Ironically, the case did not involve wrongful discharge, but rather involved an alleged tortious interference with business relationships.[33]

Payne was the owner of a business located near the center of five railroad termini leading into Chattanooga.[34] This business had become quite profitable selling goods to employees of the railroad, who worked in Chattanooga and along the five rail lines.[35] This came to an end, however, when the railroad threatened to fire any employee who did business with Payne.[36] Payne filed suit arguing that the railroad used the threat of discharge to intimidate his customers and maliciously ruin his business.[37] The court stated that Payne would be entitled to recovery only if the railroad's threats of discharge were unlawful, and those threats could only be unlawful if the railroad did not have the right to discharge its employees for doing business with Payne.[38] The court upheld the railroad's right to discharge its employees with the following reasoning:

> Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employe[e]s at will, be they many or few, for good cause, for no cause or

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[31] Morriss, supra note 28, at 699. By 1884 seven states had already adopted the employment-at-will doctrine: Louisiana (1808), Maine (1851), Mississippi (1858), Wisconsin (1871), California (1872), Illinois (1874), and Colorado (1876). *Id.*

[32] *See* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 653 n.4 (2000) (describing the *Payne* court's language as "a classic exposition on the employment-at-will rule"); Frederick J. Lewis & Jeffery A. Jarratt, *Revisiting the Tennessee Employment-At-Will Doctrine—What is the Exception and What is the Rule?*, 19 MEM. ST. U.L. REV. 171, 171 (1989) (describing the *Payne* court's language as "the exemplification of the American common law rule").

[33] *Payne*, 81 Tenn. at 508-11.

[34] *Id.* at 508-09.

[35] *Id.* at 509.

[36] *Id.* at 509-11.

[37] *Id.* at 514.

[38] *Id.* at 517.

> even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may "threaten" to discharge them without thereby doing an illegal act, per se. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employe[e]s. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment. The law leaves employer and employe[e] to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employe[e] may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny . . . .[39]

What is interesting about the reasoning expressed here is that the Tennessee Supreme Court did not cite H.G. Wood's famous treatise on master-servant law[40] nor any case law as authority for the rule. Instead, the court based its adoption of employment-at-will on the principle that courts should not interfere with the contractual and economic liberty of those involved in the employment relationship.[41]

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[39] *Id.* 519-20.

[40] The event that has been traditionally credited with placing employment-at-will on the path toward dominance was its adoption by the legal treatise writer H.G. Wood. The significance of Wood's treatise has been questioned. Morriss, *supra* note 28, at 697-98 (arguing that Wood's treatise was relatively insignificant because "only a third of the common law adopters between 1880 and 1900 cited Wood"). In his 1877 treatise on master-servant law Wood clearly expressed the doctrine:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [U]nless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

[41] *Payne*, 81 Tenn. at 519-20. The emergence of a general theory of contract and the prevalence of *laissez faire* economics inspired the creation of the employment-at-will doctrine. Feinman, *supra* note 30, at 124-27. Beginning in the 1870's, a general theory of contracts was developed by legal theorists, such as Langdell, Holmes, and Williston, which came to dominate legal thinking in the late nineteenth century. *Id.* at 124. Under contract law, individuals were given the freedom to voluntarily assume

The court expressed a desire to protect "civil and industrial liberty" from "judicial tyranny."[42] The majority recognized the potential burden that this doctrine might place on employees, but addressed this only by saying, "[t]he law cannot compel [employers] to employ workmen, nor to keep them employed."[43] Justices Freeman and Turney, however, dissented[44] and anticipated that this doctrine would eventually require exceptions:

> The principle of the majority opinion will justify employers, at any rate allow them to require employe[e]s to trade where they may demand, to vote as they may require, or do anything not strictly criminal that employer may dictate, or feel the wrath of employer by dismissal from service. Employment is the means of sustaining life to himself and family to the employe[e], and so he is morally though not legally compelled to submit. Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced, but public policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may

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legal obligations and design the terms of the relationships that would exist among them. *Id.* The common law would serve only as a foundation that individuals would build on to construct their own private law, which would emanate from the intent of the parties. *Id.* This trend of legal independence was complemented by the *laissez faire* economic and political thought which was prevalent during this time. *Id.* Thus, these trends granted individuals greater freedom in their legal and economic affairs and changed perceptions of the employer-employee relationship. *Id.* at 124-25. This relationship was increasingly perceived as a limited commercial relationship instead of a long-term domestic relationship. *Id.* at 125.

Contract theory's emphasis on the intent of the parties affected the presumptions governing indefinite employment contracts. Under the old English rule an indefinite employment contract was presumed to be for a year and this presumption was based not on the intent of the parties but on the needs and customs of the community. *Id.* at 119-20. Now presumptions would have to be inferred from the intent of the parties and this new approach led to the employment-at-will doctrine.

[42] *Payne*, 81 Tenn. at 519-20.

[43] *Id.*

[44] *Id.* at 528.

> escape or overleap these boundaries, should be carefully but judiciously guarded.[45]

However, it would be a hundred years before the Tennessee Supreme Court would adopt a public policy exception to the at-will doctrine.[46]

III. The Emergence of the Public Policy Exception in Tennessee

Although the dissent in *Payne* anticipated that public policy exceptions would be needed to contain some of the negative side effects of the employment-at-will doctrine,[47] it was one hundred years before the Tennessee courts would establish such an exception.[48] The birth of Tennessee's public policy exception occurred in *Clanton v. Cain-Sloan Co.*,[49] in which the Tennessee Supreme Court first recognized a cause of action for retaliatory discharge.[50] The plaintiff in Clanton was an at-will employee who was injured on the job and subsequently fired the day after she reached a full settlement of her worker's compensation claim.[51] The Tennessee Supreme Court held that employees discharged in retaliation for filing a worker's compensation claim would be permitted a cause of action against the employer because such an action was "necessary to enforce the duty of the employer, to secure the rights of the employee[,] and to carry out the intention of the legislature."[52] The court also held that in similar, future cases successful plaintiffs would be allowed to recover punitive damages.[53]

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[45] *Id.* at 543-44.

[46] Lewis, *supra* note 32, at 175.

[47] *Payne*, 81 Tenn. at 543-44.

[48] Lewis, *supra* note 32, at 175.

[49] 677 S.W.2d 441 (Tenn. 1984).

[50] *Id.* at 445; Carl A. Pierce, *The Tennessee Supreme Court and the Struggle for Independence, Accountability, and Modernization, 1974-1998*, *in* A HISTORY OF THE TENNESSEE SUPREME COURT 270, 291 (James W. Ely Jr. ed., 2002).

[51] *Clanton*, 667 S.W.2d at 442.

[52] *Id.* at 445.

[53] *Id.*

Central to the court's judgment was its belief that retaliatory discharges were implicitly prohibited by section 50-6-114 of the Tennessee Code Annotated, which prohibits the use of any "device" which relieves the employer of his obligations under the Worker's Compensation Law.[54] The court's reasoning first looked to the Indiana Supreme Court's decision in *Frampton v. Central Indiana Gas Co.*,[55] which the Tennessee Supreme Court described as "the leading case recognizing a cause of action for retaliatory discharge."[56] The special significance of *Frampton* to the Tennessee Supreme Court was that the Indiana Statute prohibiting devices was nearly identical to the Tennessee statute.[57] The Tennessee Supreme Court thus found it highly persuasive that the Indiana Supreme Court concluded that the threat of retaliatory discharge fell into the category of devices prohibited by the statute.[58] The Tennessee Supreme Court also noted that numerous states had reached results similar to those in *Frampton* under similar statutes.[59] In addition, the court mentioned that numerous states had granted judicial remedies for retaliatory discharge through statutory enactments.[60]

However, the Tennessee Supreme Court did recognize that several courts had refused to follow *Frampton* because they believed that creating such a cause of action should be left to the state legislature.[61] Yet, the Tennessee Supreme Court disagreed with these courts, arguing that the legislature's purpose in creating the Worker's Compensation Law was to provide employees with "a certain and expeditious remedy" and that "[r]etaliatory discharges completely circumvent this

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[54] TENN. CODE ANN. § 50-6-114 (1999) ("No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by [the Worker's Compensation Law] . . . .").

[55] 297 N.E.2d 425 (1973).

[56] *Clanton*, 667 S.W.2d at 443.

[57] *Id.*

[58] *Id.* at 443-44.

[59] *Id.* at 444. The Clanton court cited cases from Florida, Kansas, Kentucky, Michigan, Nevada, New Jersey, and Oregon. *Id.*

[60] *Id.* The states mentioned in this category were California, Hawaii, Maine, Maryland, Minnesota, Missouri, New York, North Carolina, Ohio, Oklahoma, Texas, and Wisconsin. *Id.*

[61] *Id.*

legislative scheme."[62] The defense argued that the legislature had "expressly rejected an action for retaliatory discharge" when a bill which would have permitted such an action was rejected by a Senate committee.[63] Neither the full Senate nor the full House, however, voted against this bill.[64] Thus, the court responded to the defense by stating: "We are not persuaded that the action of one Senate committee in recommending against passage of the bill constitutes a legislative intent to reject actions for retaliatory discharge."[65]

The court's approach is logical. Although the work of a single Senate committee appears to show an intent to allow retaliatory discharges, it would be irrational for the General Assembly to permit such discharges. The General Assembly did not exert the effort of creating the Workers' Compensation Law simply to see it eviscerated by the use of retaliatory discharges. Based on the proposition that the General Assembly wanted the Workers' Compensation Law to succeed, it is logical to conclude that retaliatory discharges fall into the category of devices prohibited by the General Assembly. Thus, the creation of an action for retaliatory discharge was a reasonable means of protecting the General Assembly's intent.

IV. The Public Policy Exception and Employer-Endorsed Illegal Activities

A. A New Exception Emerges in the Tennessee Courts of Appeal

Although *Clanton* created a public policy exception to the employment-at-will doctrine, the exception was strictly confined. The Tennessee Supreme Court confined the exception to situations where retaliatory discharge was used in an attempt to circumvent the Workers' Compensation Law.[66] The court never outlined any general principles that could be used to develop other public policy exceptions to

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[62] *Id.*

[63] *Id.* 445.

[64] *Id.*

[65] *Id.* One commentator has argued that "a contrary argument is equally plausible and perhaps more persuasive." Lewis, *supra* note 32, at 179 ("The [Tennessee General Assembly's] failure to provide for a cause of action for retaliatory discharge for the exercise of one's workers' compensation rights suggests that it did not favor such actions.").

[66] *Clanton*, 667 S.W.2d at 443-45.

the at-will doctrine.[67] Nevertheless, there developed a line of cases where plaintiffs, who had been discharged for refusing to take part in illegal activities, requested that a new exception be permitted for their situation.[68]

The first of these was *Williams v. Tennessee Health Services*,[69] a case before the Tennessee Court of Appeals for the Middle Section in which the plaintiff alleged that she was discharged after she refused to falsify insurance reports so that her employer could receive unearned revenue.[70] The court reversed the lower court's judgment of dismissal and remanded the case for further proceedings[71] because "the present case has the potential to present a record upon which another exception to the employment at-will rule might be approved."[72] This holding is surprising considering the strict interpretation of the at-will rule that the Middle Section expressed a few years earlier in *Whittaker v. Care-More, Inc.*[73] In *Whittaker*, the court had said: "It is not the province of this court to change the law . . . . That prerogative lies with the Supreme Court or with the legislature. However, . . . any substantial change in the 'employee-at-will' rule should first be microscopically analyzed regarding its effect on the commerce of this state."[74] Now, approximately six months after the Tennessee Supreme Court's decision in *Clanton*, the Court of Appeals for the Middle Section stated: "[I]t is the province of this [c]ourt to ascertain and apply the existing law and to assist in developing a record from which the ultimate decision can be wisely made in regard to any needed change in the law."[75]

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[67] *Id.*; Lewis, *supra* note 32, at 179.

[68] *See, e.g.,* Watson v. Cleveland Chair Co., 789 S.W.2d 538 (Tenn. 1989); Chism v. Mid-South Milling Co., 762 S.W.2d 552 (Tenn. 1988); Watson v. Cleveland Chair Co., 1 IER Cases 1780 (Tenn. Ct. App. 1985); Williams v. Tenn. Health Services, 1 IER Cases 1754 (Tenn. Ct. App. 1985).

[69] 1 IER Cases 1754 (Tenn. Ct. App. 1985).

[70] *Id.* at 1755.

[71] *Id.* at 1759.

[72] *Id.* at 1757.

[73] 621 S.W.2d 395 (Tenn. Ct. App. 1981).

[74] *Id.* at 396.

[75] *Williams,* 1 IER Cases at 1757.

In *Watson v. Cleveland Chair Co.*,[76] the Tennessee Court of Appeals for the Eastern Section went further and held that "a cause of action for retaliatory discharge arises when an at-will employee is terminated solely for refusing to participate [in], continue to participate [in], or remain silent about illegal activities."[77] In *Watson*, the plaintiffs were truck drivers who alleged that they were fired because they refused to violate state speed laws and federal rest regulations.[78] In its reasoning the court mentioned decisions by other jurisdictions that both supported and opposed such an extension of the public policy exception.[79] In addition, the court noted the warning in *Whittaker* that changes to the employment-at-will doctrine could have a negative impact on the state's ability to attract new businesses.[80] After considering these authorities, the court concluded that "[s]ince the industry we seek to attract and retain are corporate citizens who will respect our laws, we do not believe the proposed exception would adversely affect the quality of the lives of our citizens."[81]

B. Opening Chism's Exit: The Tennessee Supreme Court Addresses a New Exception

It was not until *Chism v. Mid-South Milling Co.*[82] that the Tennessee Supreme Court dealt with a case involving an employee discharged for refusing to participate in illegal activities.[83] *Chism* was an appeal arising from the Tennessee Court of

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[76] 1 IER Cases 1780 (Tenn. Ct. App. 1985).

[77] *Id.* at 1783.

[78] *Id.* at 1781.

[79] *Id.* at 1782.

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> Tennessee has made enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives. The impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.

Id. (quoting Whittaker v. Care-More, Inc., 621 S.W.2d 395, 397 (Tenn. Ct. App. 1981)).

[81] *Id.* at 1783.

[82] 762 S.W.2d 552 (Tenn. 1988).

[83] *Id.* at 553.

Appeals for the Western Section,[84] in which the plaintiff alleged he was fired for refusing to participate in procedures that allegedly violated the Internal Revenue Code.[85] The trial court rendered summary judgment for the employer, but the Court of Appeals reversed.[86] The Tennessee Supreme Court dismissed the case because the complaint was not sufficiently specific.[87]

What is interesting about *Chism*, however, is not the judgment rendered, but the discussion of retaliatory discharge that was included in the opinion. Although the court stated that "the exception cannot be permitted to consume or eliminate the general rule[,]"[88] it went on to describe general principles governing retaliatory discharge that seemed less confining than those established in *Clanton*.[89] Instead of confining retaliatory discharge to situations where an employer is attempting to circumvent the Workers' Compensation Law, the *Chism* court gave the cause of action a broader definition in which an employer would be liable for any "clear violation [by the employer] of some well-defined and established policy" that was a "significant factor in the termination of an at-will employee"[90] The court described a well-defined, established policy as one "[u]sually . . . evidenced by an unambiguous constitutional, statutory[,] or regulatory provision."[91] This description of a well-defined policy provides a broad subject matter from which to find such policies both because it includes regulatory in addition to constitutional and statutory provisions and because its use of the word "usually" implies that such policies can even be found outside this already broad subject matter.[92] The court also listed "[e]xamples of clearly defined public policies which warrant the protection provided by this cause

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[84] Chism v. Mid-South Milling Co., 1987 WL 30146 (Tenn. Ct. App. Dec. 29, 1987).

[85] *Chism*, 762 S.W.2d at 553-54.

[86] *Id.* at 552-553.

[87] *Id.* at 556-57.

[88] *Id.* at 556.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] Lewis, *supra* note 32, at 182.

of action."[93] This list included: (i) discharge for refusal to commit perjury, (ii) discharge for refusing to ignore a lawful subpoena, (iii) discharge for refusing to ignore jury duty obligations, and (iv) discharge for refusing to falsify records or participate in the mislabeling of unsafe or defective products.[94] By giving a broader definition of retaliatory discharge and a list of situations where retaliatory discharge would be "warranted,"[95] the Tennessee Supreme Court appeared to signal approval of a broader interpretation of *Clanton*. In fact, when the court dismissed the plaintiff's case in *Chism*, the court was quick to state: "We do not intend to disparage such an action. The [c]ourt is generally prepared to uphold such claims in appropriate cases . . . ."[96] Thus, *Chism* appeared to open an exit through which employees could escape some of the dangers of the employment-at-will rule.

C. Closing Chism's Exit: The Tennessee Supreme Court Hesitates

One year later, however, when *Watson v. Cleveland Chair Co.*[97] reached the Tennessee Supreme Court in 1989, the court showed little willingness to allow *Chism*'s exit to expand. As discussed above,[98] the plaintiffs in *Watson* alleged that they were discharged for their refusal to violate state speed laws and federal rest and speed regulations.[99] The Court of Appeals reversed the trial court's dismissal of the retaliatory discharge claim and held that "a cause of action for retaliatory discharge arises when an at-will employee is terminated solely for refusing to participate [in], continue to participate [in], or remain silent about illegal activities."[100] In its reasoning, the Court of Appeals did not appear to rely on a statutory statement of

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[93] *Chism*, 762 S.W.2d at 556.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 557.

[97] 789 S.W.2d 538 (Tenn. 1989).

[98] *See supra* Part IV.A.

[99] *Watson*, 789 S.W.2d at 539.

[100] Watson v. Cleveland Chair Co., 1 IER Cases 1780, 1783 (Tenn. Ct. App. 1985).

public policy.[101] Instead, it relied on "the overriding public policy that the people of this state should be encouraged to be law abiding citizens."[102]

The Tennessee Supreme Court reversed the Court of Appeal's holding.[103] In doing so, it stated, "[w]e agree in principle with the expressed views of the lower court, however . . . only in the most extraordinary circumstances should the courts of this [s]tate impose their judgment in an area which, in the first instance, is clearly a legislative function."[104] Thus, the Tennessee Supreme Court interpreted the Court of Appeals' "overriding public policy" as an attempt by the Court of Appeals to declare the public policy of the state, which is a role reserved for the legislature.[105] The Court of Appeals' "overriding public policy" could not form the basis for a retaliatory discharge claim because it was not clearly expressed by a constitutional or legislative provision.[106] In addition, the federal regulations that the plaintiff was allegedly forced to violate could not form the basis for a retaliatory discharge claim because state jurisdiction over those regulations was preempted by the Surface Transportation Assistance Act.[107]

The Tennessee Supreme Court's reversal in *Watson* did not mean that the court was opposed to allowing employees discharged for refusing to condone or participate in illegal activities to have a cause of action for retaliatory discharge, it only meant that the court was opposed to expanding it beyond *Chism*.

> We have heretofore in this opinion discussed the question of whether a cause of action for retaliatory discharge may be maintained when an employee at-will is terminated solely for refusing to participate in or remain silent about illegal activity. We have written at some length on this issue in [*Chism*]. We have expressed our accord with the Court of

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[101] *Id.* at 1782-83.

[102] *Id.* at 1783.

[103] *Watson*, 789 S.W.2d at 540.

[104] *Id.*

[105] *Id.* at 540-41.

[106] *Id.*

[107] *Id.* at 541-44.

> Appeals, that a cause of action for retaliatory discharge arises when an at-will employee is terminated solely for refusing to participate [in], continue to participate [in], or remain silent about illegal activities. However, in reference to this case, we believe the plaintiffs' remedies lie within the parameters of the Surface Transportation Assistance Act of 1982. We do not agree that it is appropriate for the courts of this [s]tate to establish public policy or adopt an exception to the common-law by placing our imprimatur thereon in the absence of some constitutional or legislative precedent.[108]

Here the court's reference to *Chism*, a case which potentially widened the public policy exception, and the court's claim to be in accord with the Court of Appeals implies that the Tennessee Supreme Court would recognize a cause of action under such facts, but only if there was an extremely clear expression of public policy from the General Assembly. Even if such a clear expression of public policy exists in a particular case, however, the court did not make clear whether an employee's refusal to condone illegal activity must be the sole reason for the employee's termination (the standard expressed by the Court of Appeals) or just a substantial factor (the standard in *Chism*). Thus, the court in *Watson* signaled to the General Assembly that a clear expression of public policy in support of whistle-blowers was needed, but it did not give clear guidance regarding the standards to be used.

If *Watson* began closing *Chism*'s exit, *Harney v. Meadowbrook Nursing Center*.[109] closed it. In *Harney*, the plaintiff alleged that she was discharged in retaliation for her unfavorable testimony in a former co-worker's workers' compensation hearing.[110] The Tennessee Supreme Court dismissed her case because her employer "made no attempt to interfere with [her] testimony[,]" but instead had an "honest difference of opinion . . . about whether her testimony was true or false."[111] In its reasoning the *Harney* court redefined the holding in *Clanton* by stating that "*Clanton* did not create a new exception to the [employment-at-will] rule."[112] Instead, the *Clanton* court merely recognized that there was a cause of action implicit within the Workers'

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[108] *Id.* at 544.

[109] 784 S.W.2d 921 (Tenn. 1990).

[110] *Id.* at 921.

[111] *Id.* at 922.

[112] *Id.*

Compensation Law that prevented employers from using retaliatory discharge to defeat the rights granted to employees by that law.[113] Thus, "[t]he [*Clanton*] decision was not intended as a license for the courts to enlarge on the employee-at-will rule or create other exceptions to public policy or the common-law in the absence of some constitutional or statutory precedent."[114]

D. Chism's Exit Fully Opens

Following the *Watson* and *Harney* decisions, the Tennessee General Assembly passed the Public Protection Act of 1990.[115] The Act states that "[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities."[116] Thus, the General Assembly expressed a public policy in favor of protecting whistle-blowers.[117] The Act did little else because it adopted the "sole reason" standard mentioned in *Watson*, which created a cause of action only if the employee's termination was motivated solely by his or her refusal to tolerate illegal activity, a standard that would be quite difficult to prove.[118] Thus, the Tennessee General Assembly reopened *Chism's* exit, but only narrowly.

Beginning in 1992 the Tennessee Supreme Court began to change its view of the public policy exception with decisions that rejected the views expressed in *Watson* and *Harney*. In *Hodges v. S.C. Toof & Co.*,[119] the court rejected the *Harney* interpretation of *Clanton*.

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[113] *Id.*

[114] *Id.*

[115] The Tennessee General Assembly passed the Public Protection Act on March 29, 1990. 1990 Tenn. Pub. Acts ch. 771. It is codified in the Tennessee Code Annotated at § 50-1-304. TENN. CODE ANN. § 50-1-304 (Supp. 2003).

[116] TENN. CODE ANN. § 50-1-304(a) (Supp. 2003).

[117] John E. Lippl, *Comment: Predicting the Success of Wrongful Discharge-Public Policy Actions: In Tennessee and Beyond*, 58 TENN. L. REV. 393, 399 (1991).

[118] *Id.*

[119] 833 S.W.2d 896 (Tenn. 1992).

> *Clanton* is not limited to retaliatory discharge actions arising from an employee's exercise of workers' compensation rights, but rather makes the tort action of retaliatory discharge available to employees discharged as a consequence of an employer's violation of a clearly expressed statutory policy. . . .
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> . . . .
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> . . . [W]e are prepared to recognize a right to recovery for retaliatory discharge in cases where an employer violates a clear public policy evidenced by an unambiguous statutory provision.[120]

In fact, the *Hodges* court went so far as to describe *Clanton* as the case in which "we recognized an exception to [the employment at will] rule."[121] This was a complete about-face from the court's previous statement in *Harney* that "*Clanton* did not create a new exception to the [employment-at-will] rule."[122]

The final step, in rejecting *Watson* and finally recognizing a new public policy exception, came with *Reynolds v. Ozark Motor Lines, Inc.*[123] In *Reynolds*, the plaintiffs were truck drivers who alleged that they were terminated because they refused to violate safety regulations adopted pursuant to the Tennessee Motor Carriers Act.[124] Although the trial court had found for the plaintiffs, the Court of Appeals reversed, arguing that a claim for retaliatory discharge could not be based upon the facts in the case because the Tennessee Motor Carriers Act did not "provide any basis for a public policy exception to the employment-at-will law of Tennessee."[125] The Tennessee Supreme Court disagreed and reinstated the trial court's judgment.[126] The court, citing *Hodges*, *Anderson*, and *Chism*, stated that an action for retaliatory discharge would "lie where the employer has violated a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision and the

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[120] *Id.* at 899.

[121] *Id.*

[122] Harney v. Meadowbrook Nursing Ctr., 784 S.W.2d 921, 922 (Tenn. 1990).

[123] 887 S.W.2d 822 (Tenn. 1994).

[124] *Id.* at 823. The Tennessee Motor Carriers Act is codified in § 65-15-101 of the Tennessee Code Annotated. TENN. CODE ANN. § 65-15-101 (Supp. 2003).

[125] *Reynolds*, 887 S.W.2d at 823.

[126] *Id.* at 825.

employer's violation was a substantial factor in the employee's discharge."[127] The court concluded that the Motor Carriers Act was an expression of public policy by the state legislature and that all the elements of retaliatory discharge were present in the case.[128] The Tennessee Supreme Court had finally allowed a plaintiff, who had been discharged for refusing to condone illegal activity, to recover for retaliatory discharge.

Reynolds was extremely important to the development of a second public policy exception to the employment-at-will rule, but it still left some loose ends. The decision was important because it clearly held that a common law cause of action for retaliatory discharge was available to employees discharged for refusing to engage in or remain silent about illegal activates. The *Reynolds* decision was also important because it clearly held that *Chism*'s substantial factor standard, rather than *Watson*'s sole factor standard, was to be used in retaliatory discharge cases dealing with employer endorsed illegal activities.[129] However, two important questions were not fully answered. First, does the Tennessee Public Protection Act preempt this common law cause of action? The *Reynolds* court implied that there was no preemption, but did not provide an explicit answer to this question.[130] Second, has the *Reynolds* holding created a durable new exception to the at-will rule or, like *Chism*, will the *Reynolds* holding be diluted by subsequent opinions? Eight years later, in *Guy v. Mutual of Omaha Insurance Co.*,[131] the Tennessee Supreme Court would answer both of these questions.

V. *Guy v. Mutual of Omaha Ins. Co.*: The Tennessee Supreme Court Verifies *Reynolds*

In *Guy* the Tennessee Supreme Court held that the Tennessee Public Protection Act "is cumulative to, and does not preempt, the common law tort remedy for retaliatory discharge claims where the employee was discharged for

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[127] *Id.* at 823.

[128] *Id.* at 825.

[129] *Id.* at 823.

[130] *Id.* at 825.

[131] 79 S.W.3d 528 (Tenn. 2002).

reporting illegal or unethical conduct."[132] In doing so the court also verified that (1) Tennessee has a common law cause of action for "retaliatory discharge when the at-will plaintiff-employee is discharged for refusing to remain silent about illegal activities"[133] and (2) "[t]he plaintiff in such an action must demonstrate that the employer's violation was a '*substantial factor* in the employee's discharge.'"[134] Thus, *Guy* both clarified and stabilized Tennessee law regarding this type of retaliatory discharge claim.

In an opinion written by Justice Barker, the court first summarized Tennessee's common law regarding retaliatory discharge claims in the context of employer endorsed illegal activities.[135] The court noted that "Tennessee has long adhered to the common law employment-at-will doctrine, which provides that an employment contract for an indefinite term is terminable at the will of either the employer or the employee for any cause or for no cause."[136] Having stated the general rule, Justice Barker further explained that the "traditional at-will rule is not absolute," an employee discharged for refusal to remain silent about illegal activities has a cause of action under the common law if he or she can show that such refusal was a substantial factor in the employer's discharge decision.[137]

The discussion then turned to the Tennessee Public Protection Act of 1990, and the court quoted its relevant provisions.[138]

> (a) No employee shall be discharged or terminated *solely* for refusing to participate in, or for refusing to remain silent about, illegal activities.
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> . . . .

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[132] *Id.* at 537.

[133] *Id.* at 535.

[134] *Id.* (quoting Chism v. Mid-South Milling Co., 762 S.W.2d 552, 557 (Tenn. 1988)) (emphasis added by the *Guy* court).

[135] *Id.* at 534-35.

[136] *Id.* (citing Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884), *rev'd on other grounds*, Hutton v. Watters, 179 S.W. 134, 137 (Tenn. 1915)).

[137] *Id.* at 535 (citing Chism v. Mid-South Milling Co., 762 S.W.2d 552, 557 (Tenn. 1988)).

[138] *Id.* at 535.

> (d)Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.[139]

According to the court, the goal of the Act was "to protect employees from being discharged in retaliation for 'blowing the whistle' on infractions of rules, regulations, or the law pertaining to the health, safety, and general welfare of the public."[140]

Mutual of Omaha insurance company ("Mutual"), the defendant-employer, argued that when the Tennessee Public Protection Act was enacted it codified the common law cause of action for retaliatory discharge when an at-will employee is discharged for reporting illegal activities.[141] Mutual further asserted that, because the statutory cause of action preempted the common law cause of action, the common law's substantial factor standard was no longer available to plaintiffs.[142] Therefore, Guy would have to prove that his whistle blowing activity was the exclusive reason for his discharge.[143]

On the other hand, Guy argued that the common law and statutory causes of action were cumulative.[144] Thus, he was not required to carry the heavy burden required in the statute.[145] Instead, he could bring his claim under the common law cause of action and enjoy its lighter burden of proof, allowing him to recover if he could prove that his whistle blowing activity was a substantial factor in Mutual's discharge decision.[146]

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[139] *Id.* (quoting TENN. CODE ANN. §§ 50-1-304(a), (d) (1999)) (emphasis added by the *Guy* court).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 535-36.

[146] *Id.*

Thus, the Tennessee Supreme Court was forced to decide whether the Tennessee Public Protection Act preempted the common law cause of action. Justice Barker outlined three arguments supporting the conclusion that the Act did not abrogate the common law.[147] First, "the clear and plain language of the text contains no . . . indication of exclusivity."[148] "[W]here a common law right exists and a statutory remedy is subsequently created, the statutory remedy is cumulative 'absent language showing that [it is] intended to be exclusive.'"[149] Second, "if the legislature had wanted to foreclose a common law cause of action, it had more than ample opportunity to do so; indeed, it could have done so . . . in 2000 [when] it amended the statute."[150] Third, "close examination of the statute reveals key distinctions from the common law tort, further indicating the cumulative, rather than the preemptive, nature of the statutory remedy."[151] For example, the statute increased the burden of proof to require the plaintiff to show that whistle blowing activity was the sole reason for being discharged, and the statute extended protection to public employees.[152] Based on this analysis the court held "that [the Tennessee Public Protection Act] is cumulative to, and does not preempt, the common law tort remedy for retaliatory discharge claims where the employee was discharged for reporting illegal or unethical conduct."[153]

The court then went on to evaluate the judgment of the Court of Appeals, which had denied Mutual's motion for summary judgment.[154] The Tennessee Supreme Court agreed with Guy that § 56-6-155 of the Tennessee Insurance Law evidenced Tennessee's public policy to protect consumers from unethical insurance agents.[155] The court concluded that this was a sufficiently "well-defined and

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147 *Id.* at 536-37.

148 *Id.* at 536.

149 *Id.* (quoting Leach v. Rich, 196 S.W. 138, 140 (Tenn. 1917)).

150 *Id.* at 536-37.

151 *Id.* at 537.

152 *Id.*

153 *Id.*

154 *Id.* at 533-34.

155 *Id.* at 537-38. Section 56-6-155 of the Tennessee Code Annotated authorizes the Commissioner of Commerce and Insurance to "suspend, revoke, or refuse to issue or renew any [insurance agent's] license" if the licensee or prospective licensee engages in various listed unethical activities. TENN.

established public policy" to serve as "the basis for [Guy's] retaliatory discharge claim."[156] Finally, the court also concluded that "there [was] a genuine issue of material fact with respect to whether Mr. Guy's whistle blowing activity was a substantial factor in Mutual's decision to discharge him."[157] Thus, the Tennessee Supreme Court affirmed the judgment of the Court of Appeals.[158]

VI. Conclusion: The Consequences of *Guy*

An important consequence of the *Guy* decision is that it helped to eliminate the uncertainty that arose in the wake of the Tennessee Supreme Court's decision in *Watson* and the Tennessee Public Protection Act. The *Watson* decision created uncertainty because it did not clearly state the standard of proof required of the plaintiff in the common law cause of action.[159] Would it be the substantial factor standard from *Chism* or the sole reason standard developed by the Tennessee Court of Appeals? The Tennessee Public Protection Act created uncertainty by raising the possibility of statutory preemption of the common law cause of action and its standard of proof. In *Reynolds*, the Tennessee Supreme Court held that the standard of proof in the common law cause of action is the substantial factor standard, but it only implied that the common law cause of action was not preempted.[160] *Guy* explicitly held that the common law cause of action and its substantial factor standard were not preempted.[161] Thus, an important consequence of the *Guy* decision was greater clarity.

The most powerful consequence of the *Guy* decision is that it prevented the only remedy available to wrongfully discharged whistle-blower employees from becoming a paper tiger. If the Tennessee Supreme Court had held that the

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CODE ANN. § 56-6-155 (2000). It also authorizes the Commissioner to assess civil penalties amounting to between $100 and $1,000 for each violation. *Id.*

156 *Guy*, 79 S.W.3d at 539.

157 *Id.*

158 *Id.*

159 *See supra* Part IV.C.

160 *See supra* Part IV.D.

161 *See supra* Part V.

Tennessee Public Protection Act preempted the common law cause of action, all whistle-blower plaintiffs would have been forced to carry the exceedingly heavy burden of proving that their whistle-blower activities were the exclusive reason for their discharge. This is so difficult to prove that it would have made the cause of action practically unavailable to most whistle-blower employees. After *Guy*, privately employed whistle-blower plaintiffs may now confidently rely on the common law cause of action with its lighter substantial factor standard. Public employees discharged for whistle-blowing, however, are left with the paper tiger because the statutory cause of action is the only means though which they may assert retaliatory discharge claims; the common law cause of action never applied to them.[162] Thus, as far as public employees are concerned, *Guy* had no real effect, but for private employees, *Guy* relegated the Tennessee Public Protection Act's sole reason standard to the dustbin of history.

[162] Public employees discharged for engaging in whistle-blower activities may not assert the common law cause of action for retaliatory discharge. Williams v. Williamson County Bd. of Educ., 890 S.W.2d 788, 790 (Tenn. Ct. App. 1994); Montgomery v. Mayor of Covington, 778 S.W.2d 444, 445 (Tenn. Ct. App. 1988). Public employee whistle-blowers had no such cause of action until § 50-1-304 was amended in 1997. 1997 Tenn. Pub. Acts ch. 511.