PREFACE

Many people probably dream about winning the lottery or otherwise finding enough money to quit work. For most of us, however, work is a part of daily life. In fact, work is usually the biggest part of our daily lives, at least calculating the hours involved.

*Labor and Employment Law: Private Sector* is all about work. Like previous editions, this book covers the relationship between employer and employee, and is a guide to state and federal law governing the duties of employers and the rights of employees.

This book differs from others on employment and labor law in four important ways:

(1) This book particularly explains Oregon law. Oregon is an employment-at-will state, but state law nonetheless offers many workplace protections. This book explains that balance.

(2) However, this book is not just about Oregon law; it also examines the federal law in conjunction with Oregon law. This balance between federal and Oregon law is especially important in the chapters on labor relations and labor law.

(3) This book analyzes the cases, statutes, and regulations that affect workplace rights and responsibilities, and includes dozens of practice tips from the Oregon experts in labor and employment law. The Oregon experience is set forth for you, the readers.

(4) This area of the law seems to be the most rapidly changing in law. As a result, all of the chapters have been updated, many with new statutes, and two completely new chapters have been added on leave laws and the Worker Adjustment and Retraining Notification Act (the WARN Act).

Work is a part of daily life, but this book will save you hours of time in your law practice—and that’s a prize worth keeping.

Harlan Bernstein
Richard Liebman

*Editors*
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§1.1 INTRODUCTION

Oregon, like most other jurisdictions, adheres to the principle of employment at will. Therefore, an employer may ordinarily discharge an employee at any time for any reason. The general rule is set forth in *Patton v. J.C. Penney Co.*, 301 Or 117, 122, 719 P2d 854 (1986): “It may seem harsh that an employer can fire an [employee] because of dislike of the [employee’s] personal lifestyle, but because the plaintiff cannot show that the actions fit under an exception to the general rule, plaintiff is subject to the traditional doctrine of ‘fire at will.’”

This chapter discusses tort claims that arise from the employment relationship. For additional discussion, see 2 TORTS ch 28 (Oregon CLE 2006).

§1.2 WRONGFUL DISCHARGE

The Oregon Supreme Court first recognized the tort of wrongful discharge in *Nees v. Hocks*, 272 Or 210, 216, 536 P2d 512 (1975), in
which the court recognized an exception to employment at will when the employer’s “motive for discharging harms or interferes with an important interest of the community.” The court held that when an employer discharges an employee for a “socially undesirable motive,” the employer “must respond in damages for any injury done.” Nees, 272 Or at 218. After the Nees opinion, the court has held that a wrongful discharge claim includes two elements: (1) “there must be a discharge” and (2) “that discharge must be ‘wrongful.’” Moustachetti v. State, 319 Or 319, 325, 877 P2d 66 (1994).

The Oregon Supreme Court has not specifically defined when a discharge is or is not wrongful. However, in Delaney v. Taco Time International, Inc., 297 Or 10, 14–16, 681 P2d 114 (1984), the court organized wrongful-discharge cases into three distinct categories:

(1) Employees discharged for fulfilling societal duties (see §1.2-1);

(2) Employees discharged for exercising rights of public importance related to their role as employees (see §1.2-2); and

(3) Cases in which an adequate remedy exists to protect society’s interest so that an additional remedy of wrongful discharge need not be provided (see §1.2-3).

The court has recognized a claim for relief for wrongful discharge in the first two categories of cases, but has declined to recognize a claim for wrongful discharge in the third category of cases because a remedy exists that adequately protects society’s interests. The lower courts have applied these three analytical categories to decide when a discharge is wrongful.

To date, no case has addressed whether the first two categories announced in the Delaney case exhaust the possible “socially undesirable motives” that are actionable as a wrongful discharge in Oregon, or whether the third category exhausts the possible exceptions to the doctrine.
§1.2-1 Discharge in Violation of Social Policy

Following the decision in *Delaney v. Taco Time International, Inc.*, 297 Or 10, 681 P2d 114 (1984) (discussed in §1.2), Oregon courts have recognized a cause of action for wrongful discharge when an employee is fired for performing a public duty or fulfilling a societal obligation. The determination regarding whether a public duty or a societal obligation has been implicated is a question of law. In making that determination, the court “must review all the relevant ‘evidence’ of a particular public policy, whether that be expressed in constitutional and statutory provisions or in the case law of this or other jurisdictions.” *Banaitis v. Mitsubishi Bank*, 129 Or App 371, 377–378, 879 P2d 1288 (1994).

The court of appeals has held that it “is not necessary that a statute specifically regulate the conduct that precipitated the discharge” or that the employer’s conduct violated a specific statute. *Banaitis*, 129 Or App at 377, 380. Rather, the focus of the inquiry is on whether the employee has produced evidence of “a substantial public policy that would . . . be ‘thwarted’ if an employer were allowed to discharge its employee without liability.” *Banaitis*, 129 Or App at 380. The court of appeals has stated that the legislature’s decision to attach criminal penalties to certain conduct is a “strong indication” that it views prohibiting the conduct “to be a matter of public importance.” *Banaitis*, 129 Or App at 380.

The court “cannot create a public duty but must find one in constitutional or statutory provisions or case law.” *Eusterman v. Northwest Permanente, P.C.*, 204 Or App 224, 229–230, 129 P3d 213 (2006); *Babick v. Oregon Arena Corp.*, 333 Or 401, 407, 40 P3d 1059 (2002). Nevertheless, the court of appeals has held that it is not enough for a plaintiff to identify provisions or cases that express a “general public concern over a particular social problem”; rather, they must either (1) specifically encourage or require a particular action or (2) “otherwise demonstrate that such acts enjoy high social value.” *Love v. Polk County Fire Dist.*, 209 Or App 474, 486–487, 149 P3d 199 (2006); *Eusterman*, 204 Or App 230. The first category is relatively objective; the second
category is “more impressionistic” and, as a result, narrowly construed. Love, 209 Or App at 487.

A subsidiary of the two categories set forth in Love “pertains to the application of the ‘important public duty’ doctrine in ‘whistleblower’ situations.” Love, 209 Or App at 487. In whistleblower situations, courts “recognize the existence of an important public duty to ‘blow the whistle’ on certain behavior even in the absence of a specific statutory obligation to do so.” Love, 209 Or App at 487. “That is, exposing certain statutory or regulatory violations, including health and safety violations, is sufficiently ‘important’ that, under certain conditions, an employee who does so is protected from being discharged for that conduct.” Love, 209 Or App at 487. A whistleblowing plaintiff must act in “good faith” when exposing statutory and regulatory violations. To act in good faith, a whistleblowing plaintiff must have “an objectively reasonable belief that defendant had engaged in conduct which, if proved, violated statutory or regulatory requirements.” Love, 209 Or App at 490.

The Oregon Supreme Court has left open the question of whether the employee must show only a substantial public policy that would be thwarted by the employer’s conduct or whether the employee must show that a statute obligates the employee to act in the way that precipitated the discharge to state a claim for wrongful discharge. Babick, 333 Or at 408. The court stated that statutes that exhibit a general public policy concern but say nothing about the specific acts precipitating the discharge are insufficient to meet the public duty standard. Babick, 333 Or at 409–410.

In Lamson v. Crater Lakes Motors, Inc., 346 Or 628, 216 P3d 852 (2009), the Oregon Supreme Court discussed whether evidence that an important public policy is “thwarted” stated a claim for wrongful discharge. In Lamson, a sales manager for a car dealership reported to his employer that a sales marketing firm hired by the employer was using unethical and illegal sales practices. When the employer hired the marketing firm for another sales event, the sales manager refused to appear for work during the event. The employer terminated the sales manager for failure to report to work. The sales manager claimed that he
was wrongfully discharged for refusing to participate in the event and for reporting the marketing firm’s fraudulent sales tactics and that the employer’s act thwarted public policies under the Uniform Trade Practices Act (UTPA).

The court in the Lamson case recognized that a termination that thwarts the policies of the UTPA would be sufficient to state a claim for a wrongful discharge. Lamson, 346 Or at 637–638. Nevertheless, the court analyzed specifically the employee actions to determine whether the public policy of the statute ―speak[s] directly to those acts.” In Lamson, the employer did not require the employee to engage in acts that violated the UTPA. Rather, the employer terminated the employee for reporting that a contractor was engaging in unlawful acts. In order for the employee’s conduct to be protected, the court held that plaintiff needed to report the contractor violations to an agency with authority to act on the violations, in this case the attorney general or the district attorney. Lamson, 346 Or at 640.

Oregon courts have found that terminations of employment frustrated substantial public policies sufficient to state a claim for wrongful discharge in the following circumstances:

(1) An employee was terminated for serving on a jury. Nees v. Hocks, 272 Or 210, 219, 536 P2d 512 (1975).

(2) A nursing-home employee who believed in good faith that certain actions constituted patient abuse was terminated for threatening to report that conduct to the Oregon Health Division. McQuary v. Bel Air Convalescent Home, Inc., 69 Or App 107, 110, 684 P2d 21 (1984).

(3) An employee was terminated for refusing to sign a false and potentially defamatory statement about a coworker. Delaney, 297 Or at 16–17.

(4) An employee was terminated for making a good-faith report to the state about dangerous conditions and potential physical abuse in a care center for developmentally disabled residents. Hirsovescu v. Shangri-La Corp., 113 Or App 145, 148–149, 831 P2d 73 (1992).