

Fall 1996

## Everything You Wanted to Know about Missouri's Public Policy Exception But Didn't Know You Should Ask

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### Recommended Citation

Joseph H. Knittig, *Everything You Wanted to Know about Missouri's Public Policy Exception But Didn't Know You Should Ask*, 61 MO. L. REV. (1996)

Available at: <https://scholarship.law.missouri.edu/mlr/vol61/iss4/4>

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## Comment

# Everything You Wanted to Know About Missouri's Public Policy Exception But Didn't Know You Should Ask

## I. INTRODUCTION

In a wrongful discharge action based on the public policy exception to the employment-at-will doctrine courts created a sleeper claim favoring terminated at will employees.<sup>1</sup> Much to the chagrin of Missouri employers, that sleeper claim is winning more and more frequently in Missouri courts. Generally, Missouri courts categorically constrain the public policy exception in a narrow and clearcut fashion. However, some Missouri courts pushed and rubbed at the bright lines of those categories and created a hazy area of unpredictability in the exception. In addition, federal courts interpreting the Missouri public policy exception introduced a significant pre-emption dispute which Missouri state courts have yet to address. To what extent has the public policy exception eroded employment-at-will? If you take a close look, the answer appears to be not much. But, do the courts know that?

## II. EVOLUTION OF MISSOURI'S PUBLIC POLICY EXCEPTION

The common law employment-at-will doctrine necessarily provides the starting point for a discussion of wrongful discharge actions based on public policy. "Employees who do not have a contract for a definite period of time are considered 'employees-at-will'."<sup>2</sup> Generally, an employer can discharge an at will employee for or without cause and not incur liability for wrongful discharge.<sup>3</sup> Before the emergence of the public policy exception,<sup>4</sup> an at will

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1. For a discussion of the interface between employment-at-will and the development of a public policy exception, see *infra* notes 15-19 and accompanying text.

2. *McCloskey v. Eagleton*, 789 S.W.2d 518, 519 (Mo. Ct. App. 1990) (citing *Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo.), *cert. denied*, 454 U.S. 1084 (1981)).

3. *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985); *see also* *Christy v. Petrus*, 295 S.W.2d 122, 124 (Mo. 1956); *Culver v. Kurn*, 193 S.W.2d 602, 603 (Mo. 1946); *Forsyth v. Board of Trustees of Park College*, 212 S.W.2d 82, 85 (Mo. Ct. App. 1948); *Bell v. Faulkner*, 75 S.W.2d 612, 613 (Mo. Ct. App. 1934) .

Dean Timothy Heinsz of the University of Missouri-Columbia School of Law discussed the underpinnings of the employment-at-will doctrine:

employee could not avoid the general rule absent a statute enabling the employee to bring a wrongful discharge action.<sup>5</sup>

With the public policy exception, a judicial check on an employer's right to terminate at will employees emerged. The court in *Petersimes v. Crane Company*<sup>6</sup> precisely stated the foundation of the public policy exception:

While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.<sup>7</sup>

Thus, courts in Missouri and throughout the country armed themselves with a tool of discretion to combat another tool of discretion—the employment-at-will rule.<sup>8</sup> As discussed below, self-regulation necessary to prevent judges

The rule is not based on contract principles, for the employer-employee relation is that of principal to agent. An agency is formed by consent and it is not necessarily a contract which requires consideration. The relationship's commencement and duration depend upon a mutual and voluntary agreement of the parties. With few exceptions, the principal or agent has the power to terminate the relationship, even when there is no right to do so. Both parties are required to work in close association for the principal's benefit and owe mutual fiduciary duties. Either should be free to terminate the relationship at will.

Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855 (1983). For another interpretation of the employment-at-will foundation, see Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 191 (1983).

4. The remainder of this Comment focuses on the public policy exception in Missouri. For a general discussion of the emergence of the public policy exception, see Heinsz, *supra* note 3, at 873-81.

5. *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985); see also *Christy v. Petrus*, 295 S.W.2d 122, 124 (Mo. 1956); *Culver v. Kurn*, 193 S.W.2d 602, 603 (Mo. 1946); *Forsyth v. Board of Trustees of Park College*, 212 S.W.2d 82, 85 (Mo. Ct. App. 1948); *Bell v. Faulkner*, 75 S.W.2d 612, 614 (Mo. Ct. App. 1934).

In Missouri, for example, an employee discharged for filing a claim under a worker's compensation statute has available a statutory wrongful discharge cause of action. See *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275-76 (Mo. 1984) (interpreting MO. REV. STAT. § 287.780 (1994)).

6. 835 S.W.2d 514 (Mo. Ct. App. 1992).

7. *Id.* at 516 (quoting *Sides v. Duke Univ.*, 328 S.E.2d 818, 826 (N.C. Ct. App. 1985)).

8. The court in *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 872 (Mo. Ct. App. 1985) discussed several cases interpreting the public policy exception in other

from becoming legislators tagged along with the self empowerment of the public policy exception.

Missouri courts introduced the public policy exception concept in *Smith v. Arthur C. Baue Funeral Home*.<sup>9</sup> In *Baue*, an at will employee arranged for a union representative to negotiate and execute an agreement with his employer.<sup>10</sup> Upon learning of the arrangement, the employer terminated the employee.<sup>11</sup> The court held:

[H]is employers' right to terminate his employment at any time for any reason . . . was modified by the adoption of Section 29, Article I,<sup>12</sup> . . . namely, an employer may not discharge an employee for asserting the constitutional right thereby given him to choose collective bargaining representatives to bargain for him concerning his employment . . . . Thus, plaintiff's discharge . . . was a wrongful discharge for which he could maintain an action for damages.<sup>13</sup>

*Baue* created the first narrowly defined exception to the Missouri employment-at-will doctrine: at will employees terminated for exercising a constitutional right, such as appointing a union representative for collective bargaining purposes, have available a wrongful discharge cause of action.<sup>14</sup>

Twenty-one years after *Baue*, the Eastern District Court of Appeals tinkered with creating a virtually undefinable public policy exception when an at will employee of Barnes Hospital sued Barnes for wrongful discharge.<sup>15</sup>

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jurisdictions. See, e.g., *Sides v. Duke University*, 328 S.E.2d 818, 826-27 (N.C. Ct. App. 1985) (interpreting North Carolina's public policy exception); *Delaney v. Taco Time Int'l, Inc.*, 681 P.2d 114, 118 (Or. 1984) (interpreting Oregon's public policy exception); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984) (interpreting Arkansas's public policy exception); *Kalman v. Grand Union Co.*, 443 A.2d 728, 730 (N.J. Super. Ct. App. Div. 1982) (interpreting New Jersey's public policy exception); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980) (interpreting California's public policy exception); *Trombetta v. Detroit, Toledo & Ironton Railroad Co.*, 265 N.W.2d 385, 388 (Mich. Ct. App. 1978) (interpreting Michigan's public policy exception).

9. 370 S.W.2d 249 (Mo. 1963).

10. *Id.* at 251.

11. *Id.*

12. Article I, section 29, of the Constitution of Missouri provides that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." MO. CONST. art. I, § 29.

13. *Baue*, 370 S.W.2d at 254.

14. *Id.*

15. *Ising v. Barnes Hosp.*, 674 S.W.2d 623 (Mo. Ct. App. 1984).

The plaintiff in *Ising v. Barnes Hospital*<sup>16</sup> was terminated for refusing to sign a hold-harmless agreement connected with an employer mandated polygraph test.<sup>17</sup> After pointing out that "public policy" invalidates agreements between employers and employees that waive employer liability for negligently maintaining work conditions,<sup>18</sup> the plaintiff argued the discharge was based on grounds contravening public policy and, therefore, was actionable as an exception to the employment-at-will doctrine.<sup>19</sup>

In emphasizing its loyalty to employment-at-will, the *Ising* court found a "substantial difference between a policy which voids a transaction and one which gives rise to an independent cause of action."<sup>20</sup> Rendering unenforceable an agreement waiving employer liability provides a protective shield for employees, not a sword for a wrongful discharge attack.<sup>21</sup> The court refused to create a boundless public policy exception.<sup>22</sup>

After such stirring in the lower courts, the Missouri Supreme Court re-entered the public policy exception fray in *Dake v. Tuell*.<sup>23</sup> In *Dake*, employees of Lowry Organ Center were fired for informing their employer that salespeople at Lowry made fraudulent misrepresentations to customers.<sup>24</sup> The employees brought prima facie tort actions against their employer on the grounds that the "defendants had discharged plaintiffs in complete disregard

16. *Id.*

17. *Id.* at 624. Barnes insisted that all members of the respiratory department submit to a polygraph test due to rampant criminal activity within the department. *Id.* Before taking the polygraph all employees were required to sign an agreement to hold harmless Barnes and the test administrator for any negligent or intentional conduct associated with the polygraph. *Id.* The plaintiff objected to the agreement, not the polygraph. *Id.*

18. See *Flaiz v. Chicago, B. & Q. R.R. Co.*, 184 S.W. 917, 919-920 (Mo. Ct. App. 1916); *Hartman v. Chicago, B. & Q. R.R. Co.*, 182 S.W. 148, 152 (Mo. 1916).

19. *Ising*, 674 S.W.2d at 624-25.

20. *Id.* at 625.

21. See *id.* The court stated that creating a sword from the public policy rendering liability waivers unenforceable is a legislative prerogative. See *id.* at 625-26 (citing *Murphy v. American Home Products, Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983) (stating that due to the far reaching consequences of alterations to the employment-at-will doctrine, the legislature is in the best position to create such alterations)).

22. *Ising*, 674 S.W.2d at 625-26.

23. 687 S.W.2d 191 (Mo. 1985).

24. *Id.* at 192.

of their state and federal constitutional rights."<sup>25</sup> The *Dake* majority held off public policy expansion, holding:

Here, plaintiffs would have us render near impotent this long standing legal principle—by establishing a rule that would permit an at will employee to bring an action for wrongful discharge under the guise of the prima facie tort doctrine. This we decline to do.<sup>26</sup>

Significantly, in concurring with the *Dake* majority, Judge Blackmar challenged Missouri's conservative wrongful discharge jurisprudence.<sup>27</sup> He said the majority opinion contained "unnecessarily broad pronouncements" regarding wrongful termination actions and should be "authoritative only on the facts now before us."<sup>28</sup> In effect, Judge Blackmar told plaintiffs' lawyers and lower courts pushing for expansion not to be discouraged—try again.<sup>29</sup>

Try again they did. In *Boyle v. Vista Eyewear, Inc.*,<sup>30</sup> the Missouri Court of Appeals, Western District, used Judge Blackmar's concurring opinion in *Dake* to springboard into a broad public policy exception analysis.<sup>31</sup> In *Boyle*, an at will employee at an eyeglass laboratory was fired after reporting her employer to the Occupational Safety and Health Administration and the Food and Drug Administration for disregarding the performance of certain FDA mandated safety tests on eyeglasses.<sup>32</sup> The employee brought a wrongful discharge claim against her employer based on the public policy exception to the employment-at-will doctrine.<sup>33</sup>

In exploring the public policy exception theory the *Boyle* court identified four broad categories of wrongful discharge actions based on the public policy

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25. *Id.* Although the plaintiffs "cloak[ed] their claims in the misty shroud of prima facie tort" in an attempt to avoid the employment-at-will doctrine that would necessarily flow from pleading wrongful discharge claims, the court recognized the claims were essentially wrongful discharge claims and analyzed them as such. *See id.* at 192-93.

26. *Id.* at 193.

27. *Dake*, 687 S.W.2d at 194 (Blackmar, J., concurring).

28. *Id.*

29. *See* Linda Forsythe, *Duration of Employment-At-Will*, 56 UMKC L. REV. 343 (1988).

30. 700 S.W.2d 859 (Mo. Ct. App. 1985).

31. *See id.* at 870-71.

32. *Id.* at 870.

33. *Id.* The employee argued: 1) she was fired for reporting violations of laws designed to protect the health and welfare of the general public; 2) termination on such grounds is against public policy and is wrongful; and 3) Missouri should recognize a valid wrongful discharge cause of action based on such facts. *Id.*

exception that are generally accepted in other states:<sup>34</sup> 1) cases dealing with "employees fired because they declined to obey directions to commit a crime or to act contrary to public policy;"<sup>35</sup> 2) cases involving the termination of employees "who report wrongdoing or violations of law or public policy by their employers or fellow employees;"<sup>36</sup> 3) cases that "frown[] on discharge of an at will employee whose acts are those that sound public policy would encourage, for example, acceptance of a call to jury duty, . . . asserting a right to elect or designate collective bargaining representatives, or joining a labor union;"<sup>37</sup> and 4) cases "disapproving of retaliatory discharge of employees whose only sin was the filing of a worker's compensation claim."<sup>38</sup>

After introducing such expansive public policy exception dicta into its opinion,<sup>39</sup> the *Boyle* court tailored a narrow holding, assuring affirmation and *some* expansion:

[W]here an employer has discharged an at-will employee *because that employee refused to violate the law* or any well established and clear mandate of public policy as expressed in the constitution, statutes and regulations promulgated pursuant to statute, *or because the employee reported to his superiors or to public authorities serious misconduct that constitutes violations of the law* and of such well established and clearly mandated public policy, the employee has a cause of action in tort for damages for wrongful discharge.<sup>40</sup>

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34. *See id.* at 872-75.

35. *Id.* at 873 (citing *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959) (holding that an at will employee terminated for refusing to commit perjury before a legislative committee has a wrongful discharge cause of action)).

36. *Boyle*, 700 S.W.2d at 873 (citing *Brown v. Physicians Mut. Ins. Co.*, 679 S.W.2d 836 (Ky. Ct. App. 1984)) which held that an at will employee terminated for reporting her employer's illegal conduct to the state insurance commission has a wrongful discharge cause of action). Incidentally, the plaintiff in *Boyle* relied on this theory. *Boyle*, 700 S.W.2d at 876-78.

37. *Id.* at 875 (citing *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. 1963)). For a discussion of *Baue*, see *supra* notes 9-14 and accompanying text.

38. *Boyle*, 700 S.W.2d at 875 (citing *Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. 1984) (holding that MO. REV. STAT. § 287.780, prohibiting the discharge of an employee for exercising worker's compensation rights, creates a wrongful discharge cause of action in favor of such an employee)). *See supra* note 5 for further discussion of MO. REV. STAT. § 287.780 (1994).

39. The aforementioned dicta regarding the four categories of public policy exceptions created a breeding ground for confusion in this area of the law.

40. *Boyle*, 700 S.W.2d at 878 (emphasis added).

*Boyle* successfully created a second clearly defined exception to the Missouri employment-at-will doctrine: at will employees terminated for *reporting an employer's violation of the law* as found in a statute or regulation based on a statute, such as the violation of an FDA regulation, have available a wrongful discharge cause of action.<sup>41</sup>

Try again they did. Just several months after *Boyle* another exception to the employment-at-will doctrine sprouted in the Eastern District Court of Appeals. In *Beasley v. Affiliated Hospital Products*,<sup>42</sup> an at will employee of Affiliated was fired for refusing to fraudulently predetermine the winner of an advertised raffle of hospital equipment donated by Affiliated.<sup>43</sup> The plaintiff claimed that adherence to his employer's instructions would have resulted in criminal actions as determined by the Missouri and United States legislatures.<sup>44</sup> Although emphasizing that "the public policy exception is a narrow exception to the at will employment doctrine,"<sup>45</sup> the *Beasley* court ruled that the plaintiff stated a cause of action for wrongful discharge.<sup>46</sup> *Beasley* created a third clearly defined exception to the Missouri employment-at-will doctrine: at will employees terminated for *refusing to violate the law*, such as state and federal fraud statutes, have available a wrongful discharge cause of action.<sup>47</sup> Just how large of a hole did the *Baue, Boyle, Beasley* trilogy bore into employment-at-will?

In 1988, the Missouri Supreme Court addressed that issue in *Johnson v. McDonnell Douglas Corporation*.<sup>48</sup> In *Johnson*, an employee was terminated for attending a deposition of a civil suit in which she was a party instead of going to work.<sup>49</sup> At trial, the plaintiff argued her employer had breached an employment contract formed on the basis of an employee handbook.<sup>50</sup> After the trial court ruled via summary judgment that the employee handbook did not create an employment contract and the plaintiff was an at will employee,

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41. *Id.* See *supra* notes 9-14 and accompanying text for the first exception.

42. 713 S.W.2d 557 (Mo. Ct. App. 1986).

43. *Id.* at 559.

44. *Id.* The plaintiff claimed predetermining a winner would have violated: MO. REV. STAT. § 570.140 (1994) (Deceptive Business Practice); MO. REV. STAT. § 570.150 (1994) (Commercial Bribery); MO. REV. STAT. § 570.160 (1994) (Bait Advertising, False Advertising); 18 U.S.C. § 1341 (1994) (Mail Fraud); 18 U.S.C. § 1343 (1994) (Wire Fraud). *Beasley*, 713 S.W.2d at 558.

45. *Id.*

46. *Id.* at 561.

47. *Id.*

48. 745 S.W.2d 661 (Mo. 1988).

49. *Id.* at 662.

50. *Id.*



the plaintiff asserted a wrongful discharge action for the first time on appeal.<sup>51</sup> The plaintiff argued that the *Baue*,<sup>52</sup> *Boyle*,<sup>53</sup> and *Beasley*<sup>54</sup> trilogy constitutes a general public policy exception to the employment-at-will doctrine in Missouri that covered her claim.<sup>55</sup>

In rejecting the plaintiff's wrongful discharge claim, the Missouri Supreme Court re-emphasized the "continued validity of employment at will":<sup>56</sup>

Plaintiff asserts . . . that she was wrongfully discharged in violation of public policy. The Court *does not deem it necessary to engraft a so-called 'public policy' exception onto the employment at will doctrine.* In the cases cited by plaintiff the employee had the benefit of a constitutional provision,<sup>57</sup> a statute,<sup>58</sup> or a regulation based on a statute. . . .<sup>59</sup> No statute, regulation based on a statute, or constitutional provision is implicated here.<sup>60</sup>

The *Johnson* court kept *Baue*, *Boyle*, and *Beasley* in three separate containers and halted, at least temporarily, the erosion of employment-at-will.<sup>61</sup>

51. *Id.* at 663. Judge Blackmar of the Missouri Supreme Court argued the plaintiff might have a valid contract based on an employee handbook and the case should be remanded for such a determination. *See id.* at 663-66 (Blackmar, J., dissenting).

52. *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. 1963). *See supra* notes 9-14 and accompanying text for a discussion of *Baue*.

53. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985). *See supra* notes 30-41 and accompanying text for a discussion of *Boyle*.

54. *Beasley v. Affiliated Hosp. Prod.*, 713 S.W.2d 557 (Mo. Ct. App. 1986). *See supra* notes 42-47 and accompanying text for a discussion of *Beasley*.

55. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988).

56. *Id.* at 661-62.

57. The plaintiff in *Baue* had the benefit of a constitutional provision. *See Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249, 252-54 (Mo. 1963).

58. The plaintiff in *Beasley* had the benefit of a statute. *See Beasley v. Affiliated Hosp. Prod.*, 713 S.W.2d 557, 559 (Mo. Ct. App. 1986).

59. The plaintiff in *Boyle* had the benefit of a regulation based on a statute. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 876 (Mo. Ct. App. 1985).

60. *Johnson*, 745 S.W.2d at 663 (emphasis added).

61. Two cases following *Johnson* clearly grasped the conservative message of *Johnson*. In *Crockett v. Mid-America Health Serv.*, 780 S.W.2d 656 (Mo. Ct. App. 1989), the plaintiff tried to assert a wrongful discharge claim based on a general public policy exception. *Id.* at 658. The court recognized the renewed vitality of the employment-at-will doctrine in stating what must be pleaded to state a wrongful discharge action pursuant to the public policy exception:

Generally speaking, the push towards a broad undefinable public policy exception confronted rejection.<sup>62</sup> Undeterred, some courts continued to smudge the clear boundaries of the public policy exception. *Johnson* became just another distinguishable case.

For example, in *Kirk v. Mercy Hospital Tri-County*,<sup>63</sup> the Southern District Court of Appeals discussed a public policy exception in broader terms than ever before used in Missouri.<sup>64</sup> The plaintiff in *Kirk*, a nurse, claimed she was fired for refusing to violate the Nursing Practice Act when she failed to "stay out" of a dying patient's improper treatment,<sup>65</sup> so she sued her employer for wrongful discharge based on the public policy exception.<sup>66</sup> The employer argued that: 1) the Missouri Supreme Court refused to recognize a general public policy exception in *Johnson*;<sup>67</sup> and 2) the Nursing Practice Act "does not constitute a clear mandate of law on which a cause of action for wrongful discharge in violation of public policy may be based."<sup>68</sup>

The *Kirk* court interpreted *Johnson* as a contract case and "not a public policy exception case" and refused to give *Johnson* precedential value in a public policy exception.<sup>69</sup> With *Johnson* out of the way, the *Kirk* court

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[A]n employee suing under the public policy exception . . . must allege and prove that conduct required of him by the employer would have amounted to a violation of a statute, constitutional provision or regulation adopted pursuant to a statute, and also that his discharge was attributable to a refusal to perform the unlawful act or his performance of a mandated lawful act contrary to the directions of his employer.

*Id.* at 658. For another example of the conservative approach to engrafting a public policy exception, see *McCloskey v. Eagleton*, 789 S.W.2d 518, 519 (Mo. Ct. App. 1990) ("The Missouri Supreme Court . . . has rejected the public policy exception to the employment-at-will doctrine.")

62. See, e.g., *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988); *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985); *Ising v. Barnes Hosp.*, 674 S.W.2d 623, 625 (Mo. Ct. App. 1984).

63. 851 S.W.2d 617 (Mo. Ct. App. 1993).

64. See *id.* at 619-22.

65. See generally MO. REV. STAT. §§ 335.011-.096 (1994) (the Nursing Practice Act). The plaintiff argued, *inter alia*, "staying out of" the mistreatment of a dying patient would constitute punishable "incompetency, misconduct, [and] gross negligence" under the Nursing Practice Act. See MO. REV. STAT. § 335.066.2 (1994).

66. *Kirk*, 851 S.W.2d at 618.

67. See *id.* at 619 (citing *Johnson*, 745 S.W.2d at 663).

68. *Kirk*, 851 S.W.2d at 621.

69. *Id.* at 619. It should be noted that the *Johnson* court exhausted its discussion of the plaintiff's contract claim before it explicitly shifted its focus to wrongful discharge. See *Johnson*, 745 S.W.2d at 663. It was within the wrongful discharge portion of *Johnson* that the Missouri Supreme Court stated it did not "deem it

freely recognized a general public policy exception that is "itself vague until applied to the facts of each case."<sup>70</sup> In applying the "vague" public policy exception to the facts at hand, the court was "convinced that the NPA and regulations thereunder set forth a clear mandate of public policy that Plaintiff not 'stay out' of a dying patient's improper treatment."<sup>71</sup> *Kirk* made little attempt to pigeonhole the plaintiff's claim under *Baue*, *Boyle*, or *Beasley*.<sup>72</sup>

The Missouri Court of Appeals, Western District, in *Clark v. Beverly Enterprises-Missouri, Inc.*<sup>73</sup> followed the swing in momentum provided by *Kirk*. The *Clark* court broadly stated the boundaries of a Missouri public policy exception<sup>74</sup> and directly attacked the employment-at-will doctrine:

The significance of the public policy exception is that it protects "a myriad" of employees without the bargaining power to command employment contracts and are "entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers."<sup>75</sup>

*Clark* and *Kirk* stretched Missouri's public policy exception jurisprudence far from the pro-employment-at-will focus of *Johnson*.

However, not every post-*Johnson* public policy exception interpretation stretched the holding of *Johnson* like *Clark* and *Kirk*. For example, in *Lay v. St. Louis Helicopter Airways, Inc.*,<sup>76</sup> a helicopter pilot refused to fly passengers because he believed cold weather rendered the flights too dangerous.<sup>77</sup> His employer lost revenue as a result of the pilot's decision and, therefore, fired the pilot.<sup>78</sup> The pilot sued his employer for wrongful discharge because the FAA Code of Ethics purportedly required the pilot to use his "best judgment", which he did; therefore, his termination contravened public policy.<sup>79</sup> The court conservatively held that the applicable FAA

necessary to engraft a so-called 'public policy' exception onto the employment at will doctrine. . . ." *Johnson*, 745 S.W.2d at 663. Thus, *Kirk* unabashedly sidestepped any and all impediments *Johnson* placed on the public policy exception.

70. *Kirk*, 851 S.W.2d at 622.

71. *Id.* at 622.

72. *See id.* at 619-22.

73. 872 S.W.2d 522 (Mo. Ct. App. 1994).

74. *See id.* at 525.

75. *Clark*, 872 S.W.2d at 525 (quoting *Sheets v. Teddy's Frosted Foods Inc.*, 427 A.2d 385, 388 (Conn. 1980)) (emphasis added).

76. 869 S.W.2d 173 (Mo. Ct. App. 1993).

77. *Id.* at 175.

78. *Id.*

79. *Id.* at 177.

regulation "imposes no duty on an employer to refrain from terminating a pilot whose judgment calls are contrary to the employer's judgment."<sup>80</sup>

Despite cases like *Clark* and *Kirk* that smear public policy distinctions, the law simply is not that unclear.

### III. THE PUBLIC POLICY EXCEPTION: WHERE DOES IT ACTUALLY STAND?

Looking back, cases interpreting the nature and scope of the public policy exception represent a struggle between traditional and progressive thought.<sup>81</sup> The Missouri Supreme Court in *Baue*<sup>82</sup> catalyzed the public policy exception movement in Missouri when it held at will employees terminated for exercising a constitutional right, such as appointing a union representative for collective bargaining purposes, have available a cause of action for wrongful discharge.<sup>83</sup> *Baue* did not dismantle employment-at-will.

Over twenty years later, the public policy exception resurfaced and a true battle began. The courts in *Ising v. Barnes Hospital*<sup>84</sup> and *Dake v. Tuell*<sup>85</sup> rejected wrongful discharge actions by trumping the public policy exception with the firmly entrenched employment-at-will doctrine.<sup>86</sup> Courts responded in a pro-employee rights manner to the conservative pro-employment-at-will stances of *Ising* and *Dake*.

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80. *Id.*

81. Most Missouri cases interpreting the employment-at-will doctrine demonstrate a hesitancy to alter the traditional employment-at-will doctrine. *See, e.g., Ising v. Barnes Hosp.*, 674 S.W.2d 623 (Mo. Ct. App. 1984); *Dake v. Tuell*, 687 S.W.2d 191 (Mo. 1985); *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. 1988). Other cases demonstrate a complete willingness to abandon traditional interpretation of employment-at-will via the creation of a broad public policy exception to the doctrine. *See, e.g., Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo. Ct. App. 1993); *Clark v. Beverly Enterprises-Missouri, Inc.*, 872 S.W.2d 522 (Mo. Ct. App. 1994).

82. 370 S.W.2d 249 (Mo. 1963). For a discussion of *Baue*, see *supra* notes 9-14 and accompanying text.

83. *Baue*, 370 S.W.2d at 253.

84. 674 S.W.2d 623 (Mo. Ct. App. 1984). For a discussion of *Ising*, see *supra* notes 15-22 and accompanying text.

85. 687 S.W.2d 191 (Mo. 1985). For a discussion of *Dake*, see *supra* notes 23-29 and accompanying text.

86. *See Ising v. Barnes Hosp.*, 674 S.W.2d 623, 625 (Mo. Ct. App. 1984); *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985).

*Boyle v. Vista Eyewear*<sup>87</sup> spearheaded the proliferation of the public policy exception. The *Boyle* court muddied public policy exception analysis by discussing a broad categorical approach advocated in jurisdictions outside of Missouri, but never adopted in Missouri,<sup>88</sup> but rendered a narrowly tailored holding. An at will employee discharged for reporting violations of statutory or regulatory law by the employer has a wrongful discharge cause of action against the employer.<sup>89</sup> *Boyle* did not dismantle employment-at-will.

*Beasley v. Affiliated Hospital Products*<sup>90</sup> continued the pro-public policy movement after *Boyle*. *Beasley* provided another basis for wrongful discharge in Missouri: an at will employee terminated for refusing to violate statutory or regulatory law has a wrongful discharge cause of action.<sup>91</sup> With two appellate cases recognizing exceptions to the employment-at-will doctrine within eight months of each other, the flow towards a broad public policy exception gained momentum. Did the public policy exception trilogy judicially abrogate employment-at-will?

In 1988, the Missouri Supreme Court said "no" in *Johnson v. McDonnell Douglas Corporation*.<sup>92</sup> The *Johnson* court refused to recognize that *Baue*, *Boyle*, and *Beasley* created a broad undefinable public policy exception.<sup>93</sup> The Missouri Supreme Court kept separate the three situations that will give an at will employee a cause of action for wrongful discharge, all based on retaliatory discharge reasoning.

First, under the *Baue* line of authority, at will employees terminated for exercising a constitutional right, such as appointing a union representative for collective bargaining purposes, have available a wrongful discharge cause of action.<sup>94</sup>

Second, under the *Boyle* line of authority, at will employees terminated for reporting an employer for violations of statutory or regulatory law have available a wrongful discharge cause of action.<sup>95</sup>

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87. 700 S.W.2d 859 (Mo. Ct. App. 1985). For a discussion of *Boyle*, see *supra* notes 30-41 and accompanying text.

88. See *Boyle*, 700 S.W.2d at 872-76.

89. *Id.* at 878.

90. 713 S.W.2d 557 (Mo. Ct. App. 1986). For a discussion of *Beasley*, see *supra* notes 42-47 and accompanying text.

91. *Beasley*, 713 S.W.2d at 561.

92. 745 S.W.2d 661 (Mo. 1988). For a discussion of *Johnson*, see *supra* notes 48-62 and accompanying text.

93. *Johnson*, 745 S.W.2d at 663.

94. See *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. 1963).

95. See *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985).

Third, under the *Beasley* line of authority, at will employees terminated for refusing to violate statutory or regulatory law have available a wrongful discharge cause of action.<sup>96</sup> Under the *Beasley* line, refusing to violate FAA Regulations that require an employee to exercise his "best judgment" is not enough to give rise to a wrongful discharge claim,<sup>97</sup> whereas refusing to violate the Nursing Practice Act is sufficient.<sup>98</sup>

After *Johnson*, appellate courts tried to stretch the narrow wrongful discharge options of at will employees in cases such as *Kirk v. Mercy Hospital*<sup>99</sup> and *Clark v. Beverly Enterprises-Missouri*.<sup>100</sup> In *Kirk*, an at will employee clearly had a wrongful discharge cause of action under *Beasley* because she was terminated for refusing to violate the Nursing Practice Act and regulations thereunder.<sup>101</sup> Instead of adhering to the limitations of *Johnson*<sup>102</sup> by deciding the case narrowly under the *Beasley* line of authority, the *Kirk* court erroneously declined to follow *Johnson*<sup>103</sup> and held that the plaintiff in that case had a wrongful discharge claim based on a general and "vague" public policy exception to the employment-at-will doctrine.<sup>104</sup> The *Clark* court also advocated an unnecessarily broad public

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96. See *Beasley v. Affiliated Hosp. Products*, 713 S.W.2d 557 (Mo. Ct. App. 1986).

97. See *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W.2d 173, 177 (Mo. Ct. App. 1993) ("The FAA's regulation concerning a pilot's responsibility and the 'Code of Ethics' requirement that a pilot use his best judgment are not clear mandates which allow employee to fall within the public policy exception. Neither imposes a duty on an employer to refrain from terminating a pilot whose judgment calls are contrary to the employer's judgment.").

98. See *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617 (Mo. Ct. App. 1993). Unlike the situation in *Lay*, the Nursing Practice Act imposed a duty on the plaintiff in *Kirk* that was contrary to her employer's judgment. See *id.* at 621-23.

99. 851 S.W.2d 617 (Mo. Ct. App. 1993). For a discussion of *Kirk*, see *supra* notes 63-72 and accompanying text.

100. 872 S.W.2d 522 (Mo. Ct. App. 1994). For a discussion of *Clark*, see *supra* notes 73-75 and accompanying text.

101. See *Kirk*, 851 S.W.2d at 618.

102. See *Johnson*, 745 S.W.2d at 663; see also *supra* notes 48-51 and accompanying text.

103. The *Kirk* court determined that *Johnson* was strictly a contract case and therefore is not binding in public policy exception cases. *Kirk*, 851 S.W.2d at 619. The court's determination is faulty in that the limitations of *Johnson* dismissed in *Kirk* are binding in public policy exception cases because the *Johnson* court completely exhausted its contract analysis before discussing the limitations solely within the wrongful discharge context. See *Johnson*, 745 S.W.2d at 663.

104. *Kirk*, 851 S.W.2d at 622.

policy exception in Missouri when the case could have been decided directly under *Boyle*.<sup>105</sup>

Cases like *Kirk* and *Clark* blur the distinctions the Missouri Supreme Court created regarding the public policy exception; namely, *Baue*, *Boyle*, and *Beasley* provide the only available wrongful discharge avenues for at will employees in Missouri. The exception is narrow and should be recognized as such.

#### IV. APPLICATION OF THE PUBLIC POLICY EXCEPTION BY FEDERAL COURTS

Federal courts interpreting the substance of Missouri's public policy exception recognize the narrow scope of the exception, as mandated by the Missouri Supreme Court.<sup>106</sup> In *Link v. K-Mart Corporation*<sup>107</sup> an employee of K-Mart alleged:

In acting as alleged herein defendant K-Mart discharged plaintiff or, alternatively forced plaintiff to resign, in violation of fundamental public policies of the State of Missouri, in the following respects among others: Terminating plaintiff for reporting the illegal acts by supervisory personal [sic] to-wit: misuses and thefts of company telephone services by manager, Jim Brunette, merchandise manager W. Kieckhafer, and assistant manager, Dodson; misuse and theft of merchandise by assistant manager Dodson; misuse and theft of food merchandise by merchandise manager Kieckhafer.<sup>108</sup>

The court dismissed the plaintiff's claim, and stated: "Vague reference to 'theft' and 'misuse' of K-Mart's own property are insufficient to state a claim under the 'narrow' public policy exception."<sup>109</sup> In order to state an actionable claim, Missouri law requires the "implication" of specific statutes, regulations, or constitutional provisions.<sup>110</sup> That is clearly the law.

105. See *Clark*, 872 S.W.2d at 525.

106. See, e.g., *Kosulandich v. Survival Technology, Inc.*, 997 F.2d 431 (8th Cir. 1993); *Stevens v. St. Louis Univ. Med. Ctr.*, 831 F. Supp. 737 (E.D. Mo. 1993); *Link v. K-Mart Corp.*, 689 F. Supp. 982 (W.D. Mo. 1988). See *infra* text accompanying notes 107-122.

107. 689 F. Supp. 982 (W.D. Mo. 1988).

108. *Id.* at 983.

109. *Id.* at 985.

110. *Id.*

In *Kosulandich v. Survival Technology, Inc.*,<sup>111</sup> employees brought public policy claims alleging they were discharged for filing for unemployment compensation benefits while they were on lay-off status.<sup>112</sup> As the source of the public policy sought to be vindicated, the plaintiffs cited statutes which "express a strong policy favoring the availability of unemployment compensation."<sup>113</sup> Significantly, the court noted that none of the statutes cited by plaintiff contain an anti-retaliatory discharge provision,<sup>114</sup> as can be found in Missouri's Workers' Compensation Act.<sup>115</sup> In holding that the plaintiffs failed to state a wrongful discharge claim based on the public policy exception, the court found that "[t]he kinds of laws which the Missouri courts treat as superseding employment at-will are those which directly forbid employers from taking retaliatory action."<sup>116</sup>

The *Kosulandich* court's interpretation of Missouri's public policy exception is extraordinarily narrow, perhaps too narrow under Missouri law. According to that court's reasoning, public policy claims are available only when the legislature rendered a specific category of discharge illegal, but failed to provide a remedy within the statute. Such reasoning cannot explain the decision in *Boyle*, where an employee stated a public policy claim based on OSHA and FDA regulations which said nothing about retaliatory discharge.<sup>117</sup>

Likewise, in *Stevens v. St. Louis University Medical Center*,<sup>118</sup> a public policy claim was dismissed because the plaintiff did not have the benefit of a statute containing a non-retaliation provision as the source of the claim.<sup>119</sup> In its holding the *Stevens* court, as compared to the *Kosulandich* court, more accurately described when a plaintiff states an actionable public policy claim: "In the absence of a specific non-retaliation law, a claim for wrongful discharge may be stated *only where an employee is terminated for his refusal*

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111. 997 F.2d 431 (8th Cir. 1993).

112. *Id.* at 432.

113. *Id.* at 433. Specifically, the plaintiffs cited two statutes: MO. REV. STAT. § 288.020 (1994) (expressing that Missouri has a strong public policy favoring the availability of unemployment benefits); MO. REV. STAT. § 288.380 (1994) (rendering void purported waivers of unemployment benefits).

114. *Kosulandich*, 997 F.2d at 433.

115. *See* MO. REV. STAT. § 287.780 (1994) (expressly forbidding retaliatory discharge against employees filing for workers' compensation benefits).

116. *Kosulandich*, 997 F.2d at 433 (citing *Luethans v. Washington Univ.*, 838 S.W.2d 117, 120 (Mo. Ct. App. 1992)).

117. *See Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859 (Mo. Ct. App. 1985).

118. 831 F. Supp. 737 (E.D. Mo. 1993).

119. *Id.* at 742.



to perform an illegal act or because he reported the employer's illegal acts."<sup>120</sup> The only exception not recognized in the *Stevens* opinion is the *Baue* exception pertaining to discharges in contravention of a constitutional provision.<sup>121</sup>

The three federal cases discussed above show Missouri's public policy exception has clearly recognizable boundaries. Federal courts do not seem to struggle in recognizing such boundaries. However, federal courts coping with Missouri's public policy exception quietly introduced into Missouri courts a pre-emption issue that is growing to proportions too significant to ignore.

## V. "PRE-EMPTION" OF PUBLIC POLICY EXCEPTION CLAIMS

Federal courts often deal with public policy exception claims based on policy set forth in statutory frameworks which contain remedial provisions, such as Title VII. Such claims raise a peculiar issue not yet addressed by Missouri state courts: Given the hesitancy of the Missouri Supreme Court to resort to the public policy exception, should a discharged at will employee have available a public policy exception claim when the statutory basis for the claim already provides a remedy or remedies for that employee?

The United States District Court for the Western District of Missouri first addressed this issue in *Prewitt v. Factory Motor Parts, Inc.*<sup>122</sup> The plaintiff in *Prewitt* was fired for reporting her employer's plan to change the salaries and working hours of employees reported to the Wage and Hour Division of the United States Department of Labor.<sup>123</sup> She raised two claims relevant to the pre-emption issue: (1) wrongful discharge under 29 U.S.C. § 215(a)(3) of the Fair Labor Standards Act (FLSA); and (2) wrongful discharge based on the Missouri public policy exception.<sup>124</sup>

The *Prewitt* court dismissed the plaintiff's public policy exception claim because the plaintiff had "a complete range of remedies" under the FLSA.<sup>125</sup>

In reaching its decision, the court relied on the following language in *Wehr v. Burroughs Corporation*:<sup>126</sup>

120. *Id.* (citing *Petersimes v. Crane Co.*, 835 S.W.2d 514, 516-17 (Mo. Ct. App. 1992) ("An at-will employee can be discharged for cause or without cause and the employer will not be liable for wrongful discharge unless the employee falls within the protective reach of a contrary statutory provision.")) (emphasis added).

121. *See* *Smith v. Arthur C. Baue Funeral Home*, 370 S.W.2d 249 (Mo. 1963).

122. 747 F. Supp. 560 (W.D. Mo. 1990).

123. *Id.* at 561.

124. *Id.*

125. *Id.* at 565 (noting the plaintiff had specific remedies under 29 U.S.C. §§ 216(b), 217 (1994)).

126. 438 F. Supp. 1052 (E.D. Pa. 1977).

It is clear then that the whole rationale undergirding the public policy exception is the vindication or the protection of certain strong policies of the community. If these policies or goals are preserved by other remedies, then the public policy is sufficiently served. Therefore, application of the public policy exception requires two factors: (1) that the discharge violate some well-established public policy; and (2) that there be no remedy to protect the interests of the aggrieved employee or society.<sup>127</sup>

Thus, "Prewitt pre-emption", which focuses on the necessity of a public policy exception remedy, is nothing more than a cousin to true pre-emption, which focuses on whether the legislature has occupied a given area of the law. *Prewitt* pre-emption does not state that courts *cannot*, due to separation of powers principles, recognize a public policy exception remedy; rather, it states that reliance on public policy to provide a remedy is absolutely *unnecessary* where a remedy already exists.<sup>128</sup> Such an analysis is wholly consistent with the Missouri Supreme Court's hesitancy to apply a public policy exception to the employment-at-will doctrine.<sup>129</sup>

Just two months after *Prewitt*, the United States District Court for the Eastern District of Missouri applied *Prewitt* pre-emption. In *Gannon v. Sherwood Medical Company*<sup>130</sup> an at will employee arguing she was terminated due to her age—a violation of the Age Discrimination in Employment Act—filed a wrongful discharge claim based on the public policy exception.<sup>131</sup> The *Gannon* court noted that the plaintiff had *potential* claims under both the Age Discrimination Employment Act and the Missouri Worker's Compensation Statute,<sup>132</sup> and because each of the "statutes . . . contains a remedial provision, the Court conclude[d] that plaintiff's claim for recovery based on the violation of a public policy evinced by both statutes is duplicative and unwarranted."<sup>133</sup> Thus, the plaintiff in *Gannon* was denied recovery under her public policy exception claim.<sup>134</sup>

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127. *Prewitt*, 747 F. Supp. at 565-66 (quoting *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1055 (E.D. Pa. 1977)) (emphasis added).

128. *See id.* at 565.

129. *See Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 663 (Mo. 1988) (limiting the availability of the public policy exception).

130. 749 F. Supp. 979 (E.D. Mo. 1990).

131. *Id.* at 980.

132. *Id.* For example, an employee terminated solely in retaliation for filing a worker's compensation claim has a statutory cause of action under MO. REV. STAT. § 287.780 (1994). *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273, 275-76 (Mo. 1984).

133. *Gannon*, 749 F. Supp. at 981.

134. *Id.*

Since *Prewitt* and *Gannon*, the *Prewitt* pre-emption reasoning has been used to dismiss at least three public policy exception claims.<sup>135</sup> The court in *Osborn v. Professional Service Industries, Inc.*<sup>136</sup> rejected a public policy exception claim because the plaintiff had *potential* remedies under the Age Discrimination in Employment Act, and reasoned as follows:

In order to survive a motion to dismiss, a claim of wrongful termination based on the public policy exception must be based on a policy which has no remedy in any statute, regulation, or constitutional provision. It is not enough to show that a constitutional provision exists which creates a policy but does not provide a remedy. *Plaintiff must show that no remedy for that wrong exists anywhere . . .*<sup>137</sup>

The reason for such a requirement, the court found, is rooted in the narrowness of the Missouri public policy exception.<sup>138</sup>

While the federal district courts in Missouri have consistently applied *Prewitt* pre-emption, the Eighth Circuit Court of Appeals has addressed the issue differently, applying true pre-emption analysis.<sup>139</sup> As discussed below, the latter could allow a plaintiff to pursue a public policy exception claim although an alternative statutory remedy in fact exists.

In *Schweiss v. Chrysler Motors Corp.*,<sup>140</sup> the plaintiff brought a wrongful discharge claim against her employer for exemplary damages based on Missouri's public policy exception, alleging she was terminated for reporting Occupational Safety and Health Act (OSHA) violations by her employer.<sup>141</sup> The employer moved to dismiss the claim, arguing that plaintiff's "state law wrongful discharge action is pre-empted under both section 11(c) of [OSHA] . . . , and section 301 of the Labor Management

135. See *Kramer v. St. Louis Regional Health Care Corp.*, 758 F. Supp. 1317, 1318 (E.D. Mo. 1991) (dismissing public policy exception claim because plaintiff had remedy under the Missouri Human Rights Act and Rehabilitation Act); *Wyrick v. TWA Credit Union*, 804 F. Supp. 1176, 1182 (W.D. Mo. 1992) (dismissing public policy exception claim because plaintiff had potential remedies under Title VII and the Missouri Human Rights Act); *Osborn v. Professional Serv. Indus., Inc.*, 872 F. Supp. 679, 681 (W.D. Mo. 1994) (dismissing public policy exception claim because plaintiff had potential remedies under the Age Discrimination in Employment Act).

136. 872 F. Supp. 679 (W.D. Mo. 1994).

137. *Id.* at 681 (emphasis added).

138. *Id.*

139. It should be noted, the Eighth Circuit has not expressly rejected the *Prewitt* line of cases.

140. 922 F.2d 473 (8th Cir. 1990).

141. *Id.* at 473.

Relations Act . . . .<sup>142</sup> because those provisions provide the plaintiff with an administrative retaliatory discharge remedy which does not authorize exemplary damages.<sup>143</sup> The district court agreed with the employer and held, "the ability of plaintiffs to pursue retaliatory discharge claims where available under state law [would] frustrate[] the remedial scheme provided for in [OSHA] . . . , and thus such state law claims are pre-empted."<sup>144</sup> In other words, this issue was addressed as a true pre-emption issue: did Congress intend for the OSHA administrative remedy to be the sole remedy for this retaliatory discharge?

The Eighth Circuit disagreed with the district court, holding that Congress did not intend OSHA to pre-empt all other remedies that permit recovery of exemplary damages.<sup>145</sup> Perhaps *Schweiss* says pre-emption, including *Prewitt* pre-emption, applies only when the statutory scheme provides a *full range* of remedies.<sup>146</sup> Whatever the logic, this holding is significant because the Eighth Circuit reversed the dismissal of a public policy claim based on a statute containing a retaliatory discharge remedy.

Likewise, in *Saffels v. Rice*<sup>147</sup> the Eighth Circuit allowed a plaintiff to pursue a public policy exception claim based on the anti-retaliatory policy of FLSA concurrently with a FLSA claim, even though FLSA contains a remedial provision.<sup>148</sup> However, the *Saffels* opinion indicates that neither *Prewitt* pre-emption nor true pre-emption were raised by the employer.<sup>149</sup> Nevertheless, *Saffels* is consistent with *Schweiss* in that both clearly allowed employees to proceed with public policy exception claims based on statutes containing remedies for retaliatory discharge.

Has the Eighth Circuit, via *Schweiss* and *Saffels*, rejected *Prewitt* pre-emption as a line of defense for employers facing public policy exception claims? Probably not.

Neither *Schweiss* nor *Saffels* truly addressed the *Prewitt* pre-emption issue. The *Schweiss* court addressed true pre-emption, which hinges on Congressional intent to pre-empt a field of law. *Prewitt* pre-emption cares nothing about Congressional intent. Rather, *Prewitt* pre-emption focuses on

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142. *Id.* at 473-74.

143. *Id.* at 474.

144. *Id.*

145. *Id.* at 476.

146. *See, e.g.,* Shawcross v. Pyro Products, Inc., 916 S.W.2d 342, 344-46 (Mo. Ct. App. 1995) (interpreting *Schweiss* as such).

147. 40 F.3d 1546 (8th Cir. 1995).

148. *Id.* at 1550.

149. *Id.* (stating that the employer argued the public policy exception claim should be dismissed because the employees' "actions do not fall under any of the recognized categories" for the exception).

honoring the Missouri Supreme Court's desire to keep the public policy exception narrow, as it provides for dismissal of public policy exception claims where public policy is already protected by a statutory remedy. This distinction is not merely academic. If *Schweiss* rejected *Prewitt* pre-emption, the Eighth Circuit certainly would have reversed *Wyrick v. TWA Credit Union*<sup>150</sup> and *Osborn v. Professional Service Industries Inc.*,<sup>151</sup> cases subsequent to *Schweiss* which dismissed public policy exception claims due to *Prewitt* pre-emption.

*Saffels* also should not affect *Prewitt* pre-emption because, as mentioned above, the employer failed to raise the pre-emption issue.<sup>152</sup> Although *Schweiss* and *Saffels* should not render the *Prewitt* pre-emption argument invalid, those opinions send a clear message: courts will not consider *Prewitt* pre-emption if not raised by the employer. At a minimum, the Eighth Circuit does not believe that under Missouri law an employee must demonstrate that no statutory remedies exist to set forth a prima facie public policy exception claim.

In sum, plaintiffs alleging public policy exception claims based on statutes containing a full range of remedial provisions will lose those claims in federal court, provided employers raise *Prewitt* pre-emption as a defense.

Another major issue with respect to *Prewitt* pre-emption remains unresolved: will the Missouri Supreme Court accept it? *Prewitt*-type cases often arise in federal courts because they are commonly rooted in federal statutory frameworks, such as Title VII, OSHA, or FLSA. One state court case raised, but did not address, a potential *Prewitt* pre-emption scenario because the plaintiff did not raise a public policy exception claim.<sup>153</sup> Thus, a very important issue awaits litigation.

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150. 804 F. Supp. 1176 (W.D. Mo. 1992).

151. 872 F. Supp. 679 (W.D. Mo. 1994).

152. See *supra* note 149 and accompanying text.

153. In *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334 (Mo. 1994), an employee of Kraft sued Kraft, alleging that Kraft discharged him because Kraft received a court order to withhold \$450 per month from the employee's pay for delinquent child support. *Id.* at 335. A discharge based upon such reasoning violates MO. REV. STAT. § 454.505.10 (Supp. 1995), a statute which expressly allows the division of child support enforcement to force the employer to reinstate the discharged employee, but says nothing about a private statutory remedy available to that employee. *Id.* The employee claimed that the statute should be read as providing him a statutory cause of action, but the court rejected that argument. *Id.* at 337. The employee did not raise a public policy exception claim. Had such a claim been raised, the court would have had to address "*Prewitt* pre-emption" because the public policy to be vindicated was contained in a statute containing a remedial provision.

Another case recognized *Prewitt* pre-emption in dicta.<sup>154</sup> Finally, the Eastern District Court of Appeals held that *Prewitt* pre-emption *does* apply where the statutory scheme embodying the public policy violated contains a full range of remedial provisions.<sup>155</sup>

If the Missouri Supreme Court does not accept the *Prewitt* pre-emption argument, the public policy exception will gain enormous significance. For example, employees with potential Title VII or FLSA claims can disregard or negligently fail to comply with administrative remedial requirements without fear of ultimately losing a remedy. The "narrow" public policy exception could take the teeth out of many carefully planned statutory frameworks designed to remedy specific retaliatory discharge situations. Judges rejecting *Prewitt* pre-emption essentially will elect themselves to Congress. It simply should not happen.

## VI. CONCLUSION

To what extent has the public policy exception eroded employment-at-will in Missouri? Not much—for now.

State and federal courts alike have devoted much attention to defining the breadth of the public policy exception. Most courts resisted the legislative temptation and confined the public policy exception to specific boundaries within the law. Although some courts try to stretch and distort those boundaries, the exception remains "narrow" in terms of its categorical application. But, a new prospect of expansion sneaks through the federal courts. If the Missouri Supreme Court does not accept *Prewitt* pre-emption, a simple discretionary tool created by the Missouri state judiciary could effectively supplement and sometimes replace complex statutory remedial mechanisms, such as Title VII and FLSA. The threat is very real.

Today, at will employees might not hold the ultimate trump card to the employment-at-will doctrine. Today, the discretionary tool forged from the conscience of the judiciary undermines elaborate legislative schemes. The law is uncertain; so uncertain that creative plaintiffs' lawyers can create undefinable causes of action that just *might* work.

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154. See *Kirk v. Mercy Hosp. Tri-County*, 851 S.W.2d 617, 620 (Mo. Ct. App. 1993).

155. See *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 344-46 (Mo. Ct. App. 1995), a potentially significant state court decision. To the author's knowledge this case provides the most persuasive state court authority favoring *Prewitt* pre-emption.

