

Employment & Labor Alert



Court Expands *Burk* Tort to Include Claims of Wrongful Discharge for Opposing Violations of the Governor’s Executive Orders

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Yesterday—December 14—the Oklahoma Supreme Court broke new ground on the *Burk* public policy tort claim. *Burk* wrongful discharge claims may now be based on allegations that an employer wrongfully terminated an employee for opposing an employer’s violation of an executive order issued by the Governor.

As a reminder, the general rule in Oklahoma is that an employment relationship is at-will. That means, as Oklahoma caselaw reiterates time and again, an employer may “discharge an employee for a good cause, no cause, or even for a morally wrong cause without being liable for a legal wrong.” The same goes for the employee; they can leave the employment relationship at any time and for any reason. But there are exceptions, and the *Burk* tort claim is one of them.

In 1989, the Oklahoma Supreme Court decided [*Burk v. K-Mart Corp.*](#), 1989 OK 22, which created what has become known as the *Burk* tort. A *Burk* tort allows an at-will employee to sue for wrongful discharge when the termination of employment violates well-defined Oklahoma public policy. The Court has made clear, though, that *Burk* claims are a very “narrow” exception to the at-will doctrine and must be based on a clear mandate of public policy as articulated by Oklahoma’s constitutional, statutory, or decisional law or a federal constitutional provision. To avoid the slippery slope that the amorphous definition of “public policy” could create, the Court has been careful when considering whether to expand the “narrow” *Burk* tort.

However, the Oklahoma Supreme Court expanded the *Burk* tort claim yesterday in the case of [*Ho v. Tulsa Spine & Specialty Hospital*](#), 2021 OK 68, when it recognized for the first time a new source of Oklahoma public policy upon which *Burk* tort claims may be based—the Oklahoma Governor’s executive orders. In *Ho*, the Court reviewed a nurse’s claim that Tulsa Spine’s decision to fire her violated Oklahoma public policy and was wrongful. The Court’s opinion was split, with one concurrence and three separately drafted dissents. The majority, though, took the stance that the Governor’s temporary emergency COVID orders expressed the public policy necessary to supply the basis for a *Burk* tort claim. The Court based its decision on the fact that the Oklahoma Legislature specifically granted the Governor the authority to issue temporary emergency orders, and that these orders expressed the established public policy of curtailing an infectious disease. The Court noted that the ability to rely on those orders was limited, lasting only while the relevant orders that focused on public-policy issues were in effect.

In view of the *Ho* decision, employers should be aware that terminating an employee because the employee opposed the employer's violation of an executive order or because the employee refused to violate an executive order could serve as the basis for an employee to file a *Burk* tort wrongful discharge claim.

GableGotwals' [Employment & Labor team](#) remains on the cutting edge of employment-related legal developments and is committed to helping employers navigate the nuances of emerging issues they face. Please contact any member of the team for further assistance.



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