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Pregnant--Congratulations...You're Fired--Extending the Burk Public Policy Tort to Pregnancy Discrimination after Collier v. Insignia Financial Group

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PREGNANT? CONGRATULATIONS... YOU'RE FIRED! EXTENDING THE *BURK* PUBLIC POLICY TORT TO PREGNANCY DISCRIMINATION AFTER *COLLIER V. INSIGNIA FINANCIAL GROUP*?

I. INTRODUCTION

A little over four years ago, my wife, Cheryl, and I announced to the world, through our family and friends, that we were expecting our first child. It was truly one of the proudest moments of our lives. Included in that list of friends was my wife's employer. However, within a week of the "good news," she was terminated from her employment because her boss feared that she might not return from maternity leave. Sadly enough, thousands of expecting moms experience this form of discrimination in the workplace each year.[1]

According to the United States Equal Employment Opportunity Commission (the "EEOC"),[2] pregnancy discrimination complaints increased by twenty-three (23) percent from 1992 to 1999,[3] despite federal legislation such as Title VII of the Civil Rights Act of 1964[4] ("Title VII") and the Pregnancy Discrimination Act of 1978 (the "PDA").[5] In spite of this increase, however,

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1. *See* Diane E. Lewis, *Lawsuit Sets Precedent Against Misperception of Working Moms*, BOSTON GLOBE, Jun. 18, 2000, at F2, *available at* 2000 WL 3331205 ("3,500 [pregnancy] discrimination complaints filed annually").

2. Established by Title VII of the Civil Rights Act of 1964, the EEOC promotes equal opportunity in employment by enforcing federal statutes that prohibit employment discrimination which include: (a) Equal Pay Act of 1963, (b) Title VII of the Civil Rights Act of 1964, (c) Age Discrimination in Employment Act of 1967, (d) Section 501 of the Rehabilitation Act of 1973, (e) Pregnancy Discrimination Act of 1978, (f) Title I of the Americans with Disabilities Act of 1990, and (g) Civil Rights Act of 1991. *See* 42 U.S.C. §§ 2000e-4 (1994).

3. *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1992 – FY 1999*, *at* http://www.eeoc.gov/stats/pregnanc.html (last visited Sep. 29, 2000). The EEOC's pregnancy discrimination table provides in pertinent part:

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999
[Charge] Receipts	3,385	3,577	4,170	4,191	3,743	3,977	4,219	4,166

4. Pub. L. No. 88-352, 701, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 2000e (1994)). Title VII, which only applies to employers with 15 or more employees, makes it unlawful "to refuse to hire, to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment" because of sex or other protected statuses. 42 U.S.C. § 2000e-2(a)(1).

5. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1994)). The Pregnancy Discrimination Act (the "PDA") is an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994), which prohibits discrimination in the workplace on the basis of sex. *See id.* The PDA provides in pertinent part:

pregnancy discrimination complaints only comprised roughly five (5) percent of the EEOC's total workload in 1999.[6]

The relatively minuscule numbers do not tell the whole story. Why? Because most women, like my wife, have enough stress in their lives just with being pregnant, so after being fired, they do not challenge an employer by filing a complaint with the EEOC. Moreover, moms-to-be who work for employers with fewer than fifteen (15) employees are not protected under Title VII.[7] Similarly, pregnant women who work at companies with fewer than fifty (50) employees or who have less than one (1) year on the job are not covered under the Family and Medical Leave Act,[8] which requires employers to give their employees twelve (12) weeks of leave to care for a newborn.[9] Based solely on these statutorial requirements, it is not hard to imagine thousands of expecting moms getting fired each year for being pregnant or while on maternity leave, and the incidents literally go unreported.

The problem of pregnancy discrimination is further exacerbated in Oklahoma due to the fact that Oklahoma's Anti-Discrimination Act (the "OADA")[10] does not protect pregnant employees of small employers[11] or of larger ones who must comply with Title VII provisions.[12] While the OADA was drafted

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> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes... as other persons not so affected but similar in their ability or inability to work....

42 U.S.C. § 2000e(k). The PDA was enacted to expressly prohibit discrimination of pregnant women after the United States Supreme Court held that pregnancy discrimination was not prohibited by Title VII because such discrimination differentiated between pregnant women (exclusively female) and non-pregnant persons (including members of both sexes). *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by* 42 U.S.C. § 2000e(k) (1994).

6. *Charge Statistics FY 1992 – FY 1999, at* http://www.eeoc.gov/stats/charges.html. (last visited Sep. 29, 2000). The EEOC's total charges table provides in pertinent part:

	FY 1992	FY 1993	FY 1994	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999
Total Charges	72,302	87,942	91,189	87,529	77,990	80,680	79,591	77,444

7. *See* 42 U.S.C. §§ 2000e(b), e-2.

8. Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601 et seq. (1994).).

9. See 29 U.S.C. §§ 2611(2)(A)(i), 2611(4)(A)(i), 2612(a)(1) (1994).

10. *See* OKLA. STAT. tit. 25, § 1101 (1991).

11. The OADA defines employer in pertinent part:

> "Employer" means a person who has *fifteen or more employees* for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, or a person who as a contractor or subcontractor is furnishing the material or performing work for the state or a governmental entity or agency of the state and includes an agent of such a person but does not include an Indian tribe or a bona fide membership club not organized for profit.

Id. § 1301(1) (emphasis added).

12. The OADA prohibits an employer:

> To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of *race, color, religion, sex, national origin, age or handicap* unless such action is related to a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business or enterprise....

to prevent discrimination in employment and in public accommodations[13] on grounds of "race, color, religion, sex, national origin, age or handicap"[14] under specified conditions, discrimination based on pregnancy is not prohibited.[15] To cure this deficiency in the OADA, many victims may argue that "public policy"[16] prohibits an employer from terminating a pregnant woman regardless of the long-standing effect of the employment-at-will rule.[17]

This note will analyze the recent Oklahoma Supreme Court decision in *Collier v. Insignia Financial Group*[18] regarding the applicability of the *Burk*[19] public policy tort to victims of pregnancy discrimination. Section II is a brief history of the *Burk* exception as it applies to an employment-at-will contract. Section III follows with a statement of the *Collier* case. Section IV discusses Oklahoma law relating to the *Burk* exception prior to the *Collier* decision. Section V reveals the Oklahoma Supreme Court's decision in *Collier*, while Section VI discusses the court's reasoning and analysis. Section VII offers a conclusory opinion that the *Collier* court never intended that a victim of pregnancy discrimination, who has been discharged from employment, would be able to maintain a public policy tort claim under the *Burk* exception to the common law's employment-at-will rule. Finally, Section VIII will conclude the analysis.

Id. § 1302(A)(1) (emphasis added). Pregnancy is not included in this list, and this status is not equivalent to sex. *See supra* note 4.

13. *See id.* §§ 1101 et seq..

14. *Id.* § 1302(A)(1).

15. There is not a single case under Oklahoma law which purports that pregnancy discrimination is prohibited under the OADA. *See also supra* note 5.

16. *See* Hinson v. Cameron, 742 P.2d 549, 552-53 (Okla. 1987). The *Hinson* case states:

> An at-will employee's discharge has been declared to be actionable on several public policy grounds. Claims recognized under this rubric are those by employees dismissed for (a) refusing to participate in an illegal activity; (b) performing an important public obligation; (c) exercising a legal right or interest; (d) exposing some wrongdoing by his employer; and (e) performing an act that public policy would encourage or, for refusing to do something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice or retaliation.

Id. (footnotes omitted).

17. *See id.* at 552 ("Under the American common-law rule, when the length of the master/servant relationship is unspecified by contract, either the employer or employee can terminate the employment without liability."); Pierce v. Franklin Elect. Co., 737 P.2d 921, 923 n.4 (Okla. 1987) ("Oklahoma case law continues to recognize that an at-will employee is subject to termination for any reason or without cause."); Foster v. Atlas Life Ins. Co., 6 P.2d 805, 808 (Okla. 1932) ("Our court has announced the rule that a contract which is indefinite as to duration is a contract at will and may be terminated by either party at any time.").

18. 981 P.2d 321 (Okla. 1999).

19. *See* Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989), *aff'd*, 956 F.2d 213 (10th Cir. 1991) (recognizing a tort, commonly known as the *Burk* public policy tort, which prohibits an at-will termination of an employee when "the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law").

II. BRIEF HISTORY OF THE BURK PUBLIC POLICY TORT EXCEPTION

A. *The Employment-at-will Rule*

Since the late nineteenth century, an employee's ability to keep his or her job has traditionally been subject to the employment-at-will rule.[20] Under the at-will rule, an employer may terminate an employee for any reason, good or bad, unless there is an employment contract for a definite period of time.[21]

During the past three decades, many jurisdictions[22] have become dissatisfied with the rigidity of this rule.[23] The Illinois Supreme Court exemplified this discontentment by noting:

> With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.[24]

To circumvent the employment-at-will rule, many jurisdictions[25] began to

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20. *See* Gary E. Murg & Clifford Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 333-35 (1982) [hereinafter *Murg*].

21. *See* Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 518-19 (1884), *overruled on other grounds by* Hutton v. Waters, 179 S.W. 134, 137-38 (Tenn. 1915). The court stated:

> [M]en must be left, without interference to buy and sell where they please, and 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. It is 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.

22. *See infra* note 25.

23. *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1031 (Ariz. 1985), *overruled by* Ariz. Rev. Stat. § 23-1501 (1996).

24. Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (citation omitted).

25. For decisions that used the public policy tort theory *see infra* note 35.
For decisions that used the implied contract theory *see* Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987); Eales v. Tanana Valley Medical-Surgical Group, 663 P.2d 958 (Alaska 1983); Leikvold v. Valley View Comm. Hosp., 688 P.2d 170 (Ariz. 1984); Gladden v. Ark. Children's Hosp., 728 S.W.2d 501 (Ark. 1987); Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Ct. App. 1981), *overruled in part by* Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089 (Cal. 2000); Salimi v. Farmers Ins. Group, 684 P.2d 264 (Col. Ct. App. 1984); Finley v. Aetna Life & Cas. Co., 520 A.2d 208 (Conn. 1987), *overruled by* Curry v. Burns, 626 A.2d 719 (1993); Bason v. Am. Univ., 414 A.2d 522 (D.C. 1980); Kinoshita v. Canadian Pac. Airlines, 724 P.2d 110 (Haw. 1986); Watson v. Idaho Falls Consol. Hosps., Inc., 720 P.2d 632 (Idaho 1986); Duldulao v. Saint Mary of Nazareth Hosp. Ctr., 505 N.E.2d 314 (Ill. 1987); McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989); Allegri v. Providence-St. Margaret Health Ctr., 684 P.2d 1031 (Kan. Ct. App. 1984); Shah v. Am. Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983); Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97 (Me. 1984); Staggs v. Blue Cross, Inc., 486 A.2d 798 (Md. Ct. Spec. App. 1985); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Robinson v. Bd. of Trs. of E. Cent. Junior Coll., 477 So.2d 1352 (Miss. 1985); Arie v. Intertherm, Inc., 648 S.W.2d 142 (Mo. 1983); Morris v. Lutheran Med. Ctr., 340 N.W.2d 388 (Neb. 1983); Southwest Gas Corp. v. Ahmad, 668 P.2d 261 (Nev. 1983);

carve out exceptions using three distinct theories: (1) public policy tort; (2) implied contract that restricts the employer's power to terminate; and (3) breach of implied covenant of "good faith and fair dealing."[26] The most widely-accepted exception is the public policy tort,[27] which provides the employee with a cause of action when his or her discharge is contrary to a notion of public policy.[28]

B. Peterman

The District Court of Appeals of California was the first court[29] to circumvent the absolutist formulation of the employment-at-will rule and to lay down the initial foundation for the public policy exception in *Petermann v. International Brotherhood of Teamsters, Local 396*.[30] In *Petermann*, an employer fired an employee after he refused to commit perjury, as per his employer's instructions, while testifying before a subcommittee of the California legislature during an investigation of his union.[31] Since false testimony of any kind directly impedes the judicial process, the court found that the perjury statutes served an essential public policy function.[32] The court reasoned that

> [i]t would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.[33]

Based on this finding, the court determined that the employer's act was

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Panto v. Moore Bus. Forms, 547 A.2d 260 (N.H. 1988); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257 (N.J. 1985); Forrester v. Parker, 606 P.2d 191 (N.M. 1980); Weiner v. McGraw-Hill, 443 N.E.2d 441 (N.Y. 1982); Hammond v. N.D. State Pers. Bd., 345 N.W.2d 359 (N.D. 1984); Mers v. Dispatch Printing Co., 483 N.E.2d 150 (Ohio 1985); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976); Yartzoff v. Democrat-Herald Publ'g Co., 576 P.2d 356 (Or. 1978); Small v. Springs Indus., Inc., 357 S.E.2d 452 (S.C. 1987); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983); Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. 1981); Piactelli v. Southern Utah State Coll., 636 P.2d 1063 (Utah 1981); Benoir v. Ethan Allen, Inc., 514 A.2d 716 (Vt. 1986); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Cook v. Heck's Inc., 342 S.E.2d 453 (W. Va. 1986); Ferraro v. Koelsch, 368 N.W.2d 666 (Wis. 1985); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985).

For decisions that used the implied covenant of good faith and fair dealing theory *see* Hoffman-La Roche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987); Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); Wagenseller v. Scottsdale Mem. Hosp., 710 P.2d 1025 (Ariz. 1985), *overruled by* Ariz. Rev. Stat. §§ 23-1501 et seq. (1996); Cleary v. Am. Airlines, Inc., 168 Cal. Rptr. 722 (Ct. App. 1980), *overruled in part by* Guz v. Bechtel Nat'l, Inc., 100 Cal. Rptr. 2d 352 (Cal. 2000); Merrill v. Crothall-Am., Inc., 606 A.2d 96 (Del. 1992); Metcalf v. Intermountain Gas. Co., 778 P.2d 744 (Idaho 1989); Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977); Gates v. Life of Mont. Ins. Co., 638 P.2d 1063 (Mont. 1982); K-Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); Berube v. Fashion Ctr., Ltd., 771 P.2d 1033 (Utah 1989); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994).

26. *Wagenseller*, 710 P.2d at 1031.

27. *See* Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 6 (1984).

28. *See Murg*, *supra* note 20, at 343-44.

29. *See* David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645, 657 (1996).

30. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

31. *See id.* at 26.

32. *See id.* at 27.

33. *Id.*

tortuous, and therefore, it granted the employee a cause of action to remedy the situation.[34]

Since *Petermann*, judiciaries from virtually every state, including Oklahoma, have adopted some form of the public policy exception to alter the long-standing presumption of the employment-at-will rule.[35]

C. *Hinson*

The Oklahoma Supreme Court formally addressed the public policy exception for the first time in 1987.[36] In *Hinson v. Cameron*,[37] an employee, working as a nurse's assistant, was fired for allegedly "not following orders."[38] The employee claimed that she never received the order for which she was discharged and that her supervisor had "altered the assignment sheet."[39] On

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34. *See id.*

35. At the time of this publication, the vast majority of states acknowledge some form of the public policy exception to the employment-at-will rule. *See* Knight v. Am. Guard & Alert, Inc., 714 P.2d 788, 792 (Alaska 1986); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 381 (Ark. 1988); *Petermann*, 344 P.2d at 27; Cronk v. Int'l Rural Elec. Ass'n, 765 P.2d 619, 622 (Colo. Ct. App. 1988); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 386-87, 389 (Conn. 1980); Heller v. Dover Warehouse Mkt., Inc., 515 A.2d 178, 181 (Del. 1986); Adams v. George W. Cochran & Co., 597 A.2d 28, 34 (D.C. 1991); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 629-32 (Haw. 1982); Jackson v. Minidoka Irrigation Dist., 563 P.2d 54, 57 (Idaho 1977); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358 (Ill. 1978); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 427-28 (Ind. 1973); Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988); Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 630 P.2d 186 (Kan. Ct. App. 1981); Firestone Textile Co. Div. v. Meadows, 666 S.W.2d 730, 733-34 (Ky. 1983); MacDonald v. E. Fine Paper, Inc., 485 A.2d 228, 230 (Me. 1984); Adler v. Am. Standard Corp., 432 A.2d 464, 473 (Md.1981); De Rose v. Putnam Mgmt. Corp., 496 N.E.2d 428, 431 (Mass. 1986); Sventko v. Kroger Co., 245 N.W.2d 151, 153-54 (Mich. Ct. App. 1976); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 570-71 (Minn. 1987); McArn v. Allied Bruce-Terminix Co., 626 So.2d 603, 607 (Miss. 1993); Boyle v. Vista Eye Wear., Inc., 700 S.W.2d 859, 877 (Mo. Ct. App. 1985); Keneally v. Orgain, 606 P.2d 127, 129 (Mont. 1980); Ambroz v. Cornhusker Square Ltd., 416 N.W.2d 510, 515 (Neb. 1987); Wiltsie v. Baby Grand Corp., 774 P.2d 432, 433 (Nev. 1989); Short v. Sch. Admin. Unit No. 16, 612 A.2d 364, 370 (N.H. 1992); Pierce v. Ortho Pharm., 417 A.2d 505, 512 (N.J. 1980); Chavez v. Manville Prod. Corp., 777 P.2d 371, 375 (N.M. 1989); Amos v. Oakdale Knitting Co., 416 S.E.2d 166, 173 (N.C. 1992); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794-95 (N.D. 1987); Painter v. Graley, 696 N.E.2d 51, 56 (Ohio 1994); Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989); Delaney v. Taco Time Int'l, Inc., 681 P.2d 114, 116-18 (Or. 1984); Reuther v. Fowler & Williams, Inc. 386 A.2d 119, 120 (Pa. 1978); Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985); Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227-28 (S.D. 1988); Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 443 (Tenn. 1984); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985); Berube v. Fashion Ctr., Ltd., 771 P.2d 1033, 1042 (Utah 1989); Payne v. Rozendaal, 520 A.2d 586, 589 (Vt. 1986); Bowman v. State Bank of Keysville, 331 S.E.2d 797, 801 (Va. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978); Wandry v. Bull's Eye Credit Union, 384 N.W.2d 325, 326 (Wis. 1986); Griess v. Consol. Freightways Corp., 776 P.2d 752, 754 (Wyo. 1989).
Currently, courts in six states (Alabama, Florida, Georgia, Louisiana, New York, and Rhode Island) have rejected any exception to the employment-at-will rule. *See* Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130, 1131 (Ala. 1977); Hartley v. Ocean Reef Club, Inc. 476 So.2d 1327, 1330 (Fla. Dist. Ct. App. 1985); Goodroe v. Ga. Power Co., 251 S.E.2d 51, 52 (Ga. 1978); Gil v. Metal Serv. Corp., 412 So.2d 706, 708 (La. Ct. App. 1982); Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86, 89-90 (N.Y. 1983), *rev'd in part by* Murphy v. Am. Home Prods. Corp., 527 N.Y.S.2d 1 (N.Y. App. Div. 1988); Pacheco v. Raytheon Co., 623 A.2d 464, 465 (R.I. 1993).
In addition to the common law recognition of the public policy exception to the employment-at-will rule, Montana has codified the exception by statute. *See* MONT. CODE ANN. § 39-2-904 (1993).

36. *See* Hinson v. Cameron, 742 P.2d 549 (Okla. 1987).

37. *Id.*

38. *Id.* at 551.

39. *Id.*

certiorari, the employer asked the court to determine whether "an at-will employee, dismissed for her failure to perform an assigned duty, [maintained] a cause of action in tort for wrongful discharge from employment."[40] Given these facts, the court quickly dismissed any possibility of applying the public policy exception because the employee's "termination was not in direct violation of any public policy."[41] In effect, the employer never ordered "Hinson to perform an illegal act or denied her an opportunity to exercise her legal rights[,] ... [and] [s]he was not prevented from performing an important public obligation nor was her termination occasioned by articulated concerns for the Hospital's legal or ethical misconduct."[42]

D. Burk

In 1989, however, the Oklahoma Supreme Court tackled the public policy exception in *Burk v. K-Mart Corp.*.[43] In *Burk*, an employee alleged constructive discharge after being harassed for reporting the wrongdoings of several K-Mart employees.[44] The employee declared that as a result of her whistleblowing her employer refused to promote her based on her sex.[45] The employee asserted a cause of action in contract and in tort for breach of the implied covenant of good faith and fair dealing relating to her employment contract.[46] In response to these claims, the employer "denied the purported existence of a claim in tort for a breach of an implied covenant of good faith, and also asserted the contract action did not exist because the employee's termination resulted in no violation of the employee's constitutional rights."[47]

To resolve the dispute, the federal district court certified the following six questions of law to the Oklahoma Supreme Court:

1. In Oklahoma, is there an implied obligation of good faith and fair dealing in reference to termination in every employment-at-will contract?

2. Is the implied obligation of good faith mutual between the employer and employee?

3. Does the breach of such implied obligation, assuming there is one, sound in contract and/or tort?

4. If the answer to question No. 3 is "contract," what are the recoverable damages for breach of the implied covenant?

5. If the answer to question No. 3 is "tort," what is the character of defendant's conduct that would permit recovery of punitive damages?

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40. *Id.*
41. *Id.* at 553.
42. *Hinson*, 742 P.2d at 553.
43. 770 P.2d 24 (Okla. 1989), *aff'd*, 956 F.2d 213 (10th Cir. 1991).
44. *See id.* at 25.
45. *See id.*
46. *See id.*
47. *Id.*

6. Whether the answer to question No. 3 is tort or contract, or both, what is the extent of the duty, if any, of either party to mitigate damages?[48]

After the Oklahoma Supreme Court immediately "reject[ed] the implication of an obligation of good faith and fair dealing in every employment-at-will contract,"[49] the court refused to answer the five remaining questions.[50] However, silence did not ensue.

While ever-mindful of the premise that an employee-at-will contract may be terminated at any time for any reason, good or bad, the Oklahoma Supreme Court acknowledged that the at-will rule was "not absolute ... and the interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace."[51] To define the boundaries of when the at-will rule could be skirted, the court first clarified its holding in *Hall v. Farmers Insurance Exchange*,[52] which many previously "perceived as creating a new cause of action in favor of an at-will employee discharged in bad faith."[53] Although the court in *Hall* recognized an implied covenant of good faith when an agency relationship existed, the court in *Burk* unequivocally declined to recognize an action in contract or tort for the breach of implied covenant of good faith and fair dealing.[54] Instead, the court decided to "follow the modern trend and adopt ... the public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law."[55]

To lay the foundation for the public policy exception in Oklahoma, the Oklahoma Supreme Court started with the premise that "a tort may arise in the course of the performance of a contract and that tort [law] may then be the basis for recovery even though it is the contract that creates the relationship between the parties."[56] Therefore, the court determined that if an at-will employee's discharge violates public policy, the termination is considered a "tortious breach of contractual obligations."[57]

In order to define the term public policy, the court referred back to *Hinson*, where the court had previously highlighted several nationally accepted violations.[58] Recognizing the vagueness associated with this new exception to the at-will rule, the court further stated:

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48. *Id.* at 25.
49. *Burk*, 770 P.2d at 25.
50. *See id.*
51. *See* Hall v. Farmers Ins. Exch., 713 P.2d 1027, 1029 (Okla. 1985).
52. *Id.*
53. *Burk*, 770 P.2d at 27.
54. *See id.* at 26-27.
55. *Id.* at 28.
56. *Id.*
57. *Id.*
58. *See id.* at 28-29; *see also supra* note 16 (listing the nationally recognized public policy exceptions mentioned in *Hinson*).

> In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.[59]

Thus, the court determined that "an actionable tort claim under Oklahoma law is where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy."[60]

In *Burk*, the Oklahoma Supreme Court severed the employer's long-standing right to determine the size and composition of his or her workforce without incurring liability under the employment-at-will rule.[61] By design, the public policy tort recognized by the *Burk* court now protects certain employee activities regarded as matters of public policy.[62] The policy underlying the *Burk* opinion is very clear and simple — greater job security for private sector employees.[63] This new form of protection under the aegis of tort law, however, is limited; it only protects employees discharged for bad cause. Thus, the public policy exception stops short of mandating private sector employers to show good cause prior to discharging an employee.

III. STATEMENT OF THE CASE

A. *Relevant Facts*

In 1994,[64] Jill Collier began working at Insignia Commercial Group, Inc. ("Insignia") as a leasing agent.[65] While holding this position, Ms. Collier's primary responsibility was marketing properties to potential clients "by cold calling, direct mailing and [by utilizing her] previous contacts."[66] Ms. Collier specialized in

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59. *Burk*, 770 P.2d at 29 (quoting Parnar v. Am. Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982)).

60. *Id.*

61. *See id.*

62. *See id.*

63. *See id.* Describing the effect of the public policy tort, the Oklahoma Supreme Court stated:

> Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences. Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits from our holding in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected against frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.

Id. (quoting Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983)).

64. *See* Plaintiff's Response to Defendant's Motion for Summary Judgment, App. D at ¶ 1, Collier v. Insignia Fin. Group, No. CIV-97-1142-R (W.D. Okla. Jan. 19, 2000) [hereinafter *Collier's Response*].

65. *See id.* at ¶¶ 8, 23.

66. *Id.* at ¶ 7.

listing exclusive "office, retail, warehouse and land sites."[67]

Shortly after her employment began with Insignia, Ms. Collier observed that her "male supervisors[68]... rewarded female employees who dated them, [who] had drinks after work and/or [who] 'partied' with them."[69] The "[r]ewards included: 1) job security; 2) promotions; 3) pay raises; [and] 4) pleasant behavior on behalf of the male coworkers and supervisors toward the females."[70] In contrast, Ms. Collier also witnessed that female employees[71] who refused to date or socially interact with these supervisors were subjected to a hostile work environment involving verbal abuse, sexual harassment, lack of promotion, and interference with assigned job-related duties.[72] Female employees who did not quit as a result of the hostile work environment were often fired by their Insignia supervisors.[73]

When Ms. Collier failed to accept the social invitations extended from her supervisors,[74] she too was subjected to the various forms of hostility described above.[75] From the start of Ms. Collier's employment, Mr. Gennarelli, the Regional Leasing Director, repeatedly "yelled and cussed at [Ms. Collier] using the word 'fuck' every other month."[76] In addition to his verbal assaults, in December 1995, Mr. Gennarelli "directed [Ms. Collier] to flirt with a client... in order to keep the account."[77] Together with Mr. Barthlow and Mr. Collins, Mr. Gennarelli frequently withheld information from Ms. Collier and a female co-broker in order to intercept leasing deals and, subsequently, to receive the commissions.[78]

During weekly mandatory meetings from November 1995 to September 1996, Mr. Barthlow and Mr. Collins "discussed their sex lives, told dirty jokes and [frequently] talked about a pornographic movie"[79] in Ms. Collier's presence. Although Ms. Collier verbally complained to Ms. Risk, Senior Property Manager,

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67. *Id.*

68. Those serving as supervisors over Ms. Collier during her employment at Insignia were: Mr. Darin Barthlow, Vice-President of Leasing; Mr. Louis Gennarelli, Regional Leasing Director; Mr. George O'Connor, Retail Leasing Director; Mr. Scott Collins, Senior Leasing Manager; Ms. Dee Ann Ellis, Director of Property Management; and Mr. Greg Banta, Leasing Manager. *Id.* at ¶ 6.

69. *Id.* at ¶ 9.

70. *Collier's Response*, at ¶9.

71. *Id.* Ms. Collier indicated that the following women never dated or socially interacted with their supervisors: Ms. Dee Ann Ellis, Director of Property Management; Ms. Heidi Hope-Vanlandingham, Leasing Specialist; Ms. Kathy White, Leasing Secretary; Ms. Kathy Risk, Leasing Secretary; Ms. Tiffani Dodson, Leasing Secretary; Ms. Stephanie Worley, Secretary; and Ms. Julie Cunningham, Temporary Secretary. *See id.* at ¶ 13. In retaliation for refusing to accept the social invitations of their supervisor, these women were subjected to verbal abuse, sexual harassment, gender discrimination, lack of promotion or termination. *See id.* at ¶¶ 14-18.

72. *Id.* at ¶ 13.

73. *See id.* at ¶¶ 13, 16, 18.

74. *See id.* at ¶ 13.

75. *Collier's Response*, at ¶¶ 19-36.

76. *Id.* at ¶ 19.

77. *Id.* at ¶ 28.

78. *See id.* at ¶ 20. Unlike the male leasing agents, Insignia also required Ms. Collier to "co-broker many of [her] listings" thereby reducing the amount of her commission. *Id.* at ¶ 23.

79. *Collier's Response*, at ¶ 36.

no corrective action ever transpired, and the vulgar comments continued.[80] In January 1996, Mr. Barthlow actually "placed his hand on [Ms. Collier's] shoulder and asked her if his behavior was sexually harassing."[81] Mr. Barthlow's inappropriate conduct continued in March 1996 when he asked Ms. Collier, "[a]re those your boobs?"[82] Once again, Ms. Collier complained to Ms. Risk, and no corrective action was taken.[83]

Next, Mr. Banta propositioned Ms. Collier, in June 1996, by saying that "he would do anything for [Ms. Collier] in exchange for sex with him."[84] Ms. Collier complained about the incident, but the incident ended without corrective action.[85] To make matters worse, Mr. Banta informed Ms. Collier, "in July and August of 1996, that [Mr.] Gennarelli told him he would fire [Ms. Collier] if [she] made any more complaints of discrimination."[86] Empowered by Mr. Gennarelli's threat, Mr. Banta continued his sexual innuendoes. In August of 1996, he "referred to his penis as a 'lilly dilly' in [Ms. Collier's] presence."[87] Three days later, Mr. Banta stalked Ms. Collier "in the office parking lot in his car and lewdly whistled at [her] as [she] walked towards the office."[88]

In light of her complaining about the inappropriate and unwelcome conduct described above, Ms. Collier's supervisors retaliated by delaying payment of her commissions between February 1995 through July 1996.[89] Once again, Ms. Collier formally complained and voiced her grievances to her co-workers as well as to those with supervisory authority.[90]

In August of 1996, however, Insignia promoted Ms. Collier to the position of Leasing Manager, although her salary still remained less than the other male leasing managers.[91] Additionally, Ms. Collier got a new supervisor, Mr. George O'Connor, who personally voiced Ms. Collier's complaints of gender discrimination and sexual harassment to Mr. Gennarelli.[92] After Mr. Gennarelli declared that he would not take corrective action, Mr. O'Connor dropped the matter completely.[93] As a result, Ms. Collier drafted a letter to Mr. Henry Horowitz, President of Insignia, describing her gender discrimination and "unfair pay practices regarding [her] commissions."[94] Just like the others, Mr. Horowitz

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80. *See id.*
81. *Id.* at ¶ 29.
82. *Id.* at ¶ 30.
83. *See id.*
84. *Id.* at ¶ 31.
85. *See Collier, at ¶* 31.
86. *Id.* at ¶ 42.
87. *Id.* at ¶ 33.
88. *Collier's Response*, at ¶ 34.
89. *See id.* at ¶ 21.
90. *See id.*
91. *See id.* at ¶ 24; Jill Collier's Complaint at ¶ 5, Collier v. Insignia Fin. Group, No. CIV-97-1142-R (W.D. Okla. Jul. 10, 1997) [hereinafter *Collier's Complaint*].
92. *Collier's Response*, at ¶ 37.
93. *See id.*
94. *Id.* at ¶ 38.

did not respond and no corrective action was implemented.[95]

During August 1996, Ms. Collier elected to file a gender discrimination and sexual harassment complaint with the EEOC.[96] Despite her formal complaint, Insignia took no corrective action.[97] Due to Insignia's failure to respond to her consistent complaints of inappropriate and unwelcome conduct, Ms. Collier left Insignia in September of 1996 because of the hostile work environment.[98] Seven months after her constructive termination, the EEOC issued a "right-to-sue letter,"[99] and Ms. Collier filed a complaint against Insignia in the Western District of Oklahoma.[100] This note discusses Count II of Ms. Collier's complaint in which she alleged that Insignia violated the gender discrimination provisions of the OADA and Oklahoma public policy.[101]

B. *Issue*

As the Oklahoma Supreme Court stated, "[t]he submitted query's essence is whether quid pro quo sexual harassment which culminates in an employee's 'constructive discharge' is actionable under an exception — first enunciated in *Burk v. K-Mart Corp.*...— to the common law's employment-at-will doctrine."[102]

IV. OKLAHOMA LAW IN REGARDS TO THE *BURK* EXCEPTION PRIOR TO THE CASE

A. *Tate*

The Oklahoma Supreme Court first expanded the "tightly circumscribed"[103] boundaries of the *Burk* public policy tort exception in 1992.[104] In *Tate v. Browning-Ferris, Inc.*,[105] a black male employee filed two complaints with the EEOC for racial discrimination and retaliatory discharge.[106] After the EEOC failed to resolve the matter, the employee filed a lawsuit in federal court asserting federal and state claims, alleging that the employer's conduct violated Title VII[107] and Oklahoma public policy.[108]

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95. *See id.*
96. *See id.* at ¶ 40. *See also Collier's Complaint*, at ¶ 7.
97. *See Collier's Response*, at ¶ 40.
98. *See id.*
99. *Collier's Complaint*, at ¶ 7.
100. *See id.*
101. *See id.* at ¶¶ 11-12.
102. Collier v. Insignia Fin. Group, 981 P.2d 321, 323 (Okla. 1999).
103. Burk v. K-Mart Corp., 770 P.2d 24, 29 (Okla. 1989), *aff'd*, 956 F.2d 213 (10th Cir. 1991).
104. *See* Tate v. Browning-Ferris, Inc. 833 P.2d 1218 (Okla. 1992).
105. *See id.*
106. *See id.* at 1220-21.
107. Pub. L. No. 88-352, 701, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 2000e (1994)). Title VII, which only applies to employers with 15 or more employees, makes it unlawful "to refuse to hire, to discharge or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions or privileges of employment" because of sex or other protected statuses. 42 U.S.C. § 2000e-2(a)(1) (1994).
108. *See Tate*, 833 P.2d at 1221.

In this case, the *Tate* court held that a "racially motivated discharge or one in retaliation for filing a racial discrimination complaint"[109] constituted a violation of public policy under *Burk*.[110] Additionally, the court determined that neither the federal nor the state statutes governing racial discrimination were exclusive[111] and, therefore, enabled a wrongfully-discharged employee to assert the *Burk* public policy tort exception.[112] At the time of *Tate*,[113] however, the OADA did not provide a separate cause of action to a racially-discriminated employee who was not satisfied with the outcome of his administrative proceeding, while affording such a remedy to an employee alleging handicap-discrimination.[114] While the court acknowledged the two distinct remedies under the OADA, the *Tate* court did not express an opinion on the consequences of such a difference.[115] Rather, the court declared that "discrimination victims [under the OADA] comprise a single class."[116] Since the OADA prohibited a racially-discriminated employee from recovering money damages for wrongful discharge, the Oklahoma Supreme Court extended the *Burk* public policy tort exception to provide the employee with an adequate remedy under Oklahoma law.[117]

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109. *Id.* at 1225.

110. *Id.*

111. *See* OKLA. STAT. tit. 25, § 1101 (1991). That section states that "[t]he general purposes of [the OADA] are to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 . . . ." *Id.* (footnotes omitted). *See also Tate*, 833 P.2d at 1227 n.40 (stating that "Title VII is not exclusive");*id.* at 1229 ("There is nothing in the [OADA] to indicate a legislative intent to even enter, much less completely occupy, the entire arena of legally regulated employer/employee relationship.").

112. *See Tate*, 833 P.2d at 1227-31.

113. *See id.* at 1223. Under the law as it existed, neither Title VII nor the OADA provided an employee the right to a jury trial or compensatory or punitive damages. The *Tate* court indicated in footnote #12 that "[t]he Civil Rights Act of 1991 (Pub. Law 102-166 [S.1745]; [effective] Nov. 21, 1991) amend[ed] the Civil Rights Act of 1964 to strengthen and improve federal civil rights law. *Id.* at 1223 n.12. The amendment provide[d], among other changes, for jury trials and for compensatory as well as punitive damages for employment discrimination." *Id.*

114. *See id.* at 1227 n.38 ("In the [OADA] 1990 revision a private cause of action was added only for those aggrieved by handicap discrimination."); *Id.* at 1229 (stating the OADA "here in contest does not provides a private right of action to a person aggrieved by racially discriminatory practices[;] . . . [i]n contrast, it does . . . for discrimination based on handicap"). When *Tate* was decided, title 21, section 1901A of the Oklahoma Statutes provided in pertinent part:

> If a charge for discrimination in employment on the basis of handicap is filed under the provisions of Sections 1101 through 1801 of Title 25 of the Oklahoma Statutes and is not resolved to the satisfaction of the charging party within one hundred eighty (180) days from the filing of such charge, the charging party may commence an action for redress against any person who is alleged to have discriminated against the charging party and against any person named as respondent in the charge, such action to be commenced in the district court of this state for the county in which the unlawful employment practice is alleged to have been committed.

OKLA. STAT. tit. 25, § 1901(A). This section further provides a handicap-discriminated employee the right to a jury trial, "nominal or actual damages such as reinstatement or hiring, with or without back pay, or any other legal or equitable relief as the court deems appropriate," and reasonable attorney fees to the prevailing party. *Id.* at § 1901(B)-(D).

115. *See Tate*, 833 P.2d at 1229.

116. *Id.* at 1229-30.

117. *See id.* at 1230.

B. Groce

A few years after *Tate*, the Oklahoma Supreme Court widened the narrow boundaries of *Burk* just a little more in *Groce v. Foster*.[118] In this case, an employee filed a third-party claim to recover money damages for injuries he received due to the alleged negligence of an oil drilling company "which was not only a service contractor at the jobsite, but also his employer's customer."[119] Once informed of the lawsuit, the employer demanded the employee to drop the complaint immediately.[120] When the employee refused, he was fired.[121]

In a 5-4 opinion, the *Groce* court held that retaliatory discharge of an employee who refuses to dismiss a "§ 44 lawsuit[122] against a third party to redress an on-the-job injury impermissibly interferes"[123] with the public policy articulated in the Workers' Compensation Act (the "WCA").[124] The court derived its conclusion by holistically considering the public policy expressed in the WCA,[125] found in title 85, sections 5-7, 12, 44-47 and 84 of the Oklahoma Statutes.[126] In light

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118. 880 P.2d 902 (Okla. 1994).

119. *Id.* at 904.

120. *See id.*

121. *See id.*

122. *See* OKLA. STAT. tit. 85, § 44(a) (1989). Section 44(a) states in pertinent part:

> If a worker entitled to compensation under the Workers' Compensation Act is injured or killed by the negligence or wrong of another not in the same employ, such injured worker shall, before any suit or claim under the Workers' Compensation Act, elect whether to take compensation under the Workers' Compensation Act, or to pursue his remedy against such other.

Id.

123. *Groce*, 880 P.2d at 905.

124. OKLA. STAT. tit. 85, § 1 (1989).

125. *See Groce*, 880 P.2d at 907.

126. To review the pertinent terms of Section 44, *see supra* note 122. The pertinent terms of title 85, section 5 are: "[n]o person, firm, partnership or corporation may discharge any employee because the employee has in good faith filed a claim, or has retained a lawyer to represent him in said claim . . . ." OKLA. STAT. tit. 85, § 5 (1989).

The pertinent terms of title 85, section 6 are: "a person, firm, partnership or corporation who violates any provision of Section 5 . . . shall be liable for reasonable damages, actual and punitive if applicable, suffered by an employee as a result of the violation." *Id.* § 6.

The pertinent terms of title 85, section 7 are: "[e]xcept as otherwise provided for by law, the district courts of the state shall have jurisdiction, for cause shown, to retain violations of this act [Workers' Compensation Act]." *Id.* § 7.

The pertinent terms of title 85, section 12 are:

> The liability prescribed in Section 11 of this title shall be exclusive and in place of all other liability of the employer and any of his employees, . . . at common law or otherwise, for such injury, loss of services, or death, to the employee, or the spouse, personal representative, parents, or dependents of the employee, or any other person. If an employer has failed to secure the payment of compensation for his injured employee, . . . [the] injured employee . . . may maintain an action in the courts for damages on account of such injury . . . .

Id. § 12.

The pertinent terms of title 85, section 45 are: "[n]o benefits, savings or insurance of the injured employee, independent of the provisions of this act [Workers' Compensation Act] shall be considered in determining the compensation or benefit to be paid under this act." *Id.* § 45.

The pertinent terms of title 85, section 46 are:

> No agreement by any employee to pay any portion of the premium paid by his employer to the cost of mutual insurance or other insurance, maintained for or carried for the purpose of

of each of these sections, the *Groce* court recognized that when the employer fired the employee for "pursuing his legal action to redress an on-the-job injury against a third party[,]"[127] it violated a public policy found in the WCA.

C. List

In light of the improvements to the federal civil rights law in 1991,[128] the Oklahoma Supreme Court refused to expand the *Burk* public policy tort exception in *List v. Anchor Paint Manufacturing Co.*[129] In *List*, a fifty-seven-year-old employee with over thirty years of experience working for Anchor Paint was demoted from a supervisory position and replaced by a younger employee.[130] As a result of a cut in pay, the loss of his supervisory/decision-making authority, and an increase in physical labor associated with his new position, the fifty-seven-year-old employee quit.[131] When the employee pursued a lawsuit, the employee's wife, who also worked at Anchor Paint, was suspended indefinitely and without pay three months later.[132] In the joint lawsuit, both employees claimed violations of the Age Discrimination in Employment Act of 1967[133] (the "ADEA"), the OADA, and Oklahoma public policy.[134]

During the trial, the federal district court asked the Oklahoma Supreme Court to decide whether Oklahoma law "recognizes a tort claim for wrongful discharge in violation of public policy based on constructive discharge."[135] To settle the issue at hand, the *List* court relied heavily on its decision in *Tate*.[136] The distinction,[137] however, was clear; in *Tate*, the employee lacked the remedies currently available to Mr. List under the ADEA.[138]

> providing compensation as herein required, shall be valid, and any employer who makes a deduction for such purpose from the wages or salary of any employee entitled to the benefits of this act [Workers' Compensation Act] shall be guilty of a misdemeanor.

Id. § 46. The pertinent terms of title 85, section 47 are: "[n]o agreement by an employee to waive his right to compensation under this act [Workers' Compensation Act] (footnote omitted) shall be valid." *Id.* § 47.

The pertinent terms of title 85, section 84 are:

> The power and jurisdiction of the [Workers' Compensation] Court over each case shall be continuing and it may. . .make such modifications or changes with respect to former findings or orders relating thereto if, in its opinion, it may be justified, including the right to require physical examinations. . .and subject to the same penalties for refusal.

Id. § 84.

127. *Groce*, 880 P.2d at 907.

128. *See infra* note 221.

129. 910 P.2d 1011, 1015 (Okla. 1996).

130. *See id.* at 1013.

131. *Id.*

132. *Id.*

133. 29 U.S.C. §§ 621 et seq. (2000) (prohibiting employment discrimination of employees that are 40-years-old or older).

134. *See List*, 910 P.2d at 1013.

135. *Id.*

136. *See id.* at 1013-14.

137. *See id.* at 1014.

138. *See id.* at 1013-14.

In light of these federal remedies,[139] the *List* court did "not extend the narrow *Burk* exception."[140] Rather, the court specifically focused on one purpose listed in the OADA which states the following in pertinent part: "The general purposes of this act are to provide for execution within the state of the policies embodied in . . . the federal Age Discrimination in Employment Act of 1967 . . . to make uniform the law of those states which enact this act . . . ."[141]

Accordingly, the court interpreted the purpose of the OADA in concert with the ADEA to determine what the statutory remedies for age discrimination were under state law.[142] Additionally, the court asserted that the "type of discrimination involved . . . [is] an important factor in courts deciding whether they will hold that statutory remedies preempt common law remedies."[143] Since the employee's claim was "not based on retaliation for anything that he did . . . [but rather] solely upon his status, his age"[144] and since adequate federal remedies existed, the *List* court held that the employee's statutory remedies under the ADEA were exclusive.[145]

D. Marshall

The last significant case of first impression regarding the *Burk* public policy tort prior to *Collier* was *Marshall v. OK Rental & Leasing, Inc.*[146] In this case, a female employee quit her job after a co-worker repeatedly subjected her to unwelcome, sexually-related propositions and passes.[147] After the co-worker continually asked her to go out on dates, the employee informed her supervisor, "hop[ing] that the supervisor would say something to [the co-worker] about it, but apparently the supervisor said nothing."[148] Additionally, the employee's diary reflected that the co-worker attempted to kiss her on several different occasions and that "her complaints were getting nowhere."[149] The only reported time that a supervisor ever reprimanded the co-worker occurred after hearing him offer to switch work days with the female employee "in exchange for sex."[150] Since the co-worker's conduct continued in light of her complaints, the employee elected not to return from vacation.[151]

Alleging that Dollar Rent a Car "allowed on-the-job sexual harassment by a

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139. *See id.* at 1014.
140. *List*, 910 P.2d at 1014.
141. *Id.* (quoting OKLA. STAT. tit. 25, § 1101(A) (1991)).
142. *See id.*
143. *Id.* at 1014. The *List* court made its decision after it referenced *Pre-emption of Wrongful Discharge Cause of Action by Civil Rights Laws*, 21 A.L.R. 5th 1, 25 § 3[a] (1994), and identified "eleven state holding[s] that [prohibited] employees . . . [from] bring[ing] common law actions for age discrimination." *Id.* at 1014 n.4.
144. *Id.* at 1015.
145. *See id.*
146. 939 P.2d 1116 (Okla. 1997).
147. *See id.* at 1118.
148. *Id.*
149. *Id.*
150. *Id.*
151. *See id.*

co-worker,"[152] the employee filed a claimed in federal court asserting the *Burk* public policy tort exception.[153] The employee declared that the OADA coupled with Title VII created the public policy "upon which she [could] base a *Burk* wrongful discharge claim."[154] Relying heavily on *List*,[155] the Oklahoma Supreme Court disagreed, finding that the female employee's "claim [was] based solely upon her status"[156] and not in retaliation for her acts.[157] Accordingly, the court determined that the female employee now had adequate remedies for the sexual harassment under Title VII that were not previously available in *Tate*.[158]

Except as noted above, the Oklahoma Supreme Court has traditionally limited the *Burt* public policy tort exception to a narrowly defined class of cases in which the wrongful discharge violates a clear mandate of public policy as defined by constitutional, statutory or case law, and there is no other available remedy to the aggrieved employee.

V. DECISION OF THE CASE

The *Collier* court answered the certified question in the affirmative, holding that an employee subjected to "quid pro quo sexual harassment who has been discharged — either explicitly or constructively — from employment, can maintain a *Burk*-type claim for wrongful discharge"[159] since the OADA did not provide "victims of sexual harassment the same remedy as that statutorily given to handicap-discrimination victims."[160]

VI. DICUSSION OF THE COURT'S REASONING

A. Constructive Discharge and the Burk Public Policy Tort

The plaintiff argued that "a *constructive* retaliatory discharge is actionable within the *Burk* tort's parameter . . . ."[161]

Recognizing that the constructive discharge doctrine had been previously used "in conjunction with several *Burk* claims,"[162] the Oklahoma Supreme Court acknowledged that "Oklahoma's extant jurisprudence [had] never specifically approved it as a basis for bringing the public-policy tort."[163] Furthermore, the court stated: "Until now the Court has not been called upon to succinctly define the criteria for determining when a constructive discharge has occurred and

152. *Marshall*, 939 P.2d at 1119.
153. *See id.*
154. *Id.*
155. *See id.* at 1120-22.
156. *Id.* at 1122.
157. *See id.*
158. *See Marshall*, 939 P.2d at 1122.
159. Collier v. Insignia Fin. Group, 981 P.2d 321, 326-27 (Okla. 1999).
160. *Id.*
161. *Id.* at 323.
162. *Id.* at 324.
163. *Id.*

whether the same will suffice for purposes of the *Burk* exception to the employment-at-will doctrine."[164]

The court began its analysis by revisiting *Marshall* where it "observed that a constructive discharge occurs when an employer deliberately makes or allows the employee's working conditions to become so intolerable that a *reasonable person* subject to them would resign."[165] The court acknowledged, however, that this definition failed to "define the outside parameters under which a constructive discharge will support a *Burk*-type claim."[166]

In defining the parameters, the court drafted an "objective [test] which assays the complained of employer's conduct through the eyes of *a reasonable person standing in the employee's shoe* and applies to all constructive discharges pressed under the *Burk* tort's guise."[167] The test solely focuses on the "impact of the employer's action, whether deliberate or not, upon a 'reasonable' employee."[168] The two-part test requires a trial court to ask "(1) whether the employer either knew or should have known of the 'intolerable' work conditions and (2) if the permitted conditions were so intolerable that a reasonable person subject to them would resign."[169]

By creating such a test,

> the court imposes upon the trial court the obligation to survey the totality of the circumstances which allegedly prompted the constructive discharge, including (but not limited to) the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[170]

In explaining the test, the court asserted that a constructive discharge can occur and "may serve as a predicate for bringing a *Burk*-type claim"[171] if an employer's conduct is "so *objectively* offensive"[172] that it causes the employee to quit.[173]

B. Quid Pro Quo Sexual Harassment Under the Burk Public Policy Tort

Additionally, the plaintiff argued that a "*Burk* claim may be pressed for a wrongful discharge occasioned by quid pro quo sexual harassment"[174] if state statutory remedies are unavailable.[175]

To determine whether quid pro quo sexual harassment was remediable

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164. *Id.*
165. *Collier*, 981 P.2d at 324 (footnote omitted).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Collier*, 981 P.2d at 324.
172. *Id.*
173. *Id.*
174. *Id.* at 323.
175. *See id.*

under the *Burk* public policy tort, the court began its analysis in the OADA.[176] The court determined that Section 1302 of the OADA "clearly articulate[d] a public policy which castigates sexual harassment in the workplace."[177] Section 1302 provides in pertinent part:

> A. It is discriminatory practice for an employer:
>
> 1. To . . . discharge[] or otherwise discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, because of race, color, religion, sex, national origin, age, or handicap . . . .[178]

According to the court, this statute prohibited "conditioning continued employment upon the grant of sexual favors requested of an employee by an employer or supervisor—the essence of quid pro quo sexual harassment."[179] In order to lay this foundation, the court rallied around *Meritor Savings Bank v. Vinson*[180] in which the United States Supreme Court recognized that "sexual harassment—actionable under Title VII—occurs when employees 'are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions.'"[181] Therefore, the court determined that an employer violated Oklahoma public policy, the first predicate of the *Burk* public policy tort, if the discharged employee could prove quid pro sexual harassment.[182]

To assert the *Burk* public policy tort exception, however, the court had to determine that the OADA lacked a statutory remedy for quid pro quo sexual harassment.[183] If one existed, the employee had no *Burk* claim.[184]

The court began its reasoning at the heart of the OADA, its purpose.[185] Title 25, section 1101(a) of the Oklahoma Statutes provides in pertinent part that:

> [t]he general purposes of this act are to provide for execution within the state of the *policies* embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 to make uniform the law of those states which enact this act, and *to provide rights and remedies substantially equivalent to those granted under*

176. *See id.* at 324-25.

177. *Collier*, 981 P.2d at 324-25 (footnote omitted). It is worthy to note that the OADA defines *employer* to mean "a person who has fifteen or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year . . . ." OKLA. STAT. tit. 25, § 1301(1) (1991). The requirement for fifteen (15) employees is identical to the number specified in Title VII. *Id.*; 42 U.S.C. § 2000e-2(a) (1994).

In *Brown v. Ford*, the Oklahoma Supreme Court acknowledged that such a statute "sought to avoid imposing upon small shops the potentially disastrous expense of defending against a state-law claim for workplace discrimination, whether based upon offending sexual conduct or on other grounds." 905 P.2d 223, 227 (Okla. 1995).

178. *Collier*, 981 P.2d at 325 (footnote omitted) (quoting OKLA. STAT. tit. 25, § 1302 (1991)).

179. *Id.*

180. 477 U.S. 57 (1986).

181. *Collier*, 981 P.2d at 325 n.11 (quoting *Meritor Savings Bank*, 477 U.S. at 68).

182. *Id.*

183. *See Id.*

184. *See id.*

185. *See id.*

the federal Fair Housing Law.[186]

Ascertaining the legislative intent from the language of this statute,[187] the court reached the "conclusion that while the Legislature meant to incorporate the policies of Title VII (among other federal acts), it intended that the [OADA's] primary remedial scheme be that afforded by the Fair Housing Law."[188] Armed with this language, the court found that "[t]his distinction explains the dichotomous remedial treatment afforded victims under the [OADA]—victims of housing discrimination may elect to pursue a civil cause of action under the terms of 25 O.S.1991 §§ 1502.14 & 1502.15 while those suffering gender-based harassment are provided only an administrative remedy."[189] Based solely on the Oklahoma Legislature's word choice, the court determined that the OADA "drafters understood that policies and remedies are distinct since [the statute's] language differentiates between the two."[190] Since the statutory language did not purport the federal remedies to be the "exclusive remedies for violations of the articulated anti-discriminatory policies,"[191] the court did not interpret them to be so.[192] Essentially, the Oklahoma Legislature drafted title 25, section 1101(a) in a fashion that makes the statute subject to more than one interpretation.[193]

Since the OADA is susceptible to multiple meanings, the court had to interpret the statutory provision in a manner "which frees [the Act] from constitutional infirmity."[194]

To make such an interpretation, the court, once again, returned to the *Tate* decision.[195] There, the court held that "for remedial purposes, discrimination

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186. *Id.* (quoting OKLA. STAT. tit. 25, § 1101(a) (1991)). The Oklahoma legislature amended section 1101(a) of the OADA in 1991 by adding the following: "and to provide rights and remedies substantially equivalent to those granted under the federal Fair Housing Law." OKLA. STAT. tit 25, § 1101(a) (1991). In the original version, the OADA contained only administrative remedies through the Oklahoma Human Rights Commission. *See* Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1229 (Okla. 1992).

187. *Collier*, 981 P.2d at 325; *see also Tate*, 833 P.2d at 1228 ("To ascertain legislative intent we look to the language of the pertinent statute. Statutory words are to be given their ordinary sense except when a contrary intention plainly appears."); Hess v. Excise Bd. of McCurtain County, Okla., 698 P.2d 930, 932 (Okla. 1985) ("The goal of statutory construction is to follow the intent of the legislature.").

188. *Collier*, 981 P.2d at 325.

189. *Id.*

190. *Id.*

191. *Id.*

192. *See id.* To reach this conclusion, the court relied on its reasoning in *Tate*. In regards to Title VII claims, the *Tate* court declared that:

> [S]tate laws will be preempted only if they actually conflict with federal law. The United States Supreme Court has interpreted these provisions as explicit disclaimers of any federal intent categorically to preempt state law or to 'occupy the field' of employment discrimination. The Nation's highest court describes Title VII as a floor beneath which federally provided protection may not drop rather than a ceiling above which it may not rise. In short, states' remedies for relief from employment discrimination and for the compensation of its victims may be both different from and broader that those provided by Title VII.

Tate, 833 P.2d at 1222.

193. *See Collier*, 981 P.2d at 325.

194. *Id.*

195. *Id.* at 325-26.

victims [under the [OADA]] comprise a single class."[196] With this holding in mind, the *Collier* court declared that "the [OADA] gives discharged victims of handicap discrimination a private cause of action against the offending employer, [yet] it only provides an administrative remedy for victims of quid pro quo sexual harassment."[197] As a result of the two different remedies, the court stated, "[w]ere we to hold that the Oklahoma Anti-Discrimination Act provides the exclusive remedial scheme for wrongful discharges which are the product of sexually discriminatory practices, we would in effect be sanctioning unequal remedies for members of the same class."[198] Moreover, the court declared that such a holding would violate Oklahoma's Constitution,[199] which clearly prohibits "the passage of special law which would authorize disparate remedies for like-situated (employment-discrimination) victims."[200] Therefore, the court "conclude[d] that the Legislature did not intend the administrative remedy afforded to sexual-discrimination victims by the [OADA] to be an exclusive remedy."[201]

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196. *Id.* at 326 (quoting *Tate*, 833 P.2d at 1229-30). Note that the bracket comment was added by the court in *Collier*, it is not found in the *Tate* decision.

197. *Id.* (footnote omitted). *See* OKLA. STAT. ANN. tit. 25, §§ 1502.14, 1502.15, 1901 (1991). The pertinent terms of title 25, section 1901(A) are:

> If a charge for discrimination in employment on the basis of handicap is filed under the provisions of Sections 1101 through 1801 of Title 25 of the Oklahoma Statutes and is not resolved to the satisfaction of the charging party within one hundred eighty (180) days from the filing of such charge, the charging party may commence an action for redress against any person named as respondent in the charge ....

Id. § 1901(A). *See also* Atkinson v. Halliburton Co., 905 P.2d 772, 776 (Okla. 1995) (declaring that Section 1901(A) of Title 25 "states clearly that an aggrieved person may resort to the courts for redress").

Sections 1501 et seq. of title 25 of the Oklahoma Statutes define how a victim may remedy alleged discrimination under the OADA. The OADA requires a victim to file a complaint with the Human Rights Commission (the "Commission") within 180 days of the alleged discriminatory practice. *See id.* § 1502(A). If the Commission finds that an employer violated any provision of section 1302 under the OADA, it may a) seek a temporary injunction or restraining order, b) require the complainant and employer to engage in conciliation, or c) order the employer to stop engaging in unlawful discrimination. *See id.* §§ 1502.1, 1502.6. A civil action is only available for violations involving discriminatory housing practices or handicap discrimination. *See id.* §§ 1502.14, 1502.15, 1901.

198. *Collier*, 981 P.2d at 326.

199. Section 46 of Article V of the Oklahoma Constitution states in pertinent part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:
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> ....
>
> Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts ... or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate ....

OKLA. CONST. art. V, § 46 (1907).

200. *Collier*, 981 P.2d at 326; *see* Tate v. Browning-Ferris, Inc. 833 P.2d 1218, 1230 ("Our Constitution absolutely interdicts the passage of special law that would sanction disparate remedies for those who complain of employment discrimination.").

201. *Collier*, 981 P.2d at 326. The court makes this decision based on its reasoning found in *Tate*. *See Tate*, 833 P.2d at 1225. The *Tate* court states: "[b]y statutory mandate *the common law remains in full force in this state, unless a statute explicitly provides to the contrary.* Oklahoma law does not permit legislative abrogation of the common law by implication; rather, its alteration must be clearly and plainly expressed." *Id.*

Section 2 of title 12 of the Oklahoma Statutes provides: "The common law, as modified by

To resolve the issue, the court determined that the "administrative remedy provided by the [OADA] to employees whose discharge is caused by quid pro quo sexual harassment is cumulative of the common law *Burk* remedy."[202] The court concluded that the *Burk* public policy tort provided a quid pro quo sexual harassment victim with a comparable remedy statutorily provided under the OADA to victims of handicap discrimination—a private cause of action in civil court.[203] Under this "adopted construction of the [OADA]—i.e., that it does not provide the exclusive remedy for quid pro quo sexual harassment which culminates in wrongful discharge,"[204] the court found that it "avoids the pitfall of according asymmetrical remedies to members of a single class of employment-discrimination victims."[205]

In summary, the *Collier* court held that quid pro quo sexual harassment victims who were constructively or explicitly discharged from their employment can assert a *Burk* public policy tort claim for wrongful discharge.[206] This claim would not be available if the OADA "afforded victims of sexual harassment the same remedy as that statutorily given to handicap-discrimination victims."[207]

VII. EXTENDING THE BURK TORT TO PREGNANCY DISCRIMINATION

A. *What about List?*

Stare decisis[208] leads one to believe that the *Collier* court would only allow a *Burk* public policy tort "in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law."[209] Yet, the majority opinion in *Collier* failed to reconcile its reasoning in light of all the decisions leading up to the case, specifically the *List* decision.[210]

Returning briefly to *List*, the court there denied the employee an opportunity to use the *Burk* public policy tort claim for two reasons.[211] First, the court determined that the employee had adequate remedies not directly available

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constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma . . . ." OKLA. STAT. tit. 12, § 2.

202. *Collier*, 981 P.2d at 326. In footnote 20, the *Collier* court rejected a prior notion found in *Marshall* that tended to "support[] the conclusion that the Oklahoma Anit-Discrimination Act provides an adequate remedy for quid pro quo sexual harassment . . . ." *Id.*

203. *See id.*

204. *Id.*

205. *Id.*

206. *See Collier*,981 P.2d at 326.

207. *Id.*

208. The Latin word *stare decisis* means "to stand by things decided." BLACK'S LAW DICTIONARY 1414 (7th ed. 1999). This word represents "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise in litigation." *Id.*

209. Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989).

210. *See Collier*, 981 P.2d at 321-27.

211. *See* discussion *supra* Part IV. C.

under the OADA but rather through the ADEA.[212] The *List* court, however, did not separate the two acts when determining whether a remedy existed. The acts were "interpreted together to discern what an employee's rights are under [Oklahoma] law."[213] Second, the employee's claim was "not based on retaliation for anything he did... [but rather] solely upon his status, his age."[214] Interestingly, the *List* court answered the certified question that was specifically geared toward Oklahoma law in the negative (i.e., it did not address a possible cause of action under federal law)[215] because the employee already had a cause of action under federal law.[216] Moreover, the *List* court held the federal remedy to be exclusive.[217]

In contrast to that in *List*, the *Collier* court did not interpret the OADA in conjunction with Title VII, although it did mention that Title VII was imbedded in the OADA purpose.[218] Rather, the *Collier* court focused on the OADA alone.[219] In doing so, the *Collier* court determined that the available remedies under the OADA for a sexual harassment victim were inferior to those of a handicap-discrimination victim.[220] The court ignored the fact that federal statutory remedies[221] were available to Ms. Collier.[222] Specifically, Title VII provided Ms. Collier the opportunity to "request a jury trial... recover compensatory and punitive damages along with attorneys' fees, costs and expenses."[223]

It is also noteworthy to mention that the *Collier* court abandoned yet another facet of its reasoning in *List*, an argument provided by Professor Lex K. Larson.[224] In *List*, the court conveyed that it was inappropriate to "use [the]

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212. *See id.*

213. List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1014 (Okla. 1996).

214. *Id.* at 1015.

215. *See id.* at 1012.

216. *See id.* at 1013; *see* discussion *supra* Part IV. C.

217. *See List*, 910 P.2d at 1013, 1015; *see* discussion *supra* Part IV. C.

218. *See* Collier v. Insignia Fin. Group, 981 P.2d 321, 321-27 (Okla. 1999).

219. *See id.* at 324-326; *see also* discussion *supra* Part VI. B.

220. *See Collier*, 981 P.2d at 324-26.

221. In the *Collier* dissent, Justice Kauger listed the remedies available to Ms. Collier under Title VII. *See id.* at 327 n.4, 328 nn.5-6. Title 42, section 1981a(a)(1) of the United States Code provides in pertinent part:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party *may recover compensatory and punitive damages* as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. § 1981a(a)(1) (1991) (emphasis added). Title 42, section 1981a(c) of the United States Code provides in pertinent part: "If a complaining party seeks compensatory or punitive damages under this section—(1) any party *may demand a trial by jury*...." *Id.* § 1981a(c) (emphasis added).

222. *See Collier*, 981 P.2d at 329; *see also supra* note 221.

223. *Collier*, 981 P.2d at 327-28.

224. Professor Lex K. Larson is the President of Employment Law Research, Inc. in Durham, North Carolina. *Larson's Worker's Compensation Pages* (visited Feb. 19, 2000) *at* http://www.larsonpubs.com/aboutlex.html. Professor Larson specializes in various aspects of

discrimination laws as a basis for any public policy exception to the at-will termination rule."[225] The *List* court quoted Professor Larson as follows:

> The use of discrimination laws as the basis for public policy exception has the potential to expand greatly the available remedies. Furthermore, because of this expansion of remedies, it would seem that employees would be encouraged to circumvent or ignore the very statutes on which the public policy exception is based. Why should a discharged employee go to the trouble of filing a claim with a state agency and/or the EEOC before bringing an action for back pay, when disregarding those procedures may bring the possibility of recovering not only lost wages but also a healthy sum in punitive damages?[226]

In contrast to this reasoning, the *Collier* court declared that the OADA was literally a state-declared public policy, the first predicate of the Burk public policy tort claim.[227]

Frankly, the *Collier* decision remains confusing and unpredictable as long as the *List* decision remains intact. In footnote 20 of the *Collier* opinion, the court overruled *Marshall* "to the extent that [it] can be read to support the conclusion that the Oklahoma Anti-Discrimination Act provides an adequate remedy for quid pro quo sexual harassment;"[228] however, *List* was not even mentioned in the majority opinion.[229] In the meantime, the *Collier* decision will continue to have potentially far-reaching effects.

B. The Burk Public Policy Tort and Pregnancy Discrimination

While the *Collier* court declared that the "*Burk* tort encompasses a broader range of wrongful discharges that [sic] just those involving one of proscribed categories of discrimination articulated in Title VII or the Oklahoma Anti-Discrimination Act,"[230] it did not intend to include pregnancy discrimination in that category.

First, the OADA fails to articulate a public policy that reprimands employers for pregnancy discrimination in the workplace.[231] The statutory language of the OADA only prohibits employers from discriminating on the basis of "race, color, religion, sex, national origin, age or handicap."[232] The proscribed discrimination under the OADA does not include that based on pregnancy. Moreover, the prohibition based on sex does not include pregnancy and, does not reach the issue of pregnancy discrimination. Therefore, if a wrongfully terminated employee is able to prove pregnancy discrimination, she still cannot assert that her

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employment law such as worker's compensation law and employment discrimination. *See id.*

225. List v. Anchor Paint Mfg. Co., 910 P.2d 1011, 1015 (Okla. 1996).

226. *Id.* (quoting 1 LEX K. LARSON, UNJUST DISMISSAL § 6.10[6][e], at 6-91 (1989)). Professor Larson no longer maintains this section in his treatise. *See* 1 LEX K. LARSON, UNJUST DISMISSAL §§ 6.01 et seq. (2000).

227. *See Collier*, 981 P.2d at 324-25; *supra* discussion Part VI. B.

228. *Collier*, 981 P.2d at 326.

229. *See id.* at 321-26.

230. *Id.* at 324.

231. *See* OKLA. STAT. tit 25, § 1308 (1991).

232. *Id.*

employer violated a state-declared public policy under the OADA.

Next, the PDA is contained within the sex discrimination provisions of Title VII.[233] While the OADA expressly "provide[s] for execution within the state of the policies embodied in [Title VII],"[234] the provision does not create a state-declared policy for the State of Oklahoma. Since Title VII provides an employee wrongfully terminated for pregnancy with a private remedy, the *Burk* public policy tort is unavailable to redress employees wrongfully terminated because of pregnancy.

The narrowly defined *Burk* public policy tort exception to the common law employment-at-will doctrine "only lies when an employer [1] violates [by wrongful discharge a] public-policy goal[] ... clearly articulated in existing law ... and [2] ... there is no adequate, statutorily-expressed remedy."[235] Since the OADA fails to provide a clearly articulated, state-declared public policy and since adequate remedies currently exist under Title VII, there can be no *Burk* tort for those aggrieved by wrongful termination motivated by pregnancy discrimination.

VIII. CONCLUSION

Collier leaves us with many unanswered questions. Many may question whether wrongfully-terminated employees alleging discrimination will be allowed to pursue the *Burk* public policy tort even though an adequate federal remedy exists. Do employees have to exhaust their administrative remedies prior to filing a *Burk* tort claim? Can wrongfully-terminated employees completely circumvent the federal statutes and ultimately recover uncapped compensatory and punitive damages? Will *Collier* now affect small employers previously protected by the OADA and Title VII?

The Oklahoma Supreme Court currently has before it yet another certified question.[236] The question specifically involves whether the *Collier* court conclusively determined that all forms of gender-based discrimination, including pregnancy discrimination, were incorporated as public policy of the State of Oklahoma to support a *Burk*-type tort. One hopes the answer will end the confusion among the various jurisdictions regarding *Collier* and pregnancy discrimination.[237] Based on the analysis above, the Oklahoma Supreme Court should rule that *Collier* does not extend the *Burk* public policy tort to victims of

233. *See supra* note 5.

234. OKLA. STAT. tit. 25, § 1101.

235. *Collier*, 981 P.2d at 323.

236. *See* Clinton v. State, No. CIV-99-937-L (W.D. Okla. 2000).

237. *Compare* Bates v. Bd. of County Comm'rs, No. CJ-97-2838 (Tulsa County Sept. 25, 1998), and Lummus-Bentov. Image Sys. Int'l, Inc., No. CIV-98-1680-L (W.D. Okla. Dec. 10, 1998), *with* Coyle v. Green Country Interiors, No. 99-CV-0690-H (N.D. Okla. Mar. 1, 1999), *and* Clinton v. State, No. CIV-99-937-L (W.D. Okla. 2000).

pregnancy discrimination. Rather, those wrongfully terminated due to pregnancy should look to the adequate federal remedies that already exist under Title VII.

Samuel E. Joyner