HIGHLIGHTS

REVISED STATE LAW SECTIONS:

- This release includes a complete revision of Sections 10.13 and 10.14. These sections, which were reorganized to conform to our new format for the state sections in Chapter 10, feature up-to-date, comprehensive analysis of the common law and statutes relating to the wrongful termination of employment in Idaho and Illinois.

RECENT CASE LAW DEVELOPMENTS:

- In addition to the completely revised state sections, the treatise has been updated with new developments in the federal and state case law of wrongful termination.

FEDERAL CASE LAW DEVELOPMENTS:

The Supreme Court, in *Jackson v. Birmingham Board of Education*, determined that the private right of action under Title IX permits individuals to bring claims of retaliation for speaking out against Title IX violations. See § 11.02 n.8.

An employer may not terminate an employee for lying if the lie was in response to a question that was prohibited by the National Labor Relations Act. In *United Services Automobile Association v. National Labor Relations Board*, the District of Columbia Circuit rejected the employer’s argument that its dismissal of the employee was justified because she lied when she was asked who distributed fliers in the office expressing concern about company layoffs. Distribution of the fliers constituted “concerted activity” under the National Labor Relations Act; the employer was therefore prohibited from interrogating the employee about such activities. Accordingly, the termination of the employee because of her answers to those improper questions was unlawful. See § 11.03[22] n.15.

In *Communication Workers of America v. Ector County Hospital District*, the Fifth Circuit held that a hospital’s refusal to permit its carpenter employee to wear a “Union Yes” lapel pin violated the employee’s First Amendment rights. See § 11.01[5] n.50.

The Sixth Circuit, in *Barrett v. Steubenville City Schools*, held that a public school
system violates an employee’s constitutional rights when it denies the employee a job because the employee chooses to send his child to a private school. See § 11.01[5] n.49.

A federal district court in Texas held in Garrett v. Circuit City Stores, Inc. that an agreement between an employer and an employee requiring that employment disputes be submitted to binding arbitration will not be enforced to require arbitration of a dispute under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA entitles members of the armed forces, including reservists, to a leave of absence for service or training and to reemployment upon the termination of their service. The court’s refusal to compel arbitration was based on a provision of the Act stating that it supersedes any state law, agreement, or policy that limits the rights given by the Act or that places additional requirements to receive the benefits the Act. See § 11.03[32] ns.8.1–8.2.

STATE CASE LAW DEVELOPMENTS:

California: Employers of at-will employees may recover damages for intentional interference with contractual relations from a third party who interferes with the employment relationship. In Reeves v. Hanlon, the California Supreme Court recognized the viability of such claims despite the fact that the employment relationship may be terminated at any time by the employer or the employee. The court found that the interference implicated in the claim is interference by another employer or other third party with the maintenance of the relationship between the original employer and the employee in the future. See § 10.05[2][d] n.186.1.

Colorado: Legal counsel for an employer may be considered a supervisor for purposes of Colorado’s whistleblower law. To be protected under the whistleblower law, an employee must make a good faith attempt to provide the whistleblowing information to a supervisor prior to disclosing the information elsewhere. In Gansert v. Colorado, the plaintiff had provided the information to her employer’s staff legal counsel. Because it was at least arguable that the legal counsel was a supervisor or that the legal counsel was an agent for a supervisor, a federal district court applying Colorado law denied the defendants’ motion for summary judgment on the plaintiff’s retaliation claim under the whistleblower law. See § 10.06[3][b] n.6.

Connecticut: A statement about an employee is deemed published, for purposes of a defamation claim, if that statement has been communicated between supervisors and placed in the employee’s personnel file. In Gambardella v. Apple Health Care, Inc., the Appellate Court of Connecticut found that the plaintiff’s evidence that her supervisors had discussed that she had stolen company property and had placed a statement to that effect in her personnel file sufficiently supported a prima facie case of defamation. See § 10.07[2][d] n.41.

Louisiana: For a communication by an employer to those who have an interest in the subject matter not to be considered published in a defamation claim, the communication must be made in good faith. In Atwood v. Grand Casinos of Louisiana, the Louisiana Court of Appeal found that questions of good faith existed where the speaker of the alleged defamation had told three different stories, on three separate occasions, on the issue of whether the plaintiff casino worker had marked cards. The defamation case was permitted to move forward. See § 4.06[4][b] n.1 and § 10.19[2] n.34.

Missouri: When a plaintiff is terminated for engaging in several different protected activities, these activities may combine to create a single cause for purposes of establishing the required exclusive causal connection in a wrongful discharge case. In Shuler v. Premium Standard Farms, the Missouri
Court of Appeals reversed a directed verdict in favor of the defendant and found that the plaintiff’s evidence that he both refused to perform an illegal act and reported the incident to his supervisor was sufficient to sustain a verdict in his favor. See § 10.26[2] n.19.

**North Carolina:** Until 2004, North Carolina did not expressly recognize a claim for wrongful discharge in violation of public policy when the termination at issue was constructive in nature. But in *Whitt v. Harris Teeter, Inc.*, the North Carolina Court of Appeals declared that conduct that is less than an outright firing may still amount to discharge for purposes of a public policy claim. Allowing an employer who acts in bad faith but does not go so far as to discharge a worker to avoid punishment would be inequitable, the court held. See § 10.34[2] n.31.

**Pennsylvania:** Pennsylvania courts have restricted claims of wrongful termination in violation of public policy to retaliation based on the violation of a Pennsylvania public policy. In *Wetherhold v. Radioshack Corp.*, a federal district court concluded that Pennsylvania public policy was violated when an employee was allegedly terminated for making a report to the federal Occupational Safety and Health Administration (OSHA). The court allowed the plaintiff’s wrongful termination case to proceed because the Pennsylvania Worker and Community Right-To-Know Act is to be read in conjunction with federal laws including the federal OSHA statute, making the termination of an employee for reporting federal OSHA offenses a violation of Pennsylvania public policy. See § 10.39[2] n.10.1.

**South Carolina:** An employee may bring an outrage claim even if the conduct complained of would also support a statutory claim. In *Frazier v. Badger*, the South Carolina Supreme Court upheld the jury verdict in favor of the plaintiff on her outrage claim. The defendant employer argued that the actions alleged supported a sexual harassment claim and therefore the civil rights statutes were the plaintiff’s only recourse. The court disagreed, stating that while the tort of outrage may not replace other torts, there is no such restriction on making a claim of outrage based on conduct prohibited by statute. See § 10.42[2] n.30.

**West Virginia:** In a case demonstrating that a contract means exactly what it says, the West Virginia Supreme Court of Appeals held that a written employment contract guaranteeing the plaintiff his salary for eight years had to be enforced according to its terms. In *Benson v. AJR, Inc.*, the court concluded that even if the plaintiff was discharged for failing a random drug test, he was still entitled to the remainder of the guaranteed eight years’ salary. The reason for this, the court explained, was that drug use did not fall within any of the enumerated exceptions in the contract. The contract, in short, was poorly drafted. In dissent, the Chief Justice described the ruling as “appalling.” See § 10.50[2] n.31.