

Representing Whistleblowers in *Adler* Wrongful Discharge Actions

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Recently, whistleblowers have achieved substantial verdicts in state common law wrongful discharge actions. In July 2008, an Ohio jury awarded \$46.6 million to a former employee of a waste management company who claimed that he was wrongfully discharged for refusing to fire three elderly employees. About two years earlier, a New Mexico jury awarded approximately \$4.4 million to a former employee of Sandia National Laboratories who alleged that he was terminated in retaliation for cooperating with a federal investigation into Chinese cyber intelligence efforts. As a tort claim, the common law wrongful discharge action can be a potent remedy that provides an opportunity for a discharged employee to seek punitive damages from a jury.

First recognized by the Court of Appeals for Maryland in *Adler v. Am. Standard Corp.*, 291 Md. 31 (1981), the *Adler* tort is an exception to the employment at-will doctrine for an employee who is terminated for refusing to engage in illegal activity or fulfilling a statutorily proscribed duty. The *Adler* tort is a critical remedy for employees in Maryland because Maryland has not adopted a comprehensive whistleblower protection statute. This article summarizes the scope of the *Adler* tort, the burden of proof for an *Adler* plaintiff, the damages available in an *Adler* claim, and provides tips from the plaintiff's perspective on litigating *Adler* claims.

I. Scope of the *Adler* Wrongful Discharge Tort

The *Adler* tort as defined by the Fourth Circuit in *Adler v. Am. Standard Corp.*, 830 F.2d 1303, 1307 (4th Cir. 1987) is limited to terminations that violate a clear mandate of public policy and is limited to three types of protected activity: (1) refusing to engage in illegal activity; (2) exercising a statutory right or privilege; or (3) fulfilling a statutory obligation.

A. Refusing to Engage in Illegal Activity

The *Adler* tort protects employees terminated because they refused to engage in illegal activity. Cases construing this form of protected conduct include:

- Recognizing an *Adler* claim in *Insignia Residential Corp. v Ashton*, 359 Md.560 (2000), where an employee was discharged after refusing to engage in sexual intercourse with her supervisor.
- Recognizing an *Adler* claim in *Magee v. Dan Souches Tec.l Servs., Inc.*, 137 Md. App. 527 (2001), where a human resources director was terminated because she refused to submit a false insurance claim for health insurance on behalf of an individual who no longer worked for the company, an act that would amount to health care benefit fraud.

- Recognizing an *Adler* claim in *Kessler v. Equity Mgmt, Inc.*, 82 Md. App. 577 (1990), where a resident manager of an apartment complex was terminated because she refused to violate tenants' constitutional right to privacy by carrying out instructions to enter tenants' apartments and look through their private papers in their absence.
- Terminating an employee because she refused her supervisor's inducements to engage in prostitution. *Perry v. FTData Inc.*, 198 F. Supp. 2d 699 (D. Md. 2002).

B. Exercising a Statutory Right

Terminating employees for exercising statutory rights can also give rise to an *Adler* claim. Cases construing this form of protected conduct include:

- Terminating a teacher for exercising his First Amendment right by speaking out about a guard's unnecessary use of force to stop a fight between inmates. *De Bleecker v. Montgomery County*, 292 Md. 498 (1982).
- Terminating an employee for refusing to submit to a polygraph test in violation of Md. Ann. Code Art. 100, § 95 which prohibits lie detector tests as a condition of employment. *Moniodis v. Cook*, 64 Md. App. 1 (1985).
- Discharging an employee solely because the employee filed a worker's compensation claim. *Ewing v. Koppers Co.*, 312 Md. 45 (1998).

C. Fulfilling a Statutory Obligation

The Court of Appeals in *Makovi v. Sherwin Williams Co.*, 316 Md. 603 (1989) also recognized that an at-will employee who is terminated for fulfilling a statutory obligation or reporting suspected criminal behavior to law enforcement is protected under *Adler*. Under this form of protected conduct, the employee must demonstrate a legal obligation or duty to report the employer's unlawful conduct. Note that in *Wholey v. Sears Roebuck*, 370 Md. 38 (2002), the court cautioned against construing this form of protected conduct broadly because the legislature has not created a general whistleblower protection statute protecting employees who investigate and internally report suspected criminal activity. Cases construing this form of protected conduct include:

- Recognizing an *Adler* claim in *Bleich v. Florence Crittenton Servs.*, 98 Md. App. 123 (1999), where a former teacher at a child care facility claimed she was terminated for reporting instances of child abuse to a state child care licensing agency.
- Finding that the physicist in *Thompson v. Mem'l at Easton, Md., Inc.*, 925 F. Supp. 400 (D. Md. 1996), failed to state an *Adler* claim when he alleged that his employment was terminated because he intended to "blow the whistle" on the hospital's practice of billing Medicare for complex radiation calculation plans when less complex and less expensive calculations were actually being performed, but had no statutory duty to report the hospital's billing irregularities.
- Finding that employees alleging that their employer closed the plant in retaliation for their cooperation in a state and federal prosecution for the employer's toxic waste dumping could not maintain an *Adler* claim because CERCLA provides its own

procedure for employees to seek relief for such retaliation. *Miller v. Fairchild Indus., Inc.*, 97 Md. App. 324 (D. Md. 1987)

While the *Adler* tort is limited to the termination of employment, many federal whistleblower protection statutes provide a remedy for adverse employment actions short of termination. For instance, in *Rachel-Smith v. FTData, Inc.*, 274 F Supp. 2d 734, 753-54 (D. Md. 2003), the court concluded that the employee failed to state an *Adler* claim where the employer did not terminate her because of her refusal to engage in prostitution, a violation of Maryland public policy. Indeed, most federal whistleblower protection statutes cover a broad range of adverse actions, including termination, suspension, demotion, reduction in pay, failure to promote, failure to hire and blacklisting.

II. Sources of Public Policy

Sources of public policy for an *Adler* claim include clear and particularized pronouncements of public policy in the United States Constitution, the Maryland Constitution, and federal and Maryland statutes and regulations. In *Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 580 (D. Md. 1982), the federal court found that discharge resulting from an employee's threatened exposure of employer's violations of federal tax laws violates clear mandate of public policy. The Court of Appeals also recognized this narrow public policy exception in *Ewing v. Koppers Co.*, 312 Md. 45, 50 (1988) where discharge of an employee in retaliation for filing a workers' compensation claim was found to violate a clear mandate of Maryland public policy. According to the court in *King v. Marriott Int'l Inc.*, 160 Md. App. 689, 701 n.8 (2005), "[p]ublic policy mandates supporting wrongful discharge claims have been found in both Maryland and federal statutes, regulations, and to the extent consistent, the common law."

III. Pleading Requirements and Burden of Proof

While there is no heightened pleading requirement for an *Adler* claim, it is critical to plead with specificity the public policy that the employer violated by discharging the plaintiff. In *Adler*, 291 Md. 31, 44 (1981) for instance, the court rejected the plaintiff's complaint on the grounds that the complaint was "too general, too conclusory, too vague and lacking in specifics to mount up to a *prima facie* showing that the claimed misconduct contravened [a statute prohibiting corporate officers from misrepresenting a company's assets or liabilities to the public] and hence violated the public policy of this State." The *prima facie* case consists of the following elements:

1. Plaintiff was an at-will employee terminated by the defendant;
2. The termination of the plaintiff's employment violates a specific public policy;
3. There is a causal nexus between the public policy violation and the employer's decision to terminate the plaintiff.

The Maryland court in *Lee v Denro*, 91 Md. App. 822 adopted Connecticut's standard found in *Sheets v. Teddy's Frosted Foods, Inc.* 427 A.2d 385 (Conn. 1980) for determining the specificity needed to state a *prima facie* claim of wrongful discharge in a whistleblower case.

IV. Alternative Remedies

Where the public policy foundation for an *Adler* claim is expressed in a statute, and that statute already contains a remedy for vindicating the public policy objectives, then the discharged employee can pursue the claim only through the existing statute. For example, before bringing an *Adler* claim, it is critical to evaluate whether the source of public policy originates from a statute that provides a remedy for the *Adler* plaintiff. For example, in *Makovi v. Sherwin-Williams Co.*, 316 Md. 603 the court dismissed plaintiff's *Adler* claim because she had an alternative remedy under Article 49B. Similarly in *Terry v. Legato Sys., Inc.*, 241 F. Supp. 2d 566, 571 (D. Md. 2003), the plaintiff's wrongful discharge claim for reporting alleged discrimination was dismissed because Title VII already provides a remedy for such wrong. As noted in 6 Emp. Discrim. Coord., *Analysis of Related Issues and Actions* § 3:18 (2008), an *Adler* claim will generally be preempted where: (1) the challenged conduct is regulated by labor relations laws such as the National Labor Relations Act or the Labor-Management Relations Act; (2) resolution of the claim requires interpretation of collective bargaining agreements regulated by labor relations laws such as the Labor-Management Relations Act or the Railway Labor Act; (3) the challenged conduct is regulated by a federal law covering a particular term or condition of employment, such as the Employee Retirement Income Security Act; or (4) the employment is in a field regulated by federal antidiscrimination laws, federal safety or environmental laws, or federal banking and lending laws.

V. Tips for Representing Whistleblowers in *Adler* Actions

A. Forum Selection

Employees generally obtain higher verdicts in state court and are more likely to survive summary judgment in state court. In addition, the Fourth Circuit has construed *Adler* more narrowly than Maryland courts. Accordingly, state court is the preferred forum for litigating an *Adler* claim.

B. Discovery

In discovery, plaintiff should focus on developing evidence on the following issues:

- Direct evidence of retaliatory motive, such as an admission that the decision-maker was angry at the employee for engaging in protected conduct.
- Close temporal proximity between the employee's protected conduct and the decision to terminate the employee.
- Deviation from company policy or practice, such as singling out the whistleblower for extraordinary disciplinary action. For example, if the whistleblower is disciplined for sending an innocuous email to his spouse to let her know that he is working late, and the company has not disciplined other employees for sending inappropriate emails, the disciplinary action taken against the whistleblower will provide evidence of disparate treatment.
- Comparative evidence demonstrating disparate treatment.
- Animus for the employee's protected conduct. The high cost to the employer of complying with the law or regulation implicated by the employer's whistleblowing suggests employer animus. Conversely, develop evidence on the revenue that the

employer generated or expected to generate by engaging in a fraudulent scheme about which the employee complained.

- Falsity of the employer's alleged business justification for the discharge.
- Evidence of unusual efforts by a senior manager or officer to retaliate against the whistleblower. For example, if a senior officer who is not responsible for evaluating the whistleblower's performance and who typically does not evaluate the performance of an employee at the level of the whistleblower, spends time papering the personnel file of the whistleblower to create a justification for terminating the whistleblower, it would be very suspicious. This type of conduct may also demonstrate malice.

C. Deciding Whether to Name an Individual Defendant

Adler claims can be asserted against supervisory employees who play a primary role in the decision to terminate the employee. The justification for individual liability according to the court in *Moniodis v. Cook*, 64 Md. App. 1, 13-14 (1985), is that an employee who plays a dominant role in the decision to terminate the plaintiff acts as an alter ego of the employer and should not be permitted to take refuge behind the corporate veil to avoid liability for wrongful discharge. In assessing whether to name a decision-maker as a defendant, consider whether naming an individual will result in removal to federal court by creating diversity jurisdiction, whether the individual's demeanor will encourage a jury to award punitive damages or instead engender sympathy from the jury, and whether the individual has insurance beyond that available to the employer to pay a judgment.

D. Maximizing Damages

A prevailing plaintiff can recover backpay (lost wages and benefits from the time of discharge until the time of the trial offset by the plaintiff's wage earnings received subsequent to the unlawful termination), frontpay (future loss of wages and benefits), emotional distress, reputational harm, and punitive damages. Plaintiff has a duty to mitigate damages, *i.e.*, to make reasonable efforts to find comparable employment. Accordingly, *Adler* plaintiffs should keep detailed records of their job searches so that they can offer evidence of mitigation.

Under Maryland law, punitive damages can be awarded only upon a showing of malice, which can be inferred from circumstantial evidence. *Kessler v. Equity Mgmt., Inc.*, 82 Md. App. 577, 591 (1990). For example, the employer's animus toward the employee's protected activity is a strong indication of malice. Similarly, evidence that the employer deviated from policies or protocols in terminating the whistleblower can help prove malice.

To obtain substantial punitive damages, it is critical to focus on what it would cost to deter the employer from violating the public policy. For example, an employer that terminates an employee for reporting the discharge of toxic waste into public waterways will not be deterred merely by paying lost wages to the discharged employee, but instead could be deterred by paying the cost of cleaning up the pollution that it caused.

The plaintiff's evidence of damages should be as detailed as the evidence of the employer's liability. For example, a plaintiff should proffer detailed evidence of the basis for

calculating lost wages and benefits, and should offer detailed testimony from friends and family of the plaintiff describing how the wrongful discharge affected the plaintiff.

E. Whistleblower Attributes that Strengthen an *Adler* Claim

The following attributes increase the likelihood of success:

- A long-term employee with a satisfactory or better performance record and at least some prior expertise in the subject matter about which she is blowing the whistle.
- A whistleblower who discloses wrongdoing in a timely manner using the employer's established complaint protocol in a non-contumacious manner.
- A whistleblower who is not complicit in the employer's wrongdoing.
- A whistleblower who complains about a matter of public concern (e.g., a matter relating to public health or safety).
- A whistleblower who cooperates fully in the employer's investigation of the disclosure.
- A whistleblower who the employer terminates within six (6) months of the protected disclosure, exercise of a statutory right, or refusal to engage in an illegal act.

F. Selecting a Theme

Before trying the case, be prepared to answer the core question in the minds of jurors: why does the plaintiff deserve relief? Keep the focus on the employer's conduct and make the jury understand why your client found it necessary to blow the whistle. Emphasize the public interest aspect of the case. For example, if your client refused to follow orders to sell contaminated food, focus on the employer's callous disregard for public safety. The employer's motive for terminating plaintiff is not just a core legal element; it is also a core focus of the plaintiff's trial presentation.

VI. Conclusion

Adler claims provide a fertile ground for discharged employees to hold employers accountable for terminations that violate a clear mandate of public policy, including the opportunity to recover substantial punitive damages. This amorphous yet potent tort provides a powerful tool to employees that should enable whistleblowers to continue to obtain high verdicts against employers who violate a clear mandate of public policy in terminating an employee.