

Watch Out!
**Here Come More Claims for
Workers' Compensation Retaliation**

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Most employers understand that Nebraska is an “at-will” employment state. This generally means that, absent a contractual or legal restriction to the contrary, employment relationships that are indefinite in duration can be terminated at any time, with or without reason. Over the years, courts and legislatures have created a number of exceptions to the “at-will” rule. Indeed, many believe that there are now so many exceptions that they have gobbled up the “at-will” rule.

One of those exceptions is the public policy exception to employment at will. This exception, created by courts, allows employees to claim damages for wrongful discharge when the motivation for the termination violates established Nebraska public policy. Generally, public policy exception cases can be grouped into three categories: (a) wrongful termination for refusing to commit an unlawful act; (b) wrongful termination for fulfilling an important public obligation; and (c) wrongful termination for exercising a right or privilege.

In 2003, the Nebraska Supreme Court recognized for the first time a public policy exception to employment at will that bars employers from terminating employees in retaliation for seeking workers' compensation benefits, *i.e.*, exercising a legal right or privilege. Unfortunately, in recent weeks the Nebraska Supreme Court decided to extend this exception even further so as to prohibit employers from demoting employees in retaliation for filing workers' compensation claims.

In *Trosper v. Bag 'N Save* (Case No. S-05-889, July 6, 2007), plaintiff Kimberlee Trosper was an at-will employee for Bag 'N Save grocery store when she suffered a work-related injury that required medical treatment. Trosper was demoted from a deli manager to deli clerk after filing a workers' compensation claim. Her demotion resulted in a annual salary decrease from \$30,100 to \$22,500. Trosper then filed a lawsuit alleging that Bag 'N Save demoted her in retaliation for her filing for workers' compensation in violation of the public policy exception to at-will employment.

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A majority of the Nebraska Supreme Court, citing the 2003 case, ruled that *Trosper* had a claim for wrongful termination in violation of the public policy of Nebraska. The court reasoned that the duty to compensate injured workers would be “seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge.” In *Trosper*, the court concluded that prohibiting retaliatory demotion is “a necessary and logical extension of the cause of action for retaliatory discharge.” The court reasoned that the extension of the public policy exception was necessary to prevent employers from negating its 2003 decision prohibiting retaliatory discharge by threatening employee’s with demotion and actions short of termination. The court stressed that “the employee must be able to exercise h[er] right in an unfettered fashion without being subject to reprisal,” and that “an employee’s right to be free from retaliatory demotion for filing a workers’ compensation claim is married to the right to be free from discharge.” While the majority in *Trosper* noted that its holding applied only to demotion, it did acknowledge that it would address other retaliatory conduct on a “case-by-case” basis.

Two judges dissented from the majority opinion contending, in part, that decisions relating to the creation of a new basis for retaliatory discharge should be made by the Nebraska Legislature, not the courts.

LESSON: Regardless of what the majority in *Trosper* claims, Nebraska employers should anticipate seeing an increase in the number of claims for workers’ compensation retaliation. These claims will come not just from decisions involving terminations and demotions, but also suspensions, reassignments, poor performance reviews, and other material adverse employment actions.

Before taking any potentially adverse employment action against an employee who has sought or received workers’ compensation benefits, employers should carefully consider whether they have a legitimate, nonretaliatory, well-documented basis for the decision. Employers should also reevaluate their return-to-work policies and practices to determine whether they possibly violate the new standard announced in *Trosper*.

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