**Whistleblowing – There’s a Right Way and a Wrong Way**

**Teaching Note**

**Critical Incident Overview**

Patrick Drummond was appointed president of Land Learning Foundation in 2007. While working for the Foundation, Mr. Drummond came to believe that the owners were engaging in illegal tax fraud. When he told the owners what he suspected, they terminated his employment. After he was terminated, Mr. Drummond reported the alleged wrongdoing to the Internal Revenue Service and the Army Corps of Engineers. He also filed a lawsuit against his employers for wrongful termination. Does Mr. Drummond have a valid claim for wrongful termination?

This critical incident is designed to encourage discussion concerning the employment-at-will doctrine, why we follow it and when and why we allow exceptions to it. The critical incident is intended for classes in Business Law and Employment Law, but may also be used in classes on Human Resources and Management.

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**Research Methods**

This critical incident was written based on court filings and the opinions issued in the Drummond v. Land Learning Foundation case.

**Learning Objectives**

After reading and analyzing the critical incident, the students should be able to:

1. Demonstrate an understanding of how the employment-at-will doctrine works; (B3)
2. Explain the justification for the employment-at-will doctrine; (B4)
3. Analyze the exceptions to the employment-at-will doctrine; (B4)
4. Explain the justifications for the public policy exception to the employment-at-will doctrine; (B4) and
5. Evaluate Mr. Drummond’s behavior under the employment-at-will doctrine. (B6)

**Questions**

1. What is the employment-at-will doctrine and why do we follow it? (LO1 & 2)
2. Under what circumstances do we allow exceptions to the doctrine? (LO 3)
3. Why do we have the public policy exception? What public policies are served by the exception? (LO 4)
4. Will Mr. Drummond succeed in his lawsuit? Why or why not? (LO5)
5. If you were Mr. Drummond, what, if anything, would you have done differently? (LO 5)

**Answers to Questions**

1. What is the employment-at-will doctrine and why do we follow it?

The employment-at-will doctrine provides that, unless an employment contract specifically provides otherwise, either the employer or the employee may terminate an employment relationship at any time for any reason (National Conference of State Legislatures, 2013). The students should all be familiar with the 13th amendment to the US Constitution. The 13th amendment states that “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction” (U.S. Const. amend. XIII (1865)). Involuntary servitude involves forcing one person to work for another person against their will (Black, 1979). Therefore, the 13th Amendment prohibits forcing an employee to work for an employer against their will and gives the employee the right to terminate an employment relationship at any time for any reason. If an employee can terminate the employment relationship at any time, fundamental fairness dictates that employers have the same right.

1. Under what circumstances do we allow exceptions to the doctrine?

The types of exceptions are noted in the critical incident; this question is designed to test the students’ understanding of the exceptions by asking them to give an example of when an exception might be claimed by an employee. If this critical incident is being used in a law class, the instructor might ask the students to find real cases demonstrating the different exceptions.

The exceptions generally fall under one of three theories: 1) contract theory, 2) tort theory) and 3) public policy theory. If the students are hesitant to give examples, the instructor can offer the following:

1. Contracts may be express or implied. Express contracts are verbal or written expressions of an agreement between two or more parties. Implied contracts are contracts that are created not by the verbal or written agreement by the parties, but by their actions when it would be unfair or unjust to find otherwise (Black, 1979).

If an employee has an express contract that states that the employee will not be fired except for good cause, then the employee is not an employee-at-will. In addition, if an employee can prove an implied contract that states that the employee will not be fired except for good cause, then the employee is not an employee-at-will (Muhl, 2001). Implied contracts have been found using employee manuals or handbooks. Implied contracts have also be found in situations where a representative of the employer, such as a member of the employer’s human resources’ department or an employee’s supervisor tells an employee that the employer never terminates anybody except for good cause (Muhl, 2001).

In addition, a small number of states have found that every employment relationship includes an implied covenant of good faith and fair dealing (Muhl, 2001). Under this exception to the employment-at-will doctrine, an employer that terminates an employee for an arbitrary or unjustified reason breaches this implied covenant (Muhl, 2001). For example, suppose an employment contract lists the specific grounds for termination. One of the grounds listed is making false statements during the employment application process. Now suppose an employer wants to terminate a specific employee so the employer looks back through the employee’s application and resume. While doing so, the employer discovers that the employee’s resume states that the employee graduated from law school in 1987. The employer knows for a fact that the employee graduated from law school in 1986. If the employer uses that to terminate the employee on the grounds that the employee made a false statement during the application process, the employer may be held to be in breach of the implied covenant of good faith and fair dealing.

For real cases dealing with the implied covenant of good faith and fair dealing in the employment area, consider Fortune v. National Cash Register Co. and Monge v. Beebe Rubber Co. In Fortune, an employer terminated a twenty-five year employee the day after the employee obtained a $5,000,000 order for the employer. The court in that case held that a jury was entitled to conclude that the termination was motivated by the employer’s desire to avoid paying the employee the bonus he had earned on the sale and that such a termination was a breach of the implied covenant of good faith and fair dealing (Fortune, 1977). In Monge, a female employee alleged that she was terminated because she refused her male supervisor’s advances. The jury concluded that the termination was “maliciously motivated” and the court found that such a termination was in violation of the implied covenant of good faith and fair dealing (Monge, 1974).

1. Under the tort theory exception, an employee terminated without cause may have a claim against their former employer for intentional infliction of emotional distress (National Conference of State Legislatures, 2013) or misrepresentation and fraud (Meadows, 2000).

An employee may have a cause of action against their employer for intentional infliction of emotional distress if they can show that their employer’s extreme or outrageous conduct was intended to inflict emotional distress upon them and that severe emotional distress did in fact occur as a result of the employer’s extreme or outrageous conduct. (Cavico, 2003). A defendant’s action will be considered “extreme and outrageous” only if “the conduct has been so outrageous in character, and so extreme in degree, so as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (Cavico, 2003). Behavior that is merely “insensitive, rude, insulting, indignant or annoying” will not support a claim for intentional infliction of emotional distress (Cavico, 2003).

In Wilson v Monarch Paper Co., the court was presented with a case in which an employer was unwilling to fire an executive vice-president with a college degree and thirty years of experience outright but instead tried to humiliate him so he would quit on his own. The employer stripped the employee of his executive duties and demoted him to an entry-level position where his responsibilities included janitorial and cleaning services. The court found that the employer’s “degrading,” and “mean spirited” behavior created a constructive discharge and found for the employee on his claim for intentional infliction of emotional distress (Cavico, 2003).

An employee may also be able to challenge their termination if they can prove that the employer engaged in misrepresentation and fraud separate from the employment contract. If an employee can show that the employer misrepresented the terms of employment and the employee relied on the misrepresentation to their detriment in accepting the employment, the employee may have a claim for misrepresentation and fraud.

For example, in O’Neil v. Stifel, Nicolaus & Co., a court allowed an employee to “dance around the barrier of the employment at-will doctrine” by demonstrating that his former employer engaged in misrepresentation and fraud (Meadows, 2000). In that case, O’Neil proved that Stifel fraudulently induced him to accept a position with the company and that he relied on the employer’s misrepresentations to his detriment by beginning the process of ending his current employment and recruiting an assistant to help him in his new job. The court held that since O’Neil’s claims arose out of the negotiations rather than the employment contract itself, O’Neil’s claims were not barred by the employment-at-will doctrine. Similarly, in Bernoudy v. Dura-Bond Concrete Restoration, Inc., the employees were allowed to avoid the employment-at-will doctrine by showing that Dura-Band had made false statements promising them that they would have jobs with Dura-Band if they sold their business to the owners of Dura-Band. Again, the court found that the employees had made a submissible case for fraud because the claim did not arise out of the employment contract itself, but out of negotiations prior to the employment contract (Meadows, 2000).

1. Under the public policy theory, an employee termination is wrongful if the termination was based on an action that violated public policy. An action violates public policy only if it is “injurious to the interests of the public or contravenes some established interest of society” (Ogden, 2008). Therefore, public policy is not implicated when an employee exercises “merely private rights”, such as the right to vacation or sick leave, or the right to refuse to sign a non-compete agreement (Ogden, 2008). However, public policy is implicated when an employee is terminated in retaliation for having exercised a fundamental right, such as the right to serve on a jury (Ogden, 2008).

Terminating an employee for any of the following reasons have been held to violate public policy: “refusing to participate in an illegal activity; performing an important public obligation; exercising a legal right or interest; exposing some wrongdoing by the employer; performing an act that public policy would encourage; or refusing to do something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice or retaliation” (Ogden, 2008).

The employee terminations in each of the following cases were found to have violated public policy:

1. In Petermann v. International Brotherhood of Teamsters, an employee was terminated because he refused to lie to the state legislature (Swift, 2010).
2. In Gantt v. Sentry Insurance, an employee was terminated because he supported another employee in their sexual harassment claim (Swift, 2010).
3. In Nees v. Hocks, an employee was terminated because she refused to ask to be excused from jury duty (Swift, 2010).
4. In Novosel v. Nationwide Insurance Co., an employee was terminated because he refused to support a bill that his employer thought would be good for the company (Swift, 2010).
5. In Frampton v. Central Indiana Gas Co., an employee was terminated shortly after she received a settlement in a workers’ compensation claim (Swift, 2010).
6. In Sabine Pilot Service, Inc. v. Hauck, the employer told the employee to pump a boat's bilges into the water. When the employee confirmed that it was illegal to pump a boat’s bilges into the water, he refused to do it, and the employer terminated him (Swift, 2010).
7. In Vermillion v. AAA Pro Moving & Storage**,** a salvage company stole some things that it salvaged from a wreck and ordered its employee to conceal the theft. Instead, the employee reported the theft to the customer. When the employer found out, he terminated the employee (Swift, 2010).
8. In Palmateer v. International Harvester Co., an employee was terminated after he reported a co-worker’s criminal activity to the authorities and agreed to cooperate with the authorities in the investigation of that criminal activity (Swift, 2010).
9. Why do we have the public policy exception? What public policies are served by the exception?

There are several public policies served by the public policy exception. This question is designed to initiate a discussion of those policies. In order to get the discussion going, the instructor might want to share the policy justifications given by the courts in a few of the cases noted above.

The court in Nees observed that if an employer were free to terminate an employee for serving on a jury, then the jury system would be adversely affected and “(t)he moral of the community” would be adversely affected (Swift, 2010).

In holding for Novosel**,** the court noted that the state constitution provided the necessary public policy, emphasizing that voting "strikes at the heart of a citizen's social right, duties and responsibilities" (Swift, 2010).

The court in Frampton, first noted that one of the purposes of workers' compensation is "to transfer from the worker to the industry in which he is employed and ultimately to the consuming public a greater portion of economic loss due to industrial accidents and injuries." The court then reasoned that even though the employment-at-will doctrine permits employers to discharge at-will employees without cause, the state Workers' Compensation Act provided a “fundamental and well stated public policy” that would be thwarted if employers were allowed to terminate employees for filing workers’ compensation claims (Swift, 2010).

In finding for the employee in Vermillion, the court held that the employer's conduct violated the state's public policy and "any other conclusion by this court would encourage unlawful conduct by employers and force employees to either consent and participate in a violation of law or risk termination" (Swift, 2010).

Lastly, in Palmateer, the court found that the public policy exception applied to provide whistleblower protection for an employee, because “(p)ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy (Palmateer, 1981).

1. Will Mr. Drummond succeed in his lawsuit? Why or why not?

Mr. Drummond claimed he was wrongfully terminated because his termination violated public policy. He claimed the termination violated public policy because it was in retaliation for whistleblowing (Appellants brief, 2011).

Persons acting in good faith who have probable cause to believe crimes have been committed should be encouraged to report suspected illegal activities to the proper authorities in order to expose the wrongdoing and aid in the investigation and prosecution of the wrongdoers (Drummond, 2011). However, reporting the wrongdoing to the wrongdoer is not enough to invoke protection under the whistleblowing public policy exception because it does nothing to expose the wrongdoer or the wrongdoing (Drummond, 2011). Instead, reporting the wrongdoing to the wrongdoer may allow the wrongdoer to avoid prosecution, contrary to public policy (Drummond, 2011). Before he was terminated, Mr. Drummond reported the alleged wrong doing to his employers, the alleged wrongdoers. However, since reporting the alleged wrongdoing to the alleged wrongdoers did not “expose” the alleged wrongdoing, it did not constitute whistleblowing, so even if his termination was in retaliation for that, it would not be in retaliation for whistleblowing.

Although Mr. Drummond did eventually report the alleged wrongdoing to the Internal Revenue Service and the Army Corps of Engineers, he did not do so until after he was terminated; therefore, his termination could not be in retaliation for that. Under the circumstances, Mr. Drummond could not prove that his termination was in retaliation for whistleblowing.

1. If you were Mr. Drummond, what, if anything, would you have done differently?

If you were Mr. Drummond and you wanted to secure your right to sue for wrongful termination on the basis of whistleblowing, you would have had to have actually “blown the whistle” by exposing the crime before you were terminated. In other words, you would have had to have reported the alleged wrongdoing to the Internal Revenue Service and/or the Army Corps of Engineers before you were terminated, not after.

**Epilogue**

Admittedly, things did not work out well for Mr. Drummond. However, to give the students another perspective, the instructor may want to discuss the case of Bradley Birkenfeld, a former banker at UBS, who blew the whistle on UBS for assisting American citizens in tax evasion. The information he provided to the Internal Revenue Service (“I.R.S.”) resulted in the recovery of more than $5 billion in unpaid taxes. The I.R.S. has the power to award whistleblowers up to 30 percent of any fines and unpaid taxes that it recovers and it awarded Mr. Birkenfeld $104 million for his assistance. The award was the largest award ever paid by the I.R.S. It should be mentioned that Mr. Birkenfeld was convicted for his part in the tax evasion scheme and served two and a half years in prison. His $104 million award amounted to more than $4,600 for every hour he spent in prison! (Kocieniewski, 2012)

**Additional Pedagogical Materials**

If this critical incident is being used in a business law class or an employment law class (or any other class focusing on law) , the instructor might want to have the students use Lexis/Nexis to find the Missouri Court of Appeals opinion in the Drummond v Land Learning Foundation case. They can find the opinion by entering “Drummond” and “Land Learning Foundation” in the “parties” field under “look up a legal case”. The instructor may also want to have the students brief the case. I have attached a copy of the court opinion as Exhibit 1. I have also attached a format for the brief as Exhibit 2 and a sample brief of the case as Exhibit 3.

For a 50 state survey of wrongful discharge laws, please see The National Employer (2009/2010), 50-State Survey of Wrongful Discharge Law, Retrieved July 1, 2013 from <http://www.justcausereform.com/wp-content/uploads/2012/09/The-National-Employer.-50-STATE-SURVEY-OF-WRONGFUL-DISCHARGE-LAW.pdf>.

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U.S. Const. amend. XIII (1865).

Exhibit 1

**PATRICK SCOTT DRUMMOND, Appellant, vs. LAND LEARNING FOUNDATION, EVANS & EVANS OUTDOOR, LLC, EVANS & EVANS FARMS, LLC, and EVANS EQUIPMENT COMPANY, INC., Respondents.**

**WD73613**

**COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, DIVISION TWO**

**358 S.W.3d 167; 2011 Mo. App. LEXIS 1640**

**December 13, 2011, Opinion Filed**

**SUBSEQUENT HISTORY:** Transfer denied by Drummond v. Land Learning Found., 2012 Mo. LEXIS 87 (Mo., Mar. 6, 2012)

**PRIOR HISTORY:**  **[\*\*1]**

APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSOURI. The Honorable Dennis A. Rolf, Judge.

**CASE SUMMARY:**

**OVERVIEW:** The employee reported his suspicions of tax fraud by respondents to respondents. Such report of wrongdoing to the wrongdoers did not constitute whistleblowing as it did not expose them or their alleged wrongdoing in such a way as to remedy the wrong. The employee should have reported his suspicions to an outside third party authority. By complaining of wrongdoing only to the wrongdoers prior to his termination, the employee did not engage in whistleblowing within the public policy exception to the employment at-will doctrine.

**OUTCOME:** Judgment affirmed.

**CORE TERMS:** wrongdoing, wrongdoer, public policy, reporting, at-will, whistleblowing, summary judgment, suspected, proper authorities, terminated, matter of law, cause of action, whistleblower, movant, expose, public policy, termination, genuine, whistle, wrongful termination, wrongful discharge, well-established, uncontroverted, non-moving, non-movant, misconduct, contacted, depending, suspicions, claimant's

**LexisNexis(R) Headnotes**

***Civil Procedure > Summary Judgment > Appellate Review > Standards of Review***

***Civil Procedure > Appeals > Standards of Review > De Novo Review***

[HN1] Appellate review of the grant of summary judgment is de novo.

***Civil Procedure > Summary Judgment > Appellate Review > Standards of Review***

***Civil Procedure > Summary Judgment > Standards > General Overview***

[HN2] Summary judgment will be upheld on appeal if a movant is entitled to judgment as a matter of law and no genuine issues of material fact exist.

***Civil Procedure > Summary Judgment > Appellate Review > Standards of Review***

***Civil Procedure > Summary Judgment > Supporting Materials > General Overview***

[HN3] The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. Facts contained in affidavits or otherwise in support of a party's motion for summary judgment are accepted as true unless contradicted by a non-moving party's response to the summary judgment motion.

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > Absence of Essential Element of Claim***

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants***

***Civil Procedure > Summary Judgment > Standards > General Overview***

[HN4] A defending party may establish a right to judgment as a matter of law by showing any one of the following: (1) facts that negate any one of the elements of the claimant's cause of action, (2) the non-movant, after an adequate period of discovery, has not and will not be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense.

***Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants***

***Civil Procedure > Summary Judgment > Opposition > General Overview***

[HN5] Once a movant has established a right to judgment as a matter of law, the non-movant must demonstrate that one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed. The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial.

***Labor & Employment Law > Employment Relationships > Employment at Will > Duration of Employment***

[HN6] Absent an employment contract with a definite statement of duration an employment at will is created.

***Labor & Employment Law > Employment Relationships > Employment at Will > General Overview***

[HN7] Generally, at-will employees may be discharged for any reason or for no reason, and they have no cause of action for wrongful termination as a matter of law.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > General Overview***

[HN8] The at-will employment doctrine is limited. An at-will employee may not be terminated for being a member of a protected class, such as race, color, religion, national origin, sex, ancestry, age or disability.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN9] Missouri recognizes the narrow public policy exception to the at-will employment doctrine. The public policy exception provides that an at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities. If an employer terminates an employee for either reason, the employee has a cause of action against the employer for wrongful discharge.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN10] Public policy encourages employees to report suspected wrongdoing to the proper authorities in order to expose the wrongdoing, to prevent further wrongdoing, and to aid in the investigation and prosecution of the wrongdoers.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN11] If an employee does, in fact, carry out the public policy mandate by reporting suspected criminal activity to the proper authorities, the employee whistleblower should not be subjected to the loss of his or her job. That is the bedrock on which the public policy exception was created.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN12] To effectuate the clear mandate of public policy implicated in a given situation, it is axiomatic that the at-will employee report or blow the whistle to the proper authorities, which, depending on the circumstances, would include the employer, internal whistleblowing, and/or a third-party authority, external whistleblowing. Internal reporting to superiors of illegal actions by other employees can constitute protected activity.

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN13] An employee who is fired for informing his superiors of wrongdoing by other employees is entitled to bring suit.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN14] A report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception. Reporting to the wrongdoer does not expose the wrongdoer or his wrongdoing and, thus, does not further the accepted clear mandate of public policy.

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN15] If wrongdoing occurred, the wrongdoer necessarily knows of the misconduct already because he is the one that engaged in the misconduct and is not the person likely to remedy the wrong.

***Labor & Employment Law > Employment Relationships > Employment at Will > Exceptions > Public Policy***

***Labor & Employment Law > Wrongful Termination > Whistleblower Protection Act > Coverage & Definitions > Protected Activities***

[HN16] While a report of wrongdoing to the wrongdoer may in some instances have the intended effect of stopping future criminal activity, it does not expose wrongdoers and their past wrongdoings in such a way as to remedy a public ill. Instead, it allows wrongdoers to escape detection and avoid prosecution for past wrongdoing, while in no way affording the victims an opportunity to protect themselves from further wrongdoing. Such is contrary to the clear mandate of public policy.

**COUNSEL:** Gene P. Graham, Jr., and Deborah J. Blakely, Independence, MO; Timothy W. Monsees, Kansas City, MO, Attorneys for Appellant.

Michael J. Gorman and Mikki L. Copeland, Kansas City, MO, Attorneys for Respondents Land Learning Foundation, Evans &Evans Outdoor, LLC, and Evans & Evans Farms, LLC.

Kevin D. Case and Patric S. Linden, Kansas City, MO, Attorneys for Respondent Evans Equipment Company, Inc.

**JUDGES:** Before Division Two: Mark D. Pfeiffer, Presiding Judge, Victor C. Howard, Judge and James Edward Welsh, Judge. All concur.

**OPINION BY:** VICTOR C. HOWARD

**OPINION**

**[\*169]** Patrick Drummond appeals the summary judgment entered by the trial court in favor of the Land Learning Foundation, Evans & Evans Outdoor, LLC, Evans & Evans Farms, LLC, and Evans Equipment Company, Inc. (collectively "Defendants") on his claim for wrongful discharge under a whistleblower theory. The judgment is affirmed.

**Factual and Procedural Background**

The facts are uncontroverted. Two brothers, Brad and Bryce Evans, own Defendants. Defendants hired Mr. Drummond to serve as president of and to operate the Land Learning Foundation, a non-profit entity. Among Mr. **[\*\*2]** Drummond's duties was to market property to hunters who would pay for guided hunts. Mr. Drummond was directed and managed in his duties by the Evans brothers.

During the course of his employment, Mr. Drummond suspected that the Evans brothers were using the Land Learning Foundation to engage in tax fraud. He was concerned that its receipt of $175,000 in public monies for a conservation easement was illegal or fraudulent and confronted the Evans brothers about the possible tax fraud on several occasions. On December 6, 2005, Mr. Drummond met with the Evans brothers to discuss ongoing projects. During the meeting, Mr. Drummond again confronted them about whether they were using the Land Learning Foundation to engage in tax fraud. The Evans brothers immediately terminated Mr. Drummond's employment.

Following his termination, Mr. Drummond contacted the IRS and the Army Corps of Engineers and reported the suspected wrongdoing. He also filed the instant action against Defendants for wrongful termination in violation of public policy. Defendants subsequently filed a motion for summary judgment. The trial court granted Defendants' motion finding that neither Mr. Drummond's report of wrongdoing **[\*\*3]** to the suspected wrongdoers nor his report to government officials after his termination constituted whistleblowing within the public policy exception to the employment at-will doctrine. This appeal by Mr. Drummond followed.

**Standard of Review**

[HN1] Appellate review of the grant of summary judgment is *de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp*., 854 S.W.2d 371, 376 (Mo. banc **[\*170]** 1993). [HN2] Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. *Id*. at 377. [HN3] The record is reviewed in the light most favorable to the party against whom judgment was entered, according that party all reasonable inferences that may be drawn from the record. *Id*. at 376. Facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id*.

[HN4] A defending party may establish a right to judgment as a matter of law by showing any one of the following: (1) facts that negate any one of the elements of the claimant's cause of action, (2) the non-movant, after an adequate period of discovery, has not and will not **[\*\*4]** be able to produce evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. *Id*. at 381.

[HN5] Once the movant has established a right to judgment as a matter of law, the non-movant must demonstrate that one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed. *Id*. The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial. *Id*.

**Discussion**

In his sole point on appeal, Mr. Drummond claims that the trial court erred in granting summary judgment in favor of Defendants. He claims that he appropriately "blew the whistle" by reporting the suspected wrongdoing to the Evans brothers.

"The at-will employment doctrine is well-established Missouri law." *Margiotta v. Christian Hosp. Ne. Nw*., 315 S.W.3d 342, 345 (Mo. banc 2010). [HN6] "Absent an employment contract with a definite statement of duration **[\*\*5]** . . . an employment at will is created." *Id*. (internal quotes and citation omitted). [HN7] Generally, at-will employees may be discharged for any reason or for no reason, and they have no cause of action for wrongful termination as a matter of law. *Id.; Fleshner v. Pepose Vision Inst., P.C*., 304 S.W.3d 81, 91 (Mo. banc 2010).

[HN8] The at-will employment doctrine is, however, limited. *Margiotta*, 315 S.W.3d at 346. An at-will employee may not be terminated for being a member of a protected class, such as "'race, color, religion, national origin, sex, ancestry, age or disability.'" *Id*. (quoting § 213.055, RSMo Cum. Supp. 2005). Additionally, [HN9] Missouri recognizes the narrow public policy exception to the at-will employment doctrine. *Id*. The public policy exception provides that "[a]n at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities." *Fleshner*, 304 S.W.3d at 92. If an employer terminates an employee for **[\*\*6]** either reason, the employee has a cause of action against the employer for wrongful discharge. *Id*.

Mr. Drummond alleged that his actions fell within the second public policy exception, commonly referred to as the whistleblowing exception. [HN10] Public policy **[\*171]** encourages employees to report suspected wrongdoing to the proper authorities in order to expose the wrongdoing, to prevent further wrongdoing, and to aid in the investigation and prosecution of the wrongdoers. *Faust v. Ryder Commercial Leasing & Servs*., 954 S.W.2d 383, 390-91 (Mo. App. W.D. 1997), *abrogated on other grounds by Fleshner v. Pepose Vision Inst., Inc*., 304 S.W.3d 81 (Mo. banc 2010). *See also Scott v. Mo. Valley Physicians, P.C*., 460 F.3d 968, 970 (8th Cir. 2006). [HN11] "[I]f an employee did, in fact, carry out this public policy mandate by reporting suspected criminal activity to the proper authorities, the employee whistleblower should not be subjected to the loss of his or her job." *Faust*, 954 S.W.2d at 391. "This is the bedrock on which the public policy exception was created." *Id*.

[HN12] "[T]o effectuate the clear mandate of public policy implicated in a given situation, it is axiomatic that the at-will employee report or 'blow the **[\*\*7]** whistle' to the proper authorities, which, depending on the circumstances, would include the employer, 'internal whistleblowing,' and/or a third-party authority, 'external whistleblowing.'" *Id*. Internal reporting to superiors of illegal actions by other employees can constitute protected activity. *Fleshner*, 304 S.W.3d at 97 n.13 ( [HN13] "[A]n employee who is fired for informing his superiors of wrongdoing by *other* employees is entitled to bring suit.") (emphasis added). *See also Bazzi v. Tyco Healthcare Group, LP*, 2010 U.S. Dist. LEXIS 32219, 2010 WL 1260141 at \*7 (E.D. Mo. 2010). However, [HN14] a report of wrongdoing to the wrongdoer is insufficient to invoke the whistleblowing public policy exception. *Fleshner*, 304 S.W.3d at 97 n.13; *Brenneke v. Dep't of Mo., Veterans of Foreign Wars of U.S. of Am*., 984 S.W.2d 134, 139 (Mo. App. W.D. 1998); *Faust*, 954 S.W.2d at 391. *See also Scott*, 460 F.3d at 970; *Bazzi*, 2010 U.S. Dist. LEXIS 32219, 2010 WL 1260141 at \*7; *Bartis v. John Bommarito Oldsmobile-Cadillac, Inc*., 626 F.Supp.2d 994, 1001 (E.D. Mo. 2009). Reporting to the wrongdoer does not expose the wrongdoer or his wrongdoing and, thus, does not further the accepted clear mandate of public policy. *Faust*, 954 S.W.2d at 391. *See also Huffman v. Office of Pers. Mgmt*., 263 F.3d 1341, 1350 (Fed. Cir. 2001) **[\*\*8]** (Whistleblower Protection Act encourages reports of wrongdoing that are likely to remedy the wrong); *Bartis*, 626 F.Supp.2d at 1001. [HN15] If wrongdoing occurred, the wrongdoer necessarily knew of the misconduct already because he is the one that engaged in the misconduct and is not the person likely to remedy the wrong. *Huffman*, 263 F.3d at 1350. [HN16] While a report of wrongdoing to the wrongdoer may in some instances have the intended effect of stopping future criminal activity, it does not expose wrongdoers and their past wrongdoings in such a way as to remedy a public ill. *Faust*, 954 S.W.2d at 391. *See also Bartis*, 626 F.Supp.2d at 1001. Instead, "[i]t allows wrongdoers to escape detection and avoid prosecution for past wrongdoing, while in no way affording the victims an opportunity to protect themselves from further wrongdoing." *Faust*, 954 S.W.2d at 391. Such is contrary to the clear mandate of public policy. *Id*.

It is uncontroverted that Mr. Drummond reported his suspicions of tax fraud by the Evans brothers to the Evans brothers. Such report of wrongdoing to the wrongdoers did not constitute whistleblowing. It did not expose the Evans brothers or their alleged wrongdoing in such a way as **[\*\*9]** to remedy the wrong. Mr. Drummond argues that he had no other superiors or supervisors to report to other than the alleged wrongdoers and to preclude his cause of action in this situation will discourage other similarly situated employees from bringing forward illegal actions and leave them without recourse **[\*172]** when terminated. He asserts that no other managers, no "800" number, and no human resources department were available to him. While we are sympathetic to Mr. Drummond's argument that those employed in small companies have fewer options for internal reporting, we are bound by precedent, which provided another available avenue to him for reporting his concerns--to a third party public authority.1 As stated above, the proper authority to whom to blow the whistle includes, depending on the circumstances, the employer and/or a third-party authority. *Fleshner*, 304 S.W.3d at 92; *Faust*, 954 S.W.2d at 391. Under the circumstances in which Mr. Drummond found himself, an outside third party authority would have been the proper authority to whom to report his suspicions. Indeed, Mr. Drummond ultimately contacted the IRS and the Corps of Engineers, but his reports did not occur until after his **[\*\*10]** employment was terminated.2 By complaining of wrongdoing only to the wrongdoers prior to his termination, Mr. Drummond did not engage in whistleblowing within the public policy exception to the employment at-will doctrine, and the trial court did not err in entering summary judgment in favor of Defendants.

1 *See Fowler v. Criticare Home Health Servs., Inc*., 27 Kan. App. 2d 869, 10 P.3d 8,15 (Kan. Ct. App. 2000) ("There was nothing about the fact that Fowler worked for a smaller company that prevented him from reporting to law enforcement, if he felt company reporting avenues were closed to him."). *See also Goenner v. Farmland Indus. Inc*., 175 F.Supp.2d 1271, 1280 (D. Kan. 2001) ("To qualify as whistle-blowing under *Fowler*, plaintiff had to seek out the intervention of a higher authority in the company, or, if there was no higher authority than [the wrongdoer] to report to, plaintiff had to seek out the intervention of law enforcement officials.").

2 Mr. Drummond does not contend that these post-termination reports qualified him as a whistleblower.

The judgment is affirmed.

VICTOR C. HOWARD, JUDGE

All concur.

Exhibit 2

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Facts:**

**Issue: (whether...)**

**Rule:**

**Application:**

**Conclusion:**

**Policy**:

**Dissent:**

Exhibit 3

**Drummond vs Land Learning Foundation**

**358 S.W. 3d 167; Mo. App. LEXIS 1640**

**Facts:** Patrick Drummond served as president of Land Learning Foundation (the “Foundation”), a non-profit entity owned by two brothers, Brad and Bryce Evans (collectively, the “Evans brothers”). As president, Mr. Drummond’s duties were managed by the Evans brothers. During the course of his employment, Mr. Drummond began to suspect that the Evans brothers were using the Foundation to engage in tax fraud. Mr. Drummond confronted the Evans brothers with his suspicions on multiple occasions. When he confronted them again during a meeting on December 6, 2010, they terminated his employment. Following his termination, Mr. Drummond contacted both the IRS and the Army Corps of Engineers and reported his suspicions.

Mr. Drummond also filed this lawsuit against the Evans brothers for wrongful termination in violation of public policy.The Evans brothers responded by filing a motion for summary judgment. The trial court granted the motion for summary judgment finding that neither Mr. Drummond’s reporting of the alleged wrongdoing to the Evans brothers during his employment nor his reporting of the alleged wrongdoing to government officials after his employment was terminated constituted whistleblowing within the public policy exception to the employment-at-will doctrine. Mr. Drummond then filed this appeal.

**Issue:** Whether the trial court erred in granting summary judgment in favor of the defendants because Mr. Drummond appropriately “blew the whistle” within the public policy exception to the employment-at-will doctrine by reporting the suspected wrongdoing to the Evans brothers.

**Rule:** The Employment-at-Will doctrine is well-established in Missouri law. It provides that, unless an employment contract specifically says otherwise, either the employer or the employee may terminate an employment relationship at any time for any reason. However, Missouri recognizes a public policy exception that provides that “(a)n at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.” If an employer terminates an employee for either of these two reasons, the employee has a cause of action for wrongful discharge.

**Application:** Mr. Drummond claims that his actions fell within the second public policy exception listed above, commonly known as the “whistleblowing exception.” He claims that he “blew the whistle” by reporting the suspected wrongdoing to the Evans brothers.

The purpose of the public policy exception is to encourage employees to report suspected wrongdoing 1) in order to expose the wrongdoing, 2) to prevent further wrongdoing and 3) to aid in investigating and prosecuting wrongdoers. If an employee reports suspected wrongdoing to the proper authorities, the employee should not then lose his job.

Under the public policy exception, an employee must report the alleged wrongdoing to the proper authorities, which, depending on the circumstances, may be internal or external parties. Internal reporting to superiors of alleged illegal activities of other employees can constitute whistleblowing. However, reporting the wrongdoing to the wrongdoer, as Mr. Drummond did in this case, does not expose the wrongdoer or his wrongdoing. In fact, it may allow the wrongdoer to escape detection and avoid prosecution. Reporting the wrongdoing to the wrongdoer does not further the purpose of the public policy exception and thus is insufficient to invoke the protection of the whistleblowing exception.

Mr. Drummond argues that he had no other internal parties available to him. The court was sympathetic to the argument that employees in smaller companies have fewer options for internal reporting, but pointed out that Mr. Drummond could have reported the alleged wrongdoing to an external party. In fact, Mr. Drummond did report the alleged wrongdoing to two external parties, the IRS and the Army Corp of Engineers, but he did not do so until after his employment was terminated.

**Conclusion:** The trial court did not err in granting summary judgment in favor of the defendants because Mr. Drummond did not appropriately “blew the whistle” within the public policy exception to the employment-at-will doctrine by reporting the suspected wrongdoing to the Evans brothers.

**Policy**: Reporting the alleged wrongdoing only to the alleged wrongdoers does not further the purpose of the public policy exception and thus is insufficient to invoke the protection of the whistleblowing exception.

**Dissent:** N/A