

Are We at a “Tipping” Point for Wrongful Discharge Claims in Minnesota?

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by Trevor Brown

A bartender is told by his employer, in violation of state law, that he must share tips with other employees. He refuses to comply and is fired. The state law in question says he can sue for being required to share tips, but doesn't say anything about suing because he was fired. ***Does the law effectively provide a “wrongful discharge” claim for the bartender, even though no such claim is expressly written into the statute and despite Minnesota’s strong adherence to the rule of at-will employment?*** The answer, provided in the recent Minnesota Supreme Court decision in *Burt v. Rackner, Inc.*, 2017 Minn. LEXIS 629 (Oct. 11, 2017), comes as something of a surprise. Its broader implications for the at-will rule, however, remain to be seen.

At-will employment is so firmly established in Minnesota law that it seldom receives a second thought. The rule in Minnesota, as in the overwhelming majority of states, is that employment relationships are terminable by either the employee or the employer, at any time and without advance notice, and for any reason or for no reason at all (just not for an unlawful reason). Put another way, discharging an employee is actionable only if it implicates an exception to the general at-will rule.

For the most part, the exceptions are based either on contract or statute. Contractual exceptions include individual employment contracts, collective bargaining agreements in unionized workplaces, and even employment handbooks or workplace policies (although careful drafting normally provides that handbooks and policies do not abrogate the at-will rule). Statutory exceptions include discrimination laws, “whistleblower” acts, and other laws defining employee “protected conduct.” If the conduct is protected by statute, then the law will typically state that the employee can sue if he or she is fired for engaging in such conduct. Further, some states recognize public policy exceptions to the at-will employment doctrine. But the bottom line is that at-will employment remains the norm.

That norm, however, may be subtly changing in Minnesota. In *Burt*, a divided Minnesota Supreme Court held that the Minnesota Fair Labor Standards Act (“MFLSA”), Minn. Stat. §§ 171.21-.35, allows employees to sue for wrongful discharge when they refuse to

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share tips, *even though the statute says nothing explicitly authorizing such a claim*. The case may be viewed as the only logical way to enforce the statutory requirement that employers in service industries or with tip-generating businesses cannot require employees to share tips with each other (although employees are free to do so voluntarily). Yet the underlying rationale for the Court's decision could have significant effects on the at-will employment doctrine in Minnesota.

The plaintiff in *Burt* worked as a bartender, earning tips in addition to his regular wage. At some point, his employer allegedly told him "that he needed to give more of his tips to the bussers, and that there would be consequences if that did not happen." Nevertheless, the plaintiff refused to share his tips. A few months later, he was told that his employment "was being terminated because [he] was not properly sharing his tips with other staff." Unable to find alternative employment, the plaintiff sued for wrongful termination. The District Court dismissed his case, but the Court of Appeals reversed.

In a 5-2 opinion, the Minnesota Supreme Court held that through the language of the MFLSA, the state legislature had expressly created a cause of action for employees who are terminated for refusing to share tips. Specifically, the Court relied on two provisions to find an express cause of action:

Under Minn. Stat. § 177.24, subd. 3,

No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees. This section does not prevent an employee from voluntarily sharing gratuities with other employees. The agreement to share gratuities must be made by the employees without employer coercion or participation

And under Minn. Stat. § 177.27, subd. 8,

An employee may bring a civil action seeking redress for a violation or violations of sections 177.21 to 177.44 directly to district court.

According to the Court, because § 177.24 prohibits employers from requiring employees to share tips, it necessarily also prohibits employers from terminating employees who refuse to do so. The Court concluded that the mere threat of termination qualifies as "requiring" an employee to take an action. And given that § 177.27 authorizes civil actions to redress *any* prohibited conduct under the MFLSA, the Court held that the plaintiff had a viable claim against his employer for wrongful discharge. But even if the Court's logic is compelling (the statute would provide little protection if any employee could be fired for refusing to share tips), it goes beyond the exact statutory wording, which does not mention termination or any action for wrongful discharge.

Indeed, Chief Justice Gildea authored a dissenting opinion, taking aim at the majority's interpretation of the relevant statutes. The dissent emphasized the majority's apparent disregard for longstanding precedent allowing the legislature to abrogate the at-will

employment doctrine *only* with express wording or necessary implication. This critique was particularly apt because other provisions in the MFLSA contain express language authorizing causes of action for wrongful discharge—language that Chief Justice Gildea noted was absent from §§ 177.24 and 177.27. If the Legislature had wanted to create a wrongful discharge remedy for violations of the tip-sharing law, it could have used similar language, but did not do so.

So what are employers to take from *Burt*?

For starters, they cannot require tip-sharing, nor can they terminate employees who refuse to share tips. The more difficult issue is how the decision could erode at-will employment in Minnesota generally. Although the sky is not yet falling, *Burt* should give employers pause. It reflects the willingness of a majority of the Supreme Court to recognize a wrongful discharge remedy (at least where there is a compelling logic for such a remedy) even if it is not explicitly described in the statute at issue. As Chief Justice Gildea wrote in dissent, *Burt* opens the door for employees to allege claims for wrongful discharge just by invoking “any MFLSA provision that imposes a requirement on an employer—and indeed, virtually any statutory provision that imposes a requirement on an employer.”

Now, more than ever, it is critical that employers stay apprised of the legal requirements imposed on them by state and federal laws. It is equally critical that both in-house and outside employment counsel keep an eye on how Minnesota courts interpret and apply *Burt* in the years to come.