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Employment Law: Report a Crime, Lose Your Job: The Oklahoma Supreme Court Reins in the Public Policy Exception in *Hayes v. Eateries, Inc.*

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I. Introduction

Oklahoma courts still profess commitment to the common law doctrine that an employment contract of infinite duration may be terminated at any time by either party for any reason or no reason at all, commonly referred to as the employment-at-will doctrine.[1] However, this doctrine is not absolute. Inroads have been made legislatively[2] and judicially[3] into an employer's right to terminate an employee arbitrarily. One such instance is when the employer terminates an employee in contravention of public policy,[4] commonly referred to as the public policy exception to employment-at-will.

Under this exception, an employee who is discharged for performing an act consistent with public policy or refusing to perform an act which contravenes public policy is able to bring a tort claim against his former employer. Acts of "whistleblowing," i.e., when an employee reports some wrongdoing by his or her employer or a co-employee, have often been protected under the public policy exception.[5]

In *Hayes v. Eateries, Inc.*,[6] the Oklahoma Supreme Court limited this "whistleblowing" cause of action to only those instances in which an employee reports crimes committed by his employer or a co-employee which directly affect the public health, safety, or welfare and not merely the private and/or proprietary interests of the employer.[7] The *Hayes* court held that, as a matter of law, a viable tort claim under the public policy exception to employment-at-will is not available to an employee who is discharged for reporting embezzlement by a co-employee.[8]

Part II of this note offers a brief history of the public policy exception and, more specifically, "whistleblower" cases prior to *Hayes*. Part III of this note examines the

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1. *See* Burk v. Kmart Corp., 770 P.2d 24, 26 (Okla. 1989).

2. *See* 85 OKLA. STAT. § 5 (Supp. 1996) (prohibiting employer from discharging an employee who files a workers' compensation claim); 74 OKLA. STAT. § 840-2.5(A)(2) (Supp. 1996) (prohibiting state employees from discharging any employee who reports a violation of state or federal law, mismanagement, or dangers to public health).

3. *See generally, e.g.*, Blanton v. Housing Auth. of Norman, 794 P.2d 412 (Okla. 1990) (recognizing an implied employment contract theory allowing only for just cause termination by employer); Burk v. Kmart Corp., 770 P.2d 24 (Okla. 1989) (recognizing action in tort for discharge of employee in violation of public policy).

4. *See Burk*, 770 P.2d at 28.

5. *See* Vannerson v. Board of Regents, 784 P.2d 1053, 1054 (Okla. 1989).

6. 905 P.2d 778 (Okla. 1995).

7. *See id.* at 786.

8. *See id.* at 780.

reasoning of the *Hayes* court, followed in part IV by an analysis of that reasoning in light of the underlying policy of Oklahoma's criminal statutes and the case law in other jurisdictions concerning the public policy exception. Part V of this note discusses the potential ramifications of *Hayes* on the future of the public policy exception and employer/employee relationships. Finally, part VI of this note will provide suggestions for legislative and judicial reform.

II. Public Policy Cause of Action Prior to Hayes

In the seminal case of *Burk v. K-Mart Corp.*,[9] the Oklahoma Supreme Court adopted a new cause of action in tort in those instances when an employee's discharge "is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law."[10] The United States District Court for the Northern District of Oklahoma had certified for the Oklahoma Supreme Court the question of whether an employment-at-will contract contained an implied obligation of good faith and fair dealing. The *Burk* court answered the question in the negative and adopted the public policy exception to employment-at-will. The court stated "[a]n employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of contractual obligations."[11]

The *Burk* court reasoned that adopting the public policy exception to employment-at-will would balance the interests of society, the employer, and the employee.[12] The *Burk* court relied on the reasoning employed by the Illinois Court of Appeals in *Palmateer v. International Harvester Co*:[13]

> With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.[14]

The *Burk* court was quick to note, however, that "the public policy exception must be tightly circumscribed"[15] and limited the cause of action to those instances "where an employee is discharged for refusing to act in violation of an established

9. 770 P.2d 24 (Okla. 1989).
10. *Id.* at 28.
11. *Id.*
12. *See id.*
13. 421 N.E.2d 876 (Ill. App. Ct. 1981).
14. *Burk*, 770 P.2d at 28 (quoting *Palmateer*, 421 N.E.2d at 878).
15. *Id.* at 29.

and well-defined public policy or for performing an act consistent with a clear and compelling public policy."[16] One such instance articulated by the court is when an employee is discharged because the employer wants to avoid payment of benefits already earned by the employee, such as commissions.[17]

The court reasoned that allowing an actionable tort while tightly circumscribing the instances when it could be invoked would provide a balance between the competing interests of the employer, the employee, and society.[18] The *Burk* court, quoting *Brockmeyer v. Dun & Bradstreet*,[19] stated:

> Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences. Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected against frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.[20]

Shortly after the *Burk* decision was announced, the Oklahoma Supreme Court was faced with its first wrongful discharge case involving an employee who claimed he was dismissed for reporting infractions of a co-employee. In *Vannerson v. Board of Regents of the University of Oklahoma*,[21] the plaintiff, an employee of the University of Oklahoma, brought a claim for wrongful discharge.[22] The claim arose from two separate incidents. In the first instance, Vannerson witnessed a co-employee transfer two unopened boxes of floor tiles to a truck driver who was not a University employee.[23] The second incident, which happened several months after the first incident, involved a dispute between Vannerson and his supervisor regarding departmental accounting discrepancies.[24]

The *Vannerson* court held that if the University discharged Vannerson because of the first incident, then Vannerson had a cognizable claim.[25] However, the events of the second incident would not support a cause of action for wrongful discharge.[26] The court reasoned that an unlawful disposition of state property was

16. *Id.*
17. *See id.*
18. *See id.*
19. 335 N.W.2d 834 (Wis. 1983).
20. *Burk*, 770 P.2d at 29 (quoting *Brockmeyer*, 335 N.W.2d at 841).
21. 784 P.2d 1053 (Okla. 1989).
22. *See id.* at 1054.
23. *See id.*
24. *See id.*
25. *See id.* at 1055.
26. *See id.*

sufficient to invoke public policy.[27] However, with regard to the second incident, the court reasoned that Vannerson's claim was insufficient because he could not "tie his allegation to any specific constitutional, statutory, or decisional wrong by the University which he sought to correct by his actions."[28] The court found that the only policy implicated by Vannerson was the University policy requiring accuracy of custodial departmental records.[29] This policy, the court stated, failed "to rise to the level of a constitutional, statutory, or decisional statement of public policy of the State of Oklahoma."[30] Furthermore, the court cited Vannerson's failure to offer any evidence of unsafe, immoral, or unlawful activity on the part of the University and that his employment was conditioned on his participation in such activities.[31] Vannerson's only allegation was that he was dissatisfied with his supervisor's investigation of the incidents and that the discrepancies in inventory were likely the result of accounting errors.[32] The court held that these allegations were insufficient to invoke public policy and, thus, support a cause of action for wrongful discharge.[33]

III. Hayes v. Eateries, Inc.

A. Statement of the Case[34]

John Hayes was an assistant manager at Garfield's restaurant in Stillwater, Oklahoma. On May 29, 1990, Hayes was discharged without reason from this position. Prior to his termination, Hayes had discovered that his immediate supervisor, the manager of the restaurant, was embezzling from Garfield's.[35] Hayes claimed that the reason he was terminated was because he confronted his manager with these allegations and threatened to continue to investigate the embezzlement and report it to law enforcement officials.[36]

Based on these events, Hayes alleged two causes of action. First, Hayes claimed that his discharge constituted a breach of an employment contract based on oral

27. *See id.*

28. *Id.*

29. *See id.*

30. *Id.*

31. *See id.*

32. *See id.*

33. *See id.* At the original trial, the jury found for Vannerson. The *Vannerson* court reversed the decision and remanded the case for a new trial. *See id.* The court stated that, although competent evidence existed on which the jury could have based its verdict, evidence of incident number two was improperly submitted to the jury. *See id.* Reversal is warranted if it is impossible to separate the plaintiff's possible recovery on properly submitted facts from the possibility that the plaintiff recovered on facts improperly submitted to the jury. *See id.* at 1055-56.

34. Because the issue before the Oklahoma Supreme Court was the appropriateness of the trial court's decision to dismiss Hayes's complaint, the entire factual record is confined to the limited factual allegations of Hayes's petition.

35. *See* Hayes v. Eateries, Inc., 905 P.2d 778, 780 (Okla. 1995).

36. *See id.* The record on who Hayes actually reported the embezzlement to is unclear. However, for purposes of the opinion, the court assumed that Hayes reported the violations to someone inside the corporation and to law enforcement officials.

assurances that he would be employed as long as he performed his job satisfactorily.[37] Second, Hayes claimed that his discharge violated public policy.[38] Therefore, he could state a cause of action under the guidelines set forth in *Burk*. After the trial court granted Eateries, Inc.'s motion to dismiss for failure to state a claim upon which relief can be granted, Hayes appealed. The Court of Appeals affirmed.[39] The Oklahoma Supreme Court granted Hayes's writ of certiorari.[40]

The issue before the Oklahoma Supreme Court was whether Hayes's discharge for reporting, either internally to company officials or externally to law enforcement officials, of embezzlement by a co-employee was sufficient to state a cause of action under the public policy exception to employment-at-will[41] as set forth in *Burk v. K-Mart Corp.*[42] The *Hayes* court held that an employee's reporting, either internally or externally, of embezzlement by a co-employee was insufficient to support a wrongful discharge cause of action and affirmed the trial court's dismissal.[43]

B. The Hayes Opinion

The essential thrust of the *Hayes* court's reasoning is that no clear and compelling public policy was invoked by Hayes.[44] The court began by noting that, while an employee's reporting of crimes committed by a co-employee against the interests of the employer to outside law enforcement officials and/or to corporate management is to be "lauded and encouraged,"[45] the crime of embezzlement is not "so imbued with a clear and compelling public policy such that a tort claim is stated if the employer discharges the employee for so reporting."[46]

The court's initial analysis focused on the external reporting of embezzlement to law enforcement officials. The court's analysis distinguished between three possible interests an employee could be protecting by reporting a crime. First are those instances in which an employee seeks to exercise a right of his own. In those cases, an employee can maintain a cause of action under the public policy exception to employment-at-will if he is discharged while exercising those rights.[47] Examples include an employee terminated for failing to drop a lawsuit against a third party resulting from an on-the-job injury or when an employee is terminated for filing a workers' compensation claim.[48] However, these examples are distinguishable from

37. *See id.* The court also dismissed this claim as inadequate to support a cause of action. However, the scope of this note is limited to the court's discussion regarding Hayes wrongful discharge claim. For more information regarding the court's discussion of Hayes's contract-based claim, see *id.* at 782-84.
38. *See id.* at 781.
39. *See id.*
40. *See id.*
41. *See id.* at 780.
42. 770 P.2d 24 (Okla. 1989).
43. *See Hayes*, 905 P.2d at 780.
44. *See id.* at 786.
45. *Id.*
46. *Id.*
47. *See id.*
48. *See id.*

the facts alleged by Hayes because the only rights Hayes sought to vindicate where those of his employer and not his own.[49]

The second class of interests which might be protected by the reporting of a crime are the interests of the public. Again, the court notes, an employee who reports a crime that is against the interests of his employer is not "seeking to vindicate a public wrong where the victim of the crime could in any real sense be said to be the general public, as where crimes or violations of health or safety laws are involved."[50] The facts in *Hayes* are distinguishable, the court argued, from cases in other jurisdictions in which an employee was protected after reporting infractions of the "rules, regulation, or law pertaining to the public health, safety or general welfare."[51] Such cases include when an employee reports his employer's Medicaid fraud,[52] complains to management of defective brake installations in automobiles,[53] reports internally that his company is not adhering to state licensing and labeling laws,[54] or attempts to persuade management to conform to consumer credit and protection laws.[55] In those cases, the interest the employee sought to protect was public. In order to support a claim under the public policy exception to employment-at-will, "the public policy must truly be public, rather than merely private or proprietary."[56] Thus, the court added, Hayes could not support a cause of action because the only interest he sought to protect was the third type of interest, the private or proprietary interest of the employer.[57]

Furthermore, the court stated that the decision to report embezzling by an employee rests with the employer who was the direct victim of the crime.[58] The court, while acknowledging that, generally, the public is the victim of all crimes, reasoned that there existed no:

> general consensus sufficient to base a *Burk* tort claim upon that there is a public policy so thoroughly established in the public consciousness that would forbid an employer from making an informed business decision that its employees are prohibited from reporting crimes against the interest of the employer (here embezzlement from Garfield's) to law enforcement officials and if they do so termination is the result. After all it is the employer, Garfield's, whose money or property was stolen, not Hayes' money or the money of a relative or friend.[59]

49. *See id.*
50. *Id.*
51. *Id.*
52. *See* Palmer v. Brown, 752 P.2d 685, 689 (Kan. 1988).
53. *See* White v. General Motors Corp., 908 F.2d 669, 671 (10th Cir. 1990).
54. *See* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388 (Conn. 1980).
55. *See* Harless v. First Nat'l Bank, 246 S.E.2d 270, 272 (W. Va. 1978).
56. Hayes v. Eateries, Inc., 905 P.2d 778, 786 (Okla. 1995).
57. *See id.*
58. *See id.* at 787.
59. *Id.*

Thus, when the employer is the victim of the crime and the only interest affected by the crime is the private or proprietary interest of the employer, an employee who reports such a crime cannot support a claim under the public policy exception to employment-at-will.

Through this framework, the court was able to distinguish Hayes's allegations from the facts of *Vannerson*. Although the plaintiff in *Vannerson* did not seek to protect an interest of his own and the infraction of Vannerson's co-employee involved an illegal disposition of the employer's property, the key distinction lies in the nature of the property. Because the property belonged a public institution, the University of Oklahoma, it was public property.[60] By reporting the illegal disposition of such property, Vannerson was protecting the public interest in seeing to it that tax dollars were not misappropriated.[61] In *Hayes*, no such overriding public interest was present. The only interest implicated was the private interest of the employer in deciding whether or not to pursue criminal action against an embezzling employee. This, according to the court, is a "private business decision" and is beyond the scope of judicial review.[62]

IV. Analysis of Hayes

The court's reasoning in *Hayes* is interesting in three respects. First, the definition of what constitutes public policy varies from the definition used by the other jurisdictions cited to in the *Hayes* opinion.[63] Second, the *Hayes* decision essentially causes a stratification between those crimes which the court perceives to be serious enough to warrant protection if reported and crimes that are not "public" in nature. Third, the public-private dichotomy drawn by the *Hayes* court is distinct from the way in which other jurisdictions, including those cited approvingly by the *Hayes* court, have separated the two interests.

A. The Hayes Determination of Public Policy

Many other jurisdictions have determined that public policy encourages the reporting of all crimes. An excellent example of this is *Palmateer v. International Harvester Co.*[64] In *Palmateer*, the Illinois Court of Appeals expressed the idea that public policy encourages citizens to report crimes.[65] The *Palmateer* court stated, "[t]here is no public policy more basic, nothing more implicit in the concept of ordered liberty than the enforcement of a State's criminal code. There is no public policy more important or more fundamental than the one favoring the effective

60. *See id.* at 787-88

61. *See id.*

62. *Id.* at 788.

63. *See infra* Part IV.A.

64. 421 N.E.2d 876 (Ill. 1981). Incidentally, the Oklahoma Supreme Court cited approvingly to the reasoning of *Palmateer* in the *Burk* decision when Oklahoma first adopted the public policy exception to employment-at-will. *See* Burk v. K-Mart Corp., 770 P.2d 24, 28 (Okla. 1989).

65. *See Palmateer*, 421 N.E.2d at 880.

protection of the lives and property of citizens."[66] Furthermore, because the enforcement of a State's criminal code is important to the public's welfare, public policy encourages citizens to report crimes,[67] even in the absence of constitutional or statutory provisions requiring affirmative action on the part of the citizen to do so.

Other jurisdictions have echoed the sentiments of the *Palmateer* court, including jurisdictions cited approvingly by the *Hayes* court. One example is *Palmer v. Brown*.[68] The *Hayes* court cites *Palmer* as a case in which an employee reported a violation of the law sufficiently pertaining to the health, safety, and welfare of the public to support a wrongful discharge claim.[69] In *Palmer*, the plaintiff claimed she was discharged after she reported Medicaid fraud by her employer externally to law enforcement officials.[70] The Kansas Supreme Court held that this allegation was sufficient to support a cause of action for wrongful discharge.[71] The *Palmer* court stated that citizens have a civil duty to report crimes or infractions pertaining to the public health, safety, or general welfare.[72] Citizens who exercise this duty should be protected from reprisal.[73] However, while the *Hayes* court distinguished between those crimes which affect the general public and those which affect only private interests, the *Palmer* court makes no such distinction. The *Palmer* court reasoned that "[i]t has long been recognized as public policy to encourage citizens to report crimes."[74]

Thus, the *Hayes* court's determination that the reporting of embezzlement is outside the scope of activity encouraged by public policy is out of step with other jurisdictions' concepts of public policy. While other jurisdictions adhere to the view that an employee who reports crimes committed by his employer or co-employees is advancing a clear, compelling, and fundamental interest, the *Hayes* court adopts the view that public policy is advanced only by the reporting of those particular crimes in which the general public is the victim, and not when the victim is a private entity.

B. The Hayes Decision Stratifies Certain Crimes

The *Hayes* decision distinguishes between those crimes which affect the public and those which affect only private interests and determines that an employee is only protected from discharge when he or she reports those crimes which affect the general public. While the court acknowledges that all crimes are generally crimes against the public, some crimes, such as embezzlement, are not so thoroughly established in the public consciousness to be classified as crimes against the

66. *Id.* at 879.
67. *See id.* at 880.
68. 752 P.2d 685 (Kan. 1988).
69. *See* Hayes v. Eateries, Inc., 905 P.2d 778, 786 (Okla. 1995).
70. *See Palmer*, 752 P.2d at 686.
71. *See id.* at 687.
72. *See id.* at 689.
73. *See id.*
74. *Id.*

public.[75] By classifying crimes in this manner, the *Hayes* court uses some abstract barometer of public opinion to determine which crimes are crimes against the public. However, a more reliable barometer is available to make this determination: the legislature.

By criminalizing embezzlement, the legislature made the decision that embezzlement would be handled by the State's criminal justice system as a crime against the State.[76] While some crimes certainly have a greater impact than embezzlement on the public consciousness, the legislature has determined that, at least on some level, embezzlement affects a public interest. Again, *Palmateer* provides assistance. In *Palmateer*, the crime reported by the discharged employee could have amounted to as little as the theft of a two-dollar screwdriver.[77] However, the *Palmateer* court reasoned that:

> [t]he magnitude of the crime is not the issue here. It was the General Assembly, the People's representatives, who decided that the theft of a $2 screwdriver was a problem that should be resolved by resort to the criminal justice system. IH's business judgment, no matter how sound, cannot override that decision.[78]

Rather than look to the legislature, the *Hayes* court instead determines whether the crime is one which is ingrained in the consciousness of the public at large.[79] Reporting of those crimes which do rise to that level is protected. This raises at least two questions. First, what happens if the public consciousness concerning a particular crime changes? Will the reporting of that crime then be protected? Second, are judges really in the best position to determine what crimes are deeply embedded in the public psyche? Judges are not responsible to the general public as legislators are. When the decision as to what constitutes public policy is raised, the judiciary should defer to that body which is closest to the people and arguably has a better understanding of the mood of the public. When the legislature has decided that a certain activity offends the public interest by criminalizing it, the court should use this more reliable legislative pronouncement as a guide to determine what constitutes public policy.

C. The Public/Private Interest Distinction

In adopting the distinction between public and private or proprietary interests, the *Hayes* court follows the lead of other jurisdictions. The *Hayes* court cites *Wagner*

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75. *See Hayes*, 905 P.2d at 787.

76. *See, e.g.*, Belline v. K-Mart Corp., 940 F.2d 184, 186-87 (7th Cir. 1991) ("A society's fundamental concern for the lives and property of its citizens is embodied in the criminal code.")

77. *See Palmateer*, 421 N.E.2d at 880.

78. *Id.*

79. *See Hayes*, 905 P.2d at 787. ("[W]e are not aware . . . that there is a public policy so thoroughly established in the public consciousness that would forbid an employer from making an informed business decision that its employees are prohibited from reporting crimes against the interest of the employer . . . to law enforcement officials and if they do so termination is the result.").

v. City of Globe[80] as standing for the proposition that only the reporting of crimes which affect the public interest are to be protected and those which involve a private or proprietary interest are not.[81] While the *Hayes* court focuses on the nature of the interest protected by the criminal statute, the *Wagner* court instead emphasizes the interest the employee seeks to promote.[82] The key inquiry is whether the employee seeks to further the public good or his own private or proprietary interest.[83] The *Wagner* court states, "[s]o long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose *illegal* or unsafe practices should be encouraged."[84] The *Wagner* court seems to suggest that the nature of the employees' motives are the key factor and not the nature of the interest protected under the criminal code. Further, the *Wagner* court concludes that any actions which promote enforcement of the State's laws provides a benefit to the public.[85] Through this framework, it matters not *which* crime has been committed, only that *some* crime has been committed and that the employee was discharged for reporting it. "The relevant inquiry is not limited to whether any particular law or regulation has been violated, although that may be important, but instead emphasizes whether some 'important public policy interest embodied in the law' has been furthered by the whistleblowing activity."[86]

Other cases cited by *Hayes* also adopt a public/private interest distinction based not on the interest protected by the statute but on the interest the whistleblower seeks to protect. In *Palmer v. Brown*,[87] the court distinguished between those employees who report crimes to further a public purpose and those who report crimes for a personal reason.[88] The court concluded that only whistleblowing done in the promotion of a public interest is protected.[89] The report must have been made out of a good faith concern for the public and not for malice or other personal reasons.[90] Again, as the court did in *Wagner*, the *Palmer* court examines whether the interest the whistleblower seeks to promote is public or private, not whether the interest protected under the criminal statute is public or private.

The California Supreme Court adopted a third, somewhat different, approach to the public/private distinction in *Foley v. Interactive Data Corp.*[91] The public/private distinction in *Foley* hinged on to whom the employee reported the alleged criminal wrongdoing.[92] When an employee is discharged after reporting

80. 722 P.2d 250 (Ariz. 1986).
81. *See Hayes*, 905 P.2d at 786-87.
82. *See Wagner*, 722 P.2d at 257.
83. *See id.*
84. *Id.* (emphasis added).
85. *See id.*
86. *Id.*
87. 752 P.2d 685 (Kan. 1988).
88. *See id.* at 686.
89. *See id.* at 690.
90. *See id.* at 690.
91. 765 P.2d 373 (Cal. 1988).
92. *See id.* at 380. *But cf.* Belline v. Kmart Corp., 940 F.2d 184 (7th Cir. 1991) (employee reporting suspected criminal wrong-doing internally to supervisor protected from discharge for so doing).

suspected infractions only to his employer, and the report serves only the private interest of the employer, the employee cannot assert a public policy cause of action.[93] In *Foley*, the plaintiff was discharged after he reported that his new supervisor was under investigation by the Federal Bureau of Investigation for suspected embezzlement at his prior job.[94] The *Foley* court reasoned that no public policy was implicated in this case.[95] Foley's disclosure only protected the private interest the employer had in retaining a possible embezzler as an employee.[96] The *Foley* court stated that when the employee's report affects only the private interest of the employer, no public policy cause of action is cognizable.[97]

While *Foley* is distinguishable factually from *Hayes* in that Foley reported that his supervisor was under investigation for past embezzlement while Hayes reported current embezzlement by his supervisor, *Foley* is helpful in illustrating the different approaches taken by the courts in the public/private analysis. While some, such as *Palmer* and *Wagner*, focus on the motivation of the employee and the interest he or she seeks to protect, the court in *Foley* focuses on who the employee chooses to report the infraction to.

V. The Ramifications of Hayes

While *Hayes* answered the question of whether an employee can maintain a cause of action when he or she is discharged for reporting the crime of embezzlement by a co-employee, the opinion left many questions unanswered. Among the primary uncertainties left by the *Hayes* opinion concerns which crimes an employee can report and be protected from discharge.

The *Hayes* opinion provides some clues but fails to provide definitive guidelines. *Hayes* teaches that a cause of action is available when a "clear and compelling public policy" is involved.[98] However, who determines when a policy is clear and compelling? In *Hayes*, the court made this decision based on the idea that no general consensus existed in the public mind that the crime of embezzlement adversely affected the public welfare.[99] However, is the judiciary equipped to make this determination?

A few hypotheticals demonstrate the difficulty in determining when a crime affects a public interest or the private interest of the employer. What interest is affected when an employee reports his employer's failure to pay state income taxes? The interest could be seen as public because the state is denied the benefit of that employer's tax contribution. However, viewed through the framework of *Hayes*, one could also argue that an employer's decision to pay or withhold income taxes is a

93. *See Foley*, 765 P.2d at 379.

94. *See id.* at 375. Interestingly, after Foley was discharged, his supervisor plead guilty to a count of embezzlement. *See id.*

95. *See id.* at 380.

96. *See id.* at 379-80.

97. *See id.* at 380.

98. *See* Hayes v. Eateries, Inc., 905 P.2d 778, 786 (Okla. 1995).

99. *See id.* at 787.

"private business decision." Furthermore, the employer's private and proprietary interests, i.e., the employer's own money, are the only interests directly affected by the employee's reporting the infraction because the employer loses the money involved. Is this interest at stake here public or private?

Additionally, while it is clear that an employee who reports embezzlement by a co-employee is not protected from discharge, what about an employee who reports a burglary committed by co-employee against the employer? Is burglary different from embezzlement because the crime involves a breaking and entering? Are different interests implicated because the employee does not commit the crime as an "insider" who illegally appropriates the employer's property? Would the result be any different if the burglary was committed by a relative of the employer? In that case, would the employer still be justified for firing an employee who reported the burglary and its perpetrator?

This state of affairs leaves employees without sufficient guidelines to determine when they can report crimes and be protected from discharge. This could leave an employee in the prickly predicament of being forced to choose between reporting a crime and keeping his or her job.[100] This could have serious implications for the criminal justice system. First, it might discourage employees from reporting crimes. If an employee faces the grim prospect of being terminated for performing a civic duty, economic realities might force the employee to overlook the crime. Rather than force employees into this state of limbo, our courts should encourage those employees who promote the aims of the criminal justice system by reporting suspected criminal wrongdoing.

The *Hayes* decision also undermines the legislative intent in passing a criminal statute. The legislature felt embezzlement represented an activity the State had an interest in preventing. It seems unreasonable that the legislature would pass a statute but not desire the citizens to follow or enforce such a statute. However, by allowing employers to discharge employees who exercise a civic duty to report certain crimes, but allowing protection for the reporting of other crimes, the *Hayes* decision leaves employees in an uncertain state of affairs.

VI. Suggestions for Reform in the Wake of Hayes

As the forgoing discussion reveals, the primary problem with the public policy cause of action lies in the definition of what constitutes public policy. At best, courts across the country have been inconsistent and incoherent when making this determination. Some courts recognize sources of public policy as diverse as professional codes of ethics and responsibility[101] and state common law, while other courts limit the public policy causes of action to only those instances when the legislature has specifically prohibited the employer from discharging the employee.[102] The inability of the courts to come to a uniform and reliable

100. *See* Belline v. Kmart Corp., 940 F.2d 184, 187 (7th Cir. 1991) ("But the risk of discharge may deter employees who reasonably believe that crimes have been committed from acting on the information.").

101. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980).

102. *See* Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89 (N.Y. 1983) (holding that any

definition of public policy has led at least one commentator to call for an abolition of both the public policy exception and the employment-at-will doctrine and replace them with a singular "just cause" termination standard.[103] However, other alternatives exist which do not require a dismantling of the current employment law structure.

First, the courts could allow a discharged employee to maintain an actionable tort under the public policy exception any time the employee reports any crime externally to law enforcement officials. The effects of this would eliminate the two policy problems presented by the *Hayes* decision. First, it would clear up the confusion about which crimes an employee could report. Because the reporting of any and all crimes would be protected, employees would not be forced to ignore criminal acts or face the prospect of termination for acting to enforce the criminal code. Second, allowing protection under the public policy exception would promote the enforcement of the criminal code. Employees could report crimes without fear of reprisal from their employers. Consequently, more crimes might be reported and the aims of the criminal justice system would be furthered.

Regarding those instances when an employee reports infractions internally to corporate management, the court could take two approaches. First, the court could afford the same protection to internal reporting as it would to external reporting by allowing an actionable tort when an employee reports the violation of any crime to internal management. This is the approach taken by the Illinois courts in the post-*Palmateer* era. In *Petrik v. Monarch Printing Corp.*,[104] the court held that an employee's discharge due to a complaint to the President and Chief Operating Officer of suspected embezzlement was sufficient to establish a cause of action for retaliatory discharge in contravention of public policy.[105] In *Petrik*, the court rejected Monarch's argument that, because Petrik did not report the suspected embezzlement to outside authorities, the case involved only a private internal dispute.[106] The court reasoned that, because the Illinois Criminal Code was implicated, public policy was thus involved and the situation involved "something more than an ordinary dispute between an employee and his employer."[107]

The second alternative would be to distinguish between the internal and external reporting of crimes. While external reporting of any crime seems to affect public policies as articulated by the legislature, internal reporting of crimes to management could be handled as a private business matter to be left to the discretion of the company. While this would afford the employer some latitude when making the decision to terminate an employee, it would still allow the employee a modicum of protection if he or she chooses to report the crime to law enforcement officials. The interests of the employer, the employee, and the public would be served to some

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change to employment-at-will doctrine is best left to the legislature).

103. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1950 (1983).

104. 444 N.E.2d 588 (Ill. App. Ct. 1982)

105. *See id.* at 589.

106. *See id.* at 592.

107. *Id.*

degree. The employer is still allowed to terminate at-will if he desires. The employee is still afforded some protection if he chooses to report the crime to appropriate law enforcement officials. And the public benefits from the enforcement of its criminal code.

Another possible solution would be for the legislature to pass a statute preventing employers from discharging employees who report crimes to law enforcement officials. This has been done in other jurisdictions. One example is the California statute which protects employees who, in good faith, report suspected criminal wrongdoing.[108] The statute reads, in relevant part:

> (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.[109]

The Oklahoma legislature has already granted this protection to employees of State agencies. The statute provides:

> As used in this act: "agency" means any office, department, board, commission or institution of the executive branch of state government. . . . No officer or employee of any state agency shall prohibit or take disciplinary action against employees of such agency, whether subject to the provisions of the Merit System or in unclassified service, for: . . . 2. Reporting any violation of state or federal law, rule or policy; mismanagement; a gross waste of public funds; an abuse of authority; or a substantial and specific danger to public health or safety.[110]

While the legislature has not yet extended this protection to employees in the private sector, it may want to in light of *Hayes*. To extend this protection would not only clear up some of the confusion surrounding *Hayes* but would advance a compelling State interest in seeing that its criminal statutes are enforced.

Ideally, the legislature would step in where the courts have failed and provide protection to those employees who, in good faith, report suspected criminal violations. This would eliminate the problems caused by judicial zig-zagging.

However, the next best solution would be for the courts to provide a definition of public policy that is consistent and easily applicable. Clear guidelines are necessary to protect both the interest of the employee in maintaining employment stability and the interest of the employer in knowing when he can terminate an employee and at the same time avoid tort liability. These clear guidelines are available in the State's criminal statutes. Using these as a benchmark, employers and

108. *See* CAL. LAB. CODE § 1102.5 (West 1989).
109. *Id.*
110. *See* 74 OKLA. STAT. § 840-1.3, 2.5 (Supp. 1994).

employees could both determine what activities were acceptable. Furthermore, Oklahoma courts could then avoid the predicament of trying to determine when a crime is public or private.

Furthermore, the internal/external reporting distinction should be avoided. As the *Petrick* court noted, a State's criminal statutes do not become less public merely because violations are reported to corporate management rather than law enforcement officials.[111] Additionally, as one commentator noted, courts and employers should encourage employees to remedy wrongs through the corporate structure rather than going outside the company.[112] By allowing an actionable tort when an employee reports suspected criminal activity to his employer, Oklahoma courts could accomplish this end.

VII. Conclusion

The analytical framework established by the Oklahoma Supreme Court in *Hayes* is problematic for several reasons. First, the court's definition of public policy ignores the fact that the Oklahoma legislature has criminalized embezzlement and made a determination that this activity is contrary to the public interest. Second, the public/private distinction drawn by the *Hayes* court rejects the notion that reporting a crime to law enforcement officials necessarily involves the public. Third, the practical effect of *Hayes* is that it could have a chilling effect on employees who may or may not now decide to report crimes because of they fear losing their job. The ramifications of this are that criminal activity may go unreported and unpunished. Although embezzlement is not "thoroughly established in the public consciousness,"[113] other crimes which are may go unreported because an employee cherishes his job more than he cherishes enforcement of Oklahoma's criminal statutes. Employees should not be forced to make this choice.

M. Derek Zolner

111. Petrick v. Monarch Printing Corp., 444 N.E.2d 588, 589 (Ill. Ct. App. 1982).
112. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 548 (1994).
113. Hayes v. Eateries, Inc., 905 P.2d 778, 787 (Okla. 1995).