FILED
United States Court of Appeals
Tenth Circuit

October 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL HOLT,

Plaintiff - Appellant,

v.

FOOT LOCKER RETAIL, INC.,

Defendant - Appellee.

No. 22-3240
(D.C. No. 5:21-CV-4039-JWB)
(D. Kan.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, **McHUGH**, and **MORITZ**, Circuit Judges.

Daniel Holt was employed as the Senior Director of Operations at a Foot Locker Retail, Inc. distribution center in Junction City, Kansas. In May 2020, in response to the spreading COVID-19 pandemic, Foot Locker required employees to wear masks. Mr. Holt was terminated a few days later for comments he made on social media and in meetings about the mask mandate. His supervisor determined he undermined the company's health and safety protocols.

Mr. Holt sued Foot Locker for retaliatory discharge under Kansas's whistleblower-protection exception to at-will employment. He claims Foot Locker's

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

stated reason for terminating him was pretextual, and he was terminated because of his reports and complaints to management of inventory irregularities. He claims the irregularities would mislead investors and thus contradicted Kansas public policy.

The district court granted summary judgment to Foot Locker on Holt's claim. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm. Kansas law requires the employee, *i.e.*, the whistleblower, to report a violation of rules, regulations, or law that would violate public health, safety, and the general welfare. Under Kansas law, the whistleblower exception applies only when it is necessary to protect a strongly-held state public policy. Because Kansas courts have not extended the whistleblower exception to the types of reports made by Mr. Holt, we decline to extend it on the facts here. And even if his reports did pertain to public health, safety, or welfare, Mr. Holt has not made the required showing by clear and convincing evidence that a reasonably prudent person would have concluded these inventory requests amount to legal violations.

I. Background

Mr. Holt was the most senior Operations employee at the Foot Locker distribution center in Junction City. He had responsibility over the warehouse inventory and managed 600 to 700 employees. For multiple years, Mr. Holt received irregular inventory requests from other departments within the company. These allegations are outlined as follows:

- **August 19, 2015**: Mr. Holt receives a request from a manager in the Transportation Department to reject a shipment because it had not been approved for delivery. Mr.

Holt denies the request and receives the product into inventory. No inventory irregularities occur.

- **September 2018**: Mr. Holt questions inventory irregularities in an internal company survey.

- **December 20, 2019**: Mr. Holt receives a request from the Director of Accounts Payable to receive product into inventory that had not yet shipped. The Director explains the intent is to make the product available online to consumers. Mr. Holt denies the request and states that this would be falsifying company records. He reports this to his supervisor and a human resources manager. The human resources manager thanks him and offers to assist. No inventory irregularities occur.

- **December 27, 2019**: Mr. Holt's team receives a request to reject a shipment because it was sent in error. Mr. Holt did not see the request. A member of his team tried to comply but ended up receiving the product into inventory and shipping it back to the vendor. This caused an error in inventory records. Mr. Holt testifies in his deposition that it is possible the issue was resolved before the end of the quarter, and, if so, would not affect Foot Locker's financial statements.

- **January 3, 2020**: Mr. Holt receives a request from the Director of Logistics not to receive a defective product into inventory until it is inspected. Mr. Holt denies the request and receives the product into inventory before inspecting it. Mr. Holt reports this to his supervisor and a human resources manager.

- **April 13, 2020**: Mr. Holt receives a request from the Logistics team not to receive product into inventory until the end of the fiscal quarter. At times this would be appropriate, but Mr. Holt denies the request and receives the product into inventory. He reports this to his supervisor and human resources manager. No inventory irregularities occurred.

In May 2020, Mr. Holt's supervisor told him several times that managers and supervisors were urged to wear masks. Appellant Br. at 17. Mr. Holt did not wear a mask. Then, in late May, Mr. Holt's supervisor informed him that all employees were required to wear masks. That night, Mr. Holt posted on Facebook that he thought people who wore masks were "sheep." Employees who reported directly to Mr. Holt were his friends on Facebook. Mr. Holt wore a mask to work the next day, but during a morning meeting he made a comment about the mask mandate that his supervisor found sarcastic and insubordinate. Mr. Holt was terminated a few days later.

Mr. Holt brought an action against Foot Locker for retaliatory discharge. Although Foot Locker contends Mr. Holt was terminated because he undermined the mask mandate, Mr. Holt argues that Foot Locker's motivation for terminating him was because he reported inventory irregularities.

II. Discussion

Mr. Holt believes the district court erred in granting summary judgment on his retaliatory discharge claim. As we explain below, we disagree.

We review the district court's entry of summary judgment *de novo*, applying the same standard as the district court. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]e view the facts and any reasonable inferences in the light most favorable to the non-moving

party." *Arnold v. City of Olathe*, 35 F.4th 778, 788 (10th Cir. 2022) (citations omitted).

A. Kansas Whistleblower Exception

Because Kansas follows the common-law doctrine of employment-at-will, an employer usually may "terminate an employee for good cause, no cause, or even for wrongful cause." *Shaw v. Sw. Kan. Groundwater Mgmt. Dist. Three*, 219 P.3d 857, 861 (Kan. Ct. App. 2009). But there are exceptions to the common law that allow a retaliatory-discharge claim, one of which is the whistleblower exception. *Id.* That exception prohibits "[t]ermination, in retaliation for the good faith reporting of a co-worker's or employer's serious infraction of rules, regulations, or law pertaining to public health, safety, and the general welfare[.]" *Flenker v. Willamette Indus., Inc.,* 967 P.2d 295, 298 (Kan. 1998) (citing *Palmer v. Brown*, 752 P.2d 685, 690 (Kan. 1988)). A termination in violation of this provision "is an actionable tort." *Id.*

To establish a prima facie case of retaliatory discharge for whistleblowing, the employee must prove by clear and convincing evidence that a reasonably prudent employee would believe the employer had violated public health, safety, or the general welfare. Kansas courts have established three elements for a retaliatory discharge claim:

> [1] [A] reasonably prudent person would have concluded the employee's co-worker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare; [2] the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee; and [3]

> the employee was discharged in retaliation for making the report.

Palmer, 752 P.2d at 690.

The "whistleblowing must be based on violations of specific and definite rules, regulations, or laws." *Goodman v. Wesley Med. Ctr., L.L.C.*, 78 P.3d 817, 822 (Kan. 2003); *see also Palmer v. Pentair*, No. 18-02638-CM-TJJ, 2019 WL 3239350, at *8 (D. Kan. July 18, 2019) (acknowledging the plaintiff must "clearly allege a violation of specific and definite rules, regulations, or laws beyond a mere feeling of wrongdoing"). If the employee can establish a prima facie case, the burden shifts to the employer to show it terminated the employee for a legitimate reason, and then shifts back to the employee to show the employer's purported reason was pretextual. *Shaw*, 219 P.3d at 862 (citing *Goodman*, 78 P.3d at 821).

The whistleblower exception is narrow. "Kansas courts permit the common-law tort of retaliatory discharge as a limited exception to the at-will employment doctrine when it is necessary to protect a strongly held state public policy from being undermined." *Hill v. State*, 448 P.3d 457, 466 (Kan. 2019) (quoting *Campbell v. Husky Hogs, L.L.C.*, 255 P.3d 1, 5 (Kan. 2011)). "The public policy of protecting employees from retaliatory discharge is to ensure that infractions of rules, regulations, or laws pertaining to public health and safety are properly reported." *Moyer v. Allen Freight Lines, Inc.*, 885 P.2d 391, 394 (Kan. Ct. App. 1994) (citing *Palmer*, 752 P.2d at 689)). The Kansas Supreme Court ruled that "[b]efore courts are justified in declaring the existence of public policy, however, 'it should be so thoroughly established as a state of

public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.'" *Palmer*, 752 P.2d at 687–88 (quoting *Noel v. Menninger Found.*, 267 P.2d 934, 941 (Kan. 1954)).

As a general matter, Kansas courts have applied the whistleblower exception in cases involving reports of serious public health and safety issues. *See, e.g.*, *White v. Gen. Motors Corp.*, 908 F.2d 669, 671 (10th Cir. 1990) (public interest in report of defects in brake installations at automobile plant); *Shaw*, 219 P.3d at 864 (public interest in employee report of groundwater waste violation); *Moyer*, 885 P.2d at 392–93 (public interest in report by truck driver of equipment failures that occurred in her truck); *cf. Love v. Johnson Cnty. Parks & Recreation Dist.*, No. 72,050, 1995 WL 18253445, at *8 (Kan. Ct. App. Aug. 18, 1995) (technical violation of budget laws did not pertain to public health, safety, and general welfare). But no case has extended the doctrine to reports involving internal inventory controls.

B. Mr. Holt's Retaliatory Discharge Claim

Mr. Holt bases his argument on two theories. First, he points to Kansas Blue Sky laws prohibiting fraud in the sale of securities and false or misleading financial filings. Kan. Stat. Ann. §§ 17-12a501, 17-12a505. Second, he relies on federal Securities regulations which require publicly-traded company financial statements to be prepared in accordance with Generally Accepted Accounting Principles (GAAP). *See* SEC Regulation S-X, 17 C.F.R. Part 210. He argues that these provisions protect the public's interest in publicly-traded companies like Foot Locker being financially transparent and truthful.

But no Kansas case has yet recognized a cause of action for retaliatory discharge based on reported violations of the Kansas Blue Sky laws or SEC regulations.[1] Thus, before recognizing a new cause of action, we must "determine that some strong public policy required it." *Conrad v. Bd. of Johnson Cnty. Comm'rs*, 237 F. Supp. 2d 1204, 1265 (D. Kan. 2002) (quoting *Dickens v. Snodgrass, Dunlap & Co.*, 872 P.2d 252, 262 (Kan. 1994)). "The Kansas Supreme Court has made it clear that this is a very hard test to satisfy." *Conrad*, 237 F. Supp. 2d at 1265. Because Kansas courts have not extended the whistleblower exception to the types of internal inventory reports made by Mr. Holt, we agree with the district court that Kansas would not extend its judge-made retaliatory discharge doctrine to this application.

Even so, his claim falters for another reason. Kansas law requires that a public policy violation must be established by clear and convincing evidence that a reasonably prudent person would have concluded Foot Locker was engaged in activities in violation of rules, regulations, or law. *Palmer*, 752 P.2d at 690. We

[1] Missouri has recognized violations of financial law are against "clearly mandated public policy[.]" *Dunn v. Enter. Rent-A-Car Co.*, 170 S.W.3d 1, 8 (Mo. Ct. App. 2005) (citing *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575, 576 (Ill. App. 1986)). In Missouri, an employee must prove he was terminated for refusing to commit an "illegal act or an act contrary to a strong mandate of public policy." *Id.* at 6-7. All the employee must demonstrate to prove this is that "the conduct required of him by the employer would have amounted to a violation of a statute, constitutional provision or regulation [.]" *Id*. at 7 (citations omitted). Kansas, however, recognizes only a "few and narrowly defined" public policy concerns, *Riddle v. Wal-Mart Stores, Inc.*, 998 P.2d 114, 119 (Kan. App. Ct. 2000), that pertain to public health, safety, and the general welfare.

conclude that no reasonably prudent person would have determined these inventory requests amounted to legal violations.

As discussed above, Mr. Holt alleges that a reasonable person would have concluded these inventory requests were violations of Kansas Blue Sky laws and federal SEC regulations because they could have resulted in inaccurate financial statements. He contends he need not show that an actual violation of law occurred, just that a reasonably prudent person would have concluded there was a violation. *See Doud v. Countrywide Home Mortg. Loan*, No. 96-2079-JWL, 1997 WL 292127, at *10 (D. Kan. May 5, 1997). He fails to make such a showing.

A reasonable person would conclude these irregular inventory requests were *potential* internal company *policy* violations. And an internal policy violation generally does not support a whistleblower claim. *See Herman v. W. Fin. Corp.*, 869 P.2d 696, 703–05 (Kan. 1994) (concluding the failure to follow company guidelines could not support a whistleblower claim); *Palmerin v. Johnson Cnty., Kan. Bd. of Cnty. Comm'rs*, 524 F. App'x 431, 433 (10th Cir. 2013) (noting Kansas has held that violations of internal policy do not qualify as rules, regulations, or the law pertaining to public health, safety, and the general welfare); *Taylor v. Home Depot USA, Inc.*, 506 F. Supp. 2d 504, 520 (D. Kan. 2007) (concluding the whistleblower exception "would not extend to merely reporting suspected failures to comply with internal company policies or procedures unrelated to such laws"); *Duffey v. Bd. of Comm'rs of Butler Cnty.*, No. 08–1186–WEB, 2011 WL 1118585, at *16 (D. Kan. Mar. 25, 2011) ("Reported violations of internal policies are insufficient to establish a claim for

whistleblowing. The reported conduct must violate the law."). And there is no basis to believe that these incidents in any way could or did result in unlawful public filings.

A reasonable person would also not conclude Foot Locker was violating the law based on the inventory requests themselves. The requests are all different in kind and it is hard to decipher any pattern of potentially illegal conduct. The departments making these requests had legitimate reasons for making such requests—and made those reasons clear to Mr. Holt. Lastly, and importantly, Foot Locker did not have any inaccurate financial statements. The only time an error occurred because of an inventory request was when his staff tried to comply with a request to reject a product sent in error, but ended up receiving it and shipping it back to the vendor. Mr. Holt admits, however, that this mistake could have been corrected before the end of the quarter. In *Love v. Johnson Cnty. Parks & Recreation Dist.*, the plaintiff alleged a "potential technical violation of budget laws." 1995 WL 18253445, at *8. The court found that a reasonable person would not believe there was a violation of law because although "the uncontroverted evidence would support an inference that monies were transferred into the wrong type of fund[,] [n]othing in the record supports a conclusion that the funds themselves were misused." *Id.* Similarly, even if the inference is that Foot Locker was trying to falsify inventory records, there is no evidence that any financial statements could or were ever falsified.

Because Mr. Holt fails to establish the first element of his prima facie case, we need not reach the burden-shifting analysis.

III. Conclusion

For these reasons, we affirm the district court's grant of summary judgment.

Entered for the Court

Timothy M. Tymkovich
Circuit Judge