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KMTG PRACTICE AREAS
Education Law

Non-reelected Probationary Teacher Did Not State A Claim For Wrongful Termination In Violation Of Public Policy Even If The District's Decision Was Motivated By The Teacher Informing An Athletic Director That A Coach Had Recommended A Nutritional Supplement To A Student

In *Carter v. Escondido Union High School*, (56 Cal.Rptr.3d 262, Cal.App. 4 Dist., Mar. 21, 2007), a California Court of Appeal recently considered whether a teacher stated a claim for wrongful discharge in violation of public policy after the school district he worked for declined to rehire him after his second year of probationary employment. The teacher alleged that he was non-reelected because he informed an athletic director that a football coach had recommended a nutritional supplement to a student. The Court of Appeal held that there was no basis for liability because the district's reason for terminating the teacher was not prohibited by law and was not in contravention of well-established public policy.

Facts

During the 1999-2000 school year, James T. Carter ("Carter") was a teacher and basketball coach at Monte Vista High School. A student told Carter that the football coach, Ed Carberry, had suggested that he should drink protein shakes containing creatine to gain weight. The student became ill after drinking the shakes. Carter told the school's athletic direc-

tor that the student had been taking a "weight gainer" because of Carberry's suggestion. The director told Carter that he would not take any action against Carberry unless the student's parents got involved. Carter informed the director that he would leave Monte Vista and find another job if the director took no action.

Carter applied for and received a probationary appointment as a teacher at Orange Glen High School in the Escondido Union High School District ("District"). After Carter accepted the position, he learned that Carberry's wife would be the interim principle at the school. Carter was employed for the 2000-2001 school year and his teaching status was renewed again for the 2001-2002 school year. However, in March 2002, the District informed Carter that his employment would terminate at the end of the year.

Carter brought a lawsuit against the District alleging that he was wrongfully terminated in violation of public policy. A jury found that the District's decision had been motivated by Carter's report and that he was entitled to damages of over \$1,000,000. Based on this finding the trial court entered judgment in favor of Carter.

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Decision

The Court of Appeal reversed the lower court's judgment. The court found that the District's liability was not grounded "on a well-established, fundamental public policy derived from a constitutional or statutory provision" and could not, therefore, support a claim for wrongful termination in violation of public policy.

Although an employer can discharge an at-will employee for an arbitrary or irrational reason, or for no reason at all, an employer cannot discharge an employee "for an unlawful reason or a purpose that contravenes fundamental public policy." An employee can state a claim for wrongful discharge against public policy only if the discharge "violates a policy that is: (1) delineated in either constitutional or statutory provisions; (2) 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interest of the individual; (3) well established at the time of discharge; and (4) 'substantial' and 'fundamental.'" The policy at issue must be based on a specific constitutional or statutory provision so as to "avoid judicial interference with the legislative domain" and to "ensure that employers have adequate notice of the conduct that will subject them to tort liability to the employees that they discharge."

Carter argued that the District's liability was based on Education Code section 49423 which provides that any pupil who is required to take medication during a regular schoolday "may be assisted by the school nurse or other designated school personnel . . . if the

school district receives' a 'written statement from the physician'" which details the instructions for taking the medication and indicates "the desire that the school district assist the pupil in the matters set forth in the statement." The court concluded that section 49423 could not be used as a basis for liability because it does not prohibit any conduct but instead delineates when assistance for the administration of medication may be given. Furthermore, the protein shake was not medication that had been prescribed by a physician. Even though the California Code of Regulations contains a provision providing that the definition of medication includes nutritional supplements, the court concluded that section 49423 still did not cover the conduct that was the subject of Carter's complaint. The court stated, "In sum, we are unable to discern from section 49423 and its implementing regulations any fundamental and well-established public 'policy against teachers recommending weight-gaining substances to students'; consequently, the statute cannot form the basis for Carter's wrongful termination action."

The court also rejected Carter's implicit argument that the judgment against the District was supported by Labor Code section 1102.5, known as the "whistle-blower" statute. Carter did not disclose a violation of a state or federal law or regulation. His disclosure to the athletic director amounted to an "internal personnel disclosure," and such a disclosure is not protected by the whistle-blower statute.

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