

2011 WL 1766508 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Charles P. DEEDS, Plaintiff/Appellant,
v.
WADDELL & REED INVESTMENT MANAGEMENT COMPANY, Defendant/Appellee.

No. 10-104949-A.
April 8, 2011.

Appeal from the District Court of Johnson County, Kansas, Honorable
Thomas Sutherland, Judge, District Court Case No. 09 CV 3116

Brief of Appellee

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***1 Nature Of Case**

Viewing the facts in the light most favorable to Appellant Charles P. Deeds, Appellee Waddell & Reed Investment Management Company (“WRIMCO”) terminated his employment on April 9, 2007, in part, as a result of an ongoing compensation dispute related to its July 2005, change in the commission opportunities available to Deeds and others in his department. After the change, Deeds challenged it as “retroactive” and “not right.” In so doing, Deeds never suggested, hinted, or claimed that WRIMCO was refusing to pay him commissions that he had already earned, that WRIMCO's actions in any way implicated the Kansas Wage Payment Act (“KWPA”), or that WRIMCO's action in any way violated any Kansas public policy, much less one that related to “rules, regulations, or laws pertaining to public health and safety.” In fact, Deeds did not make that claim until long *after* the termination of his employment.

As he did before the District Court below, Deeds requests that this Court convert his compensation dispute into either an additional retaliatory discharge exception to Kansas' long-established at-will employment doctrine or to a new, substantive “wrongful discharge claim.” Additionally, Deeds requests that this Court conclude there is a triable issue on his claim that WRIMCO terminated his employment to prevent him from performing a condition precedent to his receipt of earned commissions or, if not, that the Court conclude there is a triable issue on his claim that WRIMCO was unjustly enriched through the termination of his employment. As did the District Court, this Court should reject those requests.

First, no Kansas Court has yet recognized a retaliatory discharge exception to Kansas' at-will employment doctrine based on the KWPA. This Court should not be the *2 first, as the KWPA does not include a public policy “pertaining to public health and safety” that is at the heart of the tort of retaliatory discharge exception. Further, Deeds' challenge to the commission change as “retroactive” and “not right” did not in any way, shape, or form implicate the KWPA. As such, there was no triable issue as to whether Deeds engaged in the protected activity that is essential to a retaliatory discharge claim.

Second, no Court has yet recognized a general, substantive “wrongful discharge” exception to Kansas' at-will employment doctrine, and this Court should not be the first. Indeed, Deeds himself admitted *he* does not believe WRIMCO terminated his employment to avoid paying him earned commissions or to “misappropriate” the Pictet account. Despite his counsel's protestations to the contrary, this Court should not ignore Deeds' admissions and create a claim in which he does not even believe. It may be overly simplistic, but if Deeds does not believe in the claim, then he cannot reasonably ask a jury to.

Finally, Deeds' prevention and unjust enrichment claims are both factually and legally unsound. In terminating Deeds' employment, WRIMCO did not prevent him from performing an act that was required for him to receive commissions he had already earned, which is the heart of a prevention claim. Instead, it prevented him from earning additional commissions, as former employees no longer earn commissions at WRIMCO (or anywhere else).

And, the tort of unjust enrichment is not an appropriate vehicle for a terminated employee to renegotiate his or her compensation package. If it were, then any former Kansas employee could bring such a claim as a result of the termination of his or her *3 employment. With Kansas avowedly an at-will employment state, that simply cannot be the case. If it is, then the exceptions to the at-will employment doctrine swallow the rule.

As the District Court correctly concluded, no retaliatory discharge claim exists and no reasonable fact-finder could find for Deeds on any of his claims. This Court should affirm that conclusion.

Statement Of The Issues

- (1) Should this Court expand the limited retaliatory discharge exception to the at-will employment doctrine to include retaliation for activity allegedly protected by the KWPA? If so, then is there a triable issue as to whether Deeds engaged in protected activity under the KWPA?
- (2) Should this Court create a general, substantive “wrongful discharge” exception to the at-will employment doctrine? If so, then is there a triable issue on such a claim based on the record before this Court?
- (3) Can an at-will employee assert a claim under the prevention doctrine to seek unearned commissions where no contractual condition precedent exists? If so, then is there a triable issue on that claim based on the record before this Court?
- (4) Can an at-will employee seek after the termination of his employment to renegotiate his compensation package through a claim for unjust enrichment? If so, then is there a triable issue on that claim based on the facts in the record before this Court?

Statement Of Facts (“SOF”)

A. Procedural Background of Appeal

On April 7, 2009, Deeds filed his Petition (R Vol. I, 5-14). In his Petition, Deeds asserted claims of (1) retaliatory discharge in violation of public policy; (2) wrongful *4 discharge; (3) prevention; and (4) unjust enrichment. *Id.* On July 17, 2009, Defendants answered the Petition (R. Vol. I, 15-30).

On April 12, 2010, WRIMCO filed its Motion for Summary Judgment (“Motion”) and its Brief in Support thereof (R. Vol. II, 310-488). On June 7, 2010, Deeds filed his Response to Defendant's Motion for Summary Judgment (R. Vol. I, 49-208). On June 21, 2010, WRIMCO filed its Reply to Deeds's Response to Defendant's Motion for Summary Judgment (R. Vol. I, 209-80). On July 28, 2010, the District Court heard oral arguments on WRIMCO's Motion (R. Vol. I, 282; R. Vol. III, 1-3). On August 2, 2010, the District Court entered its Memorandum Decision and Journal Entry of Judgment (“Decision”) granting WRIMCO's Motion in its entirety (R. Vol. I, 281-304).

On August 24, 2010, Deeds filed his Notice of Appeal (R. Vol. I, 305-06). On January 24, 2011, Deeds filed his Brief of Appellant (“Brief”).

B. The Context of Deeds' Employment with WRIMCO.

Deeds started working for WRIMCO--at the time named Waddell & Reed Asset Management--in the Spring of 1998 (R. Vol. II, 324-26). At all relevant times, Deeds was an at-will employee of WRIMCO (R. Vol. I, 62; R. Vol. II, 350).

In its offer letter, WRIMCO advised Deeds he would be able to earn commissions based on his “sales activity *and* his ongoing client servicing” (R. Vol. II, 339 & 354-55) (emphasis added). In fact, Deeds' title upon starting at WRIMCO was “Vice President, Marketing & *Client Service*, Southeast Region” (*Id.* (emphasis added)). No one at WRIMCO ever told Deeds that all he had to do to earn commissions was sell the account (R. Vol. I, 226 & 268). Based on his offer letter, Deeds understood that ongoing client servicing was required for him to earn commissions generally, not just on two accounts *5 he inherited at the beginning of his employment (R. Vol. I, 257 & 259-60; R. Vol. II, 336-40).

Deeds admitted his understanding throughout his sworn testimony. For example, Deeds testified as follows in his first deposition: ¹

Q: So if I understand your testimony, the ongoing client servicing that was required was for -- only for accounts that existed at Waddell & Reed before your arrival?

A: *No*, it was for *some* existing accounts that were there before my arrival and, again, the compensation structure was, you know, the 20, 10, 5, 5, 2 1/2 trailer was a commissions structure that was paid to me as long as the account remained. **And so it was in my best interests to do whatever parts I was asked to keep those accounts.**

* * *

Q: Did you understand that the -- that a requirement for you to receive a commission or a revenue sharing **on an account** was that you provide service to that account after it had arrived?

A: Based on my offer letter from McCroy?

Q: Sure, we can put it in that context.

A: Yeah. Based on my initial offer letter, correct

Q: You understood that a requirement, a condition of you receiving the commission or revenue sharing would be your ongoing service to that account?

A: At that time, correct.

(R. Vol. II, 360) (emphasis added). *See also* R. Vol. I, 257 (Q: And is it your contention that you earned that, regardless of whether you performed any additional services for that account? A: You know, initially McCroy -- you know, when I went to work there, stated that this would be based on my ability to generate accounts **and help keep them, which in some cases meant assisting in the client service**. Some accounts had that and required it and some didn't . . .) (emphasis added); R. Vol. I, 260 (Q: Okay. And for the new *6 accounts did you - you understood that you -- I think you said that you had to provide ongoing service to the accounts to continue to receive the commission? A: If McCroy deemed that I needed to, he did, yes.) (emphasis added)

Deeds confirmed the foregoing in his second deposition:

Q: And your understanding from this offer letter was that the -- your participation -- or a requirement of your participation in receipt of commissions or revenue sharing was both sales production and ongoing client servicing, correct?

A: Correct.

Q: And that was your understanding of what was required all the way through the July 2005 change to the commission or revenue sharing schedule, correct?

A: *Correct*

(R. Vol. II, 339-40) (emphasis added).

Deeds' offer letter did not reflect a deal applicable only to him with respect to two inherited accounts. In fact, McCroy used the *exact same sentence* in his offer letter to Nikki Newton, who he also hired as a "Vice President, Marketing & Client Service," that he had used in the offer letter to Deeds, namely that "You will also have the opportunity to receive additional compensation, which will be based on your sales production and *your ongoing client servicing*" (*compare* R. Vol. I, 278, with R. Vol. II, 355)

(emphasis added). McCroy provided Newton's offer letter to him on December 17, 1997, only 3 months and 9 days before he provided Deeds' offer letter to him (*Id.*).

Accordingly, Deeds understood that he earned commissions through a combination of selling and client servicing, subject to the following schedule: 20% of fee generated the first year; 15% of fee generated the second year; 10% of fee generated the third year; 5% of fee generated the fourth year; and a “trailer” commission 2.5% of fee generated in the fifth year and beyond, so long as Deeds remained at WRIMCO (R. Vol. *7 II, 340 & 356-57). WRIMCO established that commission schedule to deal with the “typical” account because, as a practical matter, the amount of service any account required varied from account to account: some accounts required a lot of client servicing attention while others required less (R. Vol. II, 372-73). That is why, as Deeds points out on page 7 of his Brief, there were accounts on which he received commissions but that he did not service. It is also why there were accounts on which he received commissions that he serviced but did not sell. (*Id.*)

C. Deeds Earned The Trailer Commission Through Client Service.

Under the foregoing schedule, the “trailer” commission was solely in exchange for primary client service. Deeds specifically admitted he understood that:

Q: So it was your understanding that you would have -- the client servicing was going to be shifted to other folks?

A: That was my understanding.

Q: And so the trailer fee *that was based on client servicing* was going to be phased out and removed?

A: From -- yeah, *that was my understanding* and that was the part that I -- at this point I began to have some concern with because I disagreed with all the prior business, my compensation structure. . . .

(R. Vol. II, 340 & 363) (emphasis added).

Deeds' understanding was consistent with WRIMCO's actual practice. When Deeds inherited pre-existing clients to service, he--not the person who sold the account--received the trailer commission on those accounts (R. Vol. II, 337-38 & 362, 370). When he transferred accounts to a new employee (Clayton Johnson) to service, the trailer commission transferred, too (R. Vol. II, 371, 377).

The same is true for Nikki Newton, Deeds' predecessor and peer (and, later, boss). Newton's offer letter contained the same “ongoing client servicing” requirement that Deeds' offer letter contained (R. Vol. I, 273, 277-78). And, when Newton transferred *8 accounts to a new employee (Clayton Johnson) to service, he transferred the trailer commission, too (R. Vol. II, 377).

Deeds understood throughout his employment that the trailer commissions referenced in the Commission Schedule were to help him build income if he was at WRIMCO “long-term,” i.e., that the trailer commissions would flow to him as long as he worked at WRIMCO (R. Vol. II, 338 & 353). While Deeds initially tried to claim otherwise, he later clarified that was only his “understanding.” In fact, he specifically admitted that no one ever told him that he would receive trailer commissions after his employment concluded (R. Vol. I, 257-58, 261, 269-70; R. Vol. II, 371).

Further, Deeds repeatedly admitted McCroy told him the trailer commissions were only “if you're here for the long haul,” not regardless of whether you are here or not (R. Vol. II, 361). Deeds testified as follows in his first deposition:

Q: And your - as I understand your testimony, your first knowledge of the \$50,000 cap was sometime a year or so after you started?

A: Yes.

Q: Did you object to that cap?

A: Yes.

Q: To McCroy?

A: Yes.

Q: To anyone else?"

A: It was my -- no, McCroy was my department head. I objected to him.

Q: And what was McCroy's response?

A: His response was, I want you to think long term. You know, the cap is there. Management's decided, but the reality is we're in a building process and with this fee structure, you know, 10, 5, 5, a 2 1/2, there is the potential to build a substantial income *if you're here for the long haul*.

Id.

While Deeds attempted to retreat from the foregoing testimony during the hearing on his wage claim, he later clarified that attempt on cross-examination (R. Vol. I, 267). In *9 so doing, he admitted McCroy never told him that he would continue to receive trailer commissions after his employment concluded (R. Vol. I, 269-70).

Deeds further clarified that testimony during his second deposition. Specifically, Deeds on four separate occasions testified that he understood he would receive trailer commissions only while employed at WRIMCO. The first occasion is at R. Vol. II, 33, where Deeds admitted the trailer commission applied only "*for as long as I worked at Waddell & Reed.*"² The second occasion is a few lines later, again at R. Vol. II, 333, where Deeds testified that McCroy told him "If you're here -- we're trying to build a department. I'm here to try to build this division. *If you're here for the long term*, this *10 compensation structure rewards you for that" (emphasis added). The third occasion is at R. Vol. II, 344, where Deeds said "It was communicated to me by McCroy that that's how I would--when we got--when we were handed the \$50,000 cap, that's how -- that's how I would build my income *if I was here for. the long term*" (emphasis added). And, the final occasion is at R. Vol. II, 353, where Deeds specifically testified that he understood that the trailer commissions "would flow to me *as long as I worked at Waddell & Reed*" (emphasis added).

D. WRIMCO Prospectively Phased Out Trailer Commissions and the Primary Client-Servicing Through Which They Were Earned

Effective July 1, 2005, WRIMCO changed the commission schedule to phase out the trailer commission that employees in Deeds' department earned through primary client servicing (R. Vol. II, 345 & 378--80). Deeds understood the phasing out of trailer commissions coincided with the phasing out of the primary client servicing responsibilities for him and his peers, on which trailer commissions were based (R. Vol. I, 268, wherein Deeds admitted the change was to remove "primary" client servicing, though he retained some client servicing responsibilities until the conclusion of his employment; R. Vol. II, 340, 346, 363, 372-74).

According to Deeds, the phasing out of primary client servicing "pretty much" coincided with the phasing out of the trailer commission (R. Vol. II, 346, 352, 364, 373-74, 383). In fact, in pursuit of his wage claim, Deeds advised the Department of

Labor that “[t]his change identified in that document was specifically designed to end the client servicing of accounts and payments tied to that function over a three year reduction plan” (R. Vol. II, 383) (emphasis added). After the phase-out, Deeds and his *11 peers retained only secondary client service responsibility (R., Vol. II, 339-40 & 372-74). For that responsibility, there was no trailer commission,

E. Deeds Complained the Trailer Commission Phase-Out was “Retroactive” and “Not Right,” But He Did Not Complain During His Employment Regarding Lawfulness of the Phase-Out

According to Deeds, he complained that he believed the application of the new schedule (i.e., the phase-out of trailer commissions) to existing accounts was “retroactive” and “not right” on a number of occasions, including in June or July 2005; in November, 2005; in March or April, 2006; in October, 2006, and in January, 2007 (R. Vol. II, 340-44). Deeds admitted those were his only complaints, i.e., that the phase-out was “retroactive” and “not right”:

Q: That what you indicated was you thought it was a retroactive change?

A: Right. I also conveyed that it wasn't right because I was the only one that it was happening to.

Q: Okay. *Anything else that you recall* from the conversations with Newton and Sundeen about the compensation change that you've not testified to today?

A: *Not that I can remember.*

(R. Vol. II, 345) (emphasis added).

Deeds claimed in his interrogatory answers that he complained to WRIMCO that it could not “lawfully” phase out commissions and that he believed commissions “were unlawfully being phased out” (R. Vol. II, 400-01). However, Deeds later clarified that:

- He was not aware of Kansas law during his employment (R. Vol. II, 334);
- He was not able to form any belief as to what Kansas law did/did not require during his employment (R. Vol. II, 348); and
- *12 • He *never* used the word “unlawful” in any of his complaints about the application of the new schedule to existing accounts (R. Vol. II, 345 & 347-48).

Deeds ultimately admitted he did not at any time before engaging counsel—which occurred after the termination of his employment and after he had filed his wage claim with the Kansas Department of Labor (“DOL”)—believe that the commission change was unlawful (R. Vol. II, 334 & 347).

F. Termination of Deeds' Employment and Assignment of Pictet Account

On April 9, 2007, WRIMCO terminated Deeds' employment (R. Vol. II, 366). Deeds claims that, in the meeting at which he learned of the termination of his employment, his supervisor--Newton--cited Deeds' dissatisfaction with his compensation as at least one of the reasons for the action (R. Vol. II, 348). For purposes of its Motion, WRIMCO admitted Deeds claim (R. Vol. I, 236).

At the termination of Deeds' employment, Newton did not know who would assume responsibility for any of Deeds' accounts, including Pictet (R. Vol. II, 407-08).³ In Newton's experience, the person assuming a departed employee's account did not earn commissions on that account (*Id.*). John Sundeen-Newton's supervisor--decided Newton *13 would assume the Pictet account

and, after making that decision, that Newton would be able to earn commissions for his work on the account (R. Vol. II, 409-10). Newton did not seek, and had no input into, whether he would participate in commissions for any work he did on the Pictet account (*Id.*). Pictet is the only account Newton assumed from Deeds on which he received commissions (R. Vol. II, 407-08).

Deeds does not believe Newton terminated his employment so that he could appropriate Deeds' commissions for himself. Indeed, Deeds specifically testified as follows:

Q: Do you believe that that Newton decided to terminate your employment because he wanted responsibility for the Pictet account?

A: No, I think it was because of my complaining. I don't know if it was Newton. I think my--my termination was because I was complaining about, you know, and the retroactive change on my trailer commissions, the fact that I wasn't paid those.

Q: *You don't believe that Newton or anyone else was motivated by the desire to become responsible for the Pictet account?*

A: *No.*

(R. Vol. II, 349) (emphasis added). In other words, Deeds does not believe Newton "purloined" the Pictet account.

Deeds also does not believe WRIMCO terminated his employment to avoid paying him earned commissions. In fact, Deeds answered "No" when asked specifically "Are you claiming that the motivation for the termination of your employment was an attempt to try to avoid paying you earned commissions?" (R. Vol. II, 351).

G. Deeds' Wage Claim

Following the conclusion of his employment with WRIMCO, Deeds filed a claim with the Kansas DOL, seeking over \$1,000,000.00 in allegedly unpaid commissions, which Deeds alleged he earned in addition to the hundreds of thousands of dollars *14 WRIMCO paid him yearly in base salary and commissions (R. Vol. II, 484-88). As he claimed to the District Court, Deeds claimed to the DOL that he earned commissions solely upon selling an account and as long as the account remained at WRIMCO, regardless of whether he remained employed by WRIMCO (*Id.*). After engaging counsel, Deeds also claimed to the DOL that WRIMCO violated the KWPA by "retroactively" eliminating the trailer in July of 2005 for accounts he already sold and by failing to pay him commissions following the termination of his employment (*Id.*).

On August 20, 2009, the DOL Hearing Officer rendered an Initial Order denying Deeds' claims in their entirety (*Id.*). In the Initial Order, the Hearing Officer found that Deeds earned commissions at WRIMCO over time based on both sales and ongoing client servicing, as his offer letter specifically stated (*Id.*). Specifically, the Hearing Officer found that "client servicing is an integral, indispensable part of the job. Client servicing is a mandatory prerequisite to earning commissions. It was specifically mentioned in Mr. Deeds' offer of employment letter" (*Id.*).

Deeds sought review of the Hearing Officer's Initial Order and, at the time of the District Court's Decision, that review remained pending (R. Vol. III, 11-12). It still does.

H. Summary Judgment

On August 2, 2010, the District Court entered its Memorandum Decision and Journal Entry of Judgment (R. Vol. I, 281-304). In granting WRIMCO's Motion with respect to Deeds' retaliatory discharge and wrongful discharge claims, the District Court (1) rejected the notion that the KWPA reflects a public policy "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," such that it supports an exception to the at-

will employment doctrine, and (2) noted the absence of any Kansas case law to suggest a *15 contrary conclusion (R. Vol. I, 285-94). Additionally, the District Court noted that Deeds himself did not believe WRIMCO terminated his employment as he claimed in his wrongful discharge claim, i.e., Deeds did not believe WRIMCO terminated his employment to avoid paying him earned commissions or to “purloin” his accounts (R. Vol. I, 294).

With respect to Deeds' prevention and unjust enrichment claims, the District Court granted WRIMCO's Motion because (1) Deeds was an at-will employee; (2) WRIMCO terminated Deeds' employment pursuant to a legal right; (3) Deeds did not show that WRIMCO's termination of his employment was “unjustified,” wrongful, or in bad faith; and (4) allowing Deeds to maintain either claim would circumvent the at-will employment doctrine in Kansas (R. Vol. I, 294-303).

I. Appellate Jurisdiction

WRIMCO agrees with Deeds' statement of this Court's jurisdiction over the above-captioned appeal.

Argument And Authorities

I. The District Court Properly Granted WRIMCO's Motion on Deeds' KWPA Retaliatory Discharge Claim.

A. Standard of Review

In addressing a motion for summary judgment, the District Court must view the evidence most favorably to the party opposing the motion and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. *Sternberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009). If the pleadings, depositions, answers to interrogatories, admissions on file, and *16 any affidavits demonstrate no genuine issue of material fact, then the District Court should render judgment as a matter of law. *Id.*

The Court of Appeals reviews the District Court's factual and legal findings de novo. *Shamberg*, 289 Kan. at 900; *Miller v. Westport Ins. Corp.*, 288 Kan. 27, 32, 200 P.3d 419 (2009). In other words, it applies the same standard as the District Court. *Id.*; *Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick County*, 268 Kan. 319, 322, 995 P.2d 844 (2000).

B. The KWPA Does Not Reflect A Public Policy Sufficient To Warrant Further Erosion Of Kansas' At-Will Employment Doctrine.

In granting WRIMCO's Motion, the District Court concluded the KWPA does not embody the type of public policy that justifies an additional retaliatory discharge exception to Kansas' well-established at-will employment doctrine (R. Vol. I, 285-94). The District Court was correct, as Kansas' courts have explained that the public policy at issue must relate to “public health and safety” for a retaliatory discharge claim to lie. *Moyer v. Allen Freight Lines, Inc.*, 20 Kan. App. 2d 203, 206, 885 P.2d 391 (1994). This Court should affirm the District Court's conclusion.

At all times, Deeds was an at-will employee of WRIMCO (R. Vol. I, 62; R. Vol. II, 350). As such, WRIMCO could terminate his employment at any time with good cause, no cause, or even wrong cause, without incurring liability. *Goodman v. Wesley Med. Ctr.*, 276 Kan. 586, 589, 78 P.3d 817 (2003).

As Deeds points out in his Brief, Kansas courts have recognized a *limited*⁴ exception to the foregoing rule for retaliatory discharges in contravention of public *17 policy. However, not all public policies are sufficient to serve as the basis for such an exception. Indeed, the Kansas Supreme Court aptly held that, “[b]efore courts are justified in declaring the existence of public policy ... ‘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*, 242 Kan. at 897 (1988).

Over the years, very few public policies have met that narrow requirement. Specifically, Kansas courts have recognized exceptions only for retaliatory discharges based on (1) asserting a workers compensation claim; (2) whistle-blowing pertaining to “public health, safety, and the general welfare”; (3) exercising rights under the Federal Employers Liability Act (“FELA”); and (4) reporting **elder abuse**. *Poull v. Affinitas Kansas, Inc.*, Case No. 102,700, 2010 WL 1462763, *4-7 (Kan. Ct. App. Apr. 8, 2010) (citations omitted). Those limited exceptions are inapplicable here.

Nevertheless, Deeds in I.A.-E. of his **ARGUMENTS AND AUTHORITIES** walks this Court through each of those limited exceptions. In so doing, Deeds fails to connect the dots between them, namely that they all include conduct implicating “public health and safety,” not conduct that is in the self-interest of a single employee that is “more in the nature of a private and individual grievance.” Where that type of conduct is at issue, no retaliatory discharge exception lies. *See, e.g., Geary v. Telular Corp.*, 793 N.E.2d 128, 134 (Ill. Ct. App. 2003) (wage payment act claim “was more in the nature of *18 a private and individual grievance insufficient to justify a claim of retaliatory discharge”); *Malone v. Amer. Bus. Info.*, 634 N.W.2d 788, 793 (2001) (refusing to expand the tort of retaliatory discharge to encompass claims based on the NWPCA because it “does not represent a ‘very clear mandate of public policy’ which would warrant recognition of an exception to the employment-at-will doctrine”).

Indeed, in first recognizing a public policy retaliatory discharge claim, this Court in *Murphy v. City of Topeka* held that the Workmen's Compensation Act was “designed to promote the welfare of the people in this state.” 6 Kan. App. 2d 488, 495-96, 630 P.2d 186 (1981). In so doing, this Court emphasized that “[t]o allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert *the purpose of the act.*” *Id.* at 496 (emphasis added).

In *Hysten v. Burlington Northern Santa Fe Ry. Co.*, the Kansas Supreme Court extended the logic of *Murphy* to recognize a retaliatory discharge claim related to an employee's exercise of rights under FELA. 277 Kan. 551, 108 P.3d 437 (2004) In so doing, the Court extended the *Murphy* recognition of a public policy supporting injured workers' rights to pursue remedies for their on-the-job injuries. *Id.*

In *Palmer v. Brown*, the Kansas Supreme Court extended *Murphy* to whistleblowing, holding that Kansas' strong public policy encouraged citizens to report crimes. 242 Kan. at 899 (1988). In so holding, the Court considered influential (1) the existence of a statutory “informer's privilege”; (2) a criminal statute making it unlawful to corruptly influence a witness; and (3) the recognition of common law whistleblower protection in several other jurisdictions. Thus, the Court found that “[p]ublic policy requires that citizens in a democracy be protected from reprisals for performing their civil *19 duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare.” *Id.* at 899-900.

Most recently, this Court in *Poull* extended *Murphy* to good-faith reporting of **elder abuse**. 2010 WL 1462763, *5-7. In so doing, this Court discussed at length that Kansas' **elder abuse** statutes-among other things-contained (1) explicit provisions mandating reports of **elder abuse** by certain professionals and encouraging reporting of **elder abuse** by others; (2) explicit provisions prohibiting employers from imposing sanctions on employees who make such reports; and (3) similar provisions related to **abuse** in nursing home and hospital facilities. *Id.* This Court concluded that those provisions evidenced a public policy “so definite and fixed that its existence is not subject to any substantial doubt.” *Id.* at *6 (citing *Riddle v. Wal-Mart Stores, Inc.*, 27 Kan. App. 2d 79, 86, 998 P.2d 114 (2000)).

In each of the foregoing cases, the court recognized a retaliatory discharge public policy exception to the at-will employment doctrine only upon recognition of a broad public policy that pertained to “public health or safety.” That Kansas courts have to date recognized only those few public policies as so strong and definite that they warrant an exception to the at-will employment doctrine confirms that courts should be cautious about further eroding the at-will employment doctrine.

The KWPA does not justify throwing that caution to the wind. Indeed, no Kansas court has yet recognized such a public policy inherent in the KWPA. While both *Burriss v. Northern Assurance Co. of Amer*, 236 Kan. 326, 333, 691 P.2d 10 (1984) and

Coma Corp. v. Kansas Dep't of Labor, 283 Kan. 625, 154 P.3d 1080 (2001), generally recognize a public policy related to protection of wage earners “in order that they and the *20 families dependent upon them are not destitute,” neither case relates to the establishment of a public policy exception to the at-will employment doctrine for purposes of a retaliatory discharge claim. Moreover, neither case discusses the Legislature’s expressed purpose in enacting the KWPA. As such, they are inapt.

The Kansas courts’ silence as to any such policy being part of the KWPA is deafening, as the KWPA has been around for 37 years. And that silence is likely a function of the Legislature’s expression of the KWPA’s specific purpose (protection of “low-income workers”) and the absence of any retaliation provision-like that in *Poull*--in its text. Both the KWPA’s limited purpose and failure to include a retaliation provision support that which is true: no retaliatory discharge exception exists or ought to exist for conduct allegedly protected by the KWPA.

1. The KWPA is a collections statute that the Legislature enacted to protect the economic interests of low-income individuals.

At its essence, the KWPA is a collections statute to serve the economic interests of individuals. Indeed, the Legislature enacted it in 1973 to “protect low-income workers from the **abuses** of employers.” 1973 Senate Committee on Public Health and Welfare hearing on H.B. 1429; *A.O. Smith Corp. v. Kansas Dep't of Human Resources*, 36 Kan. App. 2d 530, 538-39, 144 P.3d 760 (2005) (citing *Morton Bldgs, Inc. v. Dep't of Human Resources*, 10 Kan. App. 2d 197, 199, 695 P.2d 450 (1985) and Byers & Rumfelt, *See Dick and Jane Work: A Kansas Wage Payment Act Primer*, 72 J.K.B.A. 14-15 (Oct. 2003)).

Consistent with that purpose, the KWPA provides mechanisms for ensuring the priority of wage payments and allowing collection of earned wages, including formal enforcement provisions. K.S.A. §§44-312, 44-322, & 44-322a. In those detailed *21 enforcement provisions, the KWPA provides two specific avenues for enforcement and collection of wages: (1) a claim with the Kansas Department of Labor, because legislators believed the small amounts likely to be at issue for “low-income workers” impeded complainants in obtaining counsel; and (2) a private cause of action in district court. *Id.* §§ 44-322 & 44-322a.

Notably, the Legislature failed to include any anti-retaliation provisions when enacting the KWPA or since. The Legislature’s failure is conspicuous for several reasons:

- The KWPA contains a wide range of protections for employees’ wages, including preference for wages in the event of an employer’s insolvency (K.S.A. § 44-312), payment of wages at separation of employment (K.S.A. §§ 44-315 and 44-316), authorized withholdings (K.S.A. § 44-319), prohibition of waivers (K.S.A. §44-321), elaborate enforcement provisions (K.S.A. §§ 44-322 and 44-322a), and provisions for judicial review (K.S.A. § 44-322a).
- The Kansas Legislature has amended the KWPA on several occasions since its enactment in 1973, including as recently as 2010. *See* 2010 Kansas Laws Ch. 17 (S.B. 376).
- The Kansas Act Against Discrimination (“KAAD”), K.S.A. § 44-1001 *et seq.*, preceded the KWPA and contains an explicit anti-retaliation provision.
- The federal Fair Labor Standards Act (“FLSA”), the protections of which the Kansas Legislature discussed specifically in introducing *22 the KWPA, contains an explicit provision prohibiting discrimination or retaliation for pursuing rights set forth therein. *See* 29 U.S.C. § 215(a)(3) (prohibiting retaliation against any employee for pursuing FLSA rights); *see also Wirtz v. Ross Packaging Co.*, 367 F.2d 549 (5th Cir. 1966) (showing FLSA explicitly prohibited retaliation before the Kansas Legislature introduced and enacted the KWPA); 1973 Senate Committee on Public Health and Welfare hearing on H.B. 1429 (referring to the FLSA in considering the KWPA’s adoption).

In other words, while undoubtedly cognizant of the anti-retaliation provisions in both the KAAD and the FLSA when it enacted the KWPA in 1973 and when it has amended the KWPA since, Kansas’ Legislature did not include an anti-retaliation provision

in the KWPA initially and has not seen fit to add one since. Given that fact and the Legislature's expression of the KWPA's limited purpose (protection of "low-income workers"), it cannot be said that the broad public policy Deeds seeks to have this Court recognize is "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." Absent that, the KWPA does not justify an additional retaliatory discharge exception to the at-will employment doctrine.

Why is clear. Where the public policy is so thoroughly established, the employer cannot claim to be ignorant of the fact that its conduct may expose it to liability. Where it is not, the employer risks being subject to strict liability for a brand new tort.

*23 This case illustrates the point. As discussed more fully below, in challenging the change in the commission schedule, Deeds said nothing that suggested to WRIMCO that he believed it had done anything other than change the terms it had previously agreed to. In other words, he never suggested, hinted, or claimed that WRIMCO was refusing to pay him commissions that he had already earned, that WRIMCO's actions in any way implicated Kansas law (including the KWPA), or that WRIMCO's action in any way violated any Kansas public policy, much less one that related to "rules, regulations, or laws pertaining to public health and safety." See SOF, Part E.

It had not. As explained above, the KWPA's explicit purpose was to protect low-income workers. Receiving hundreds of thousands of dollars per year from WRIMCO, Deeds could not in any way, shape, or form be considered within the class of workers the Legislature intended through the KWPA to protect. See *id.* Part G.

As such, WRIMCO neither knew nor could have known that Deeds' compensation challenges implicated the KWPA, much less a public policy "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." Without that, it is inherently unfair to punish WRIMCO for taking an action that it could not have known may expose it to liability.

2. Other jurisdictions have soundly and repeatedly refused to recognize retaliatory discharge claims predicated on wage payment statutes.

That conclusion is supported by the few courts that have similarly considered whether to expand the limited scope of retaliatory discharge to include claims based on wage payment statutes. Most notably, Illinois courts have refused to expand the tort to include claims related to the Illinois Wage Payment and Collections Act ("IWPCA"). We *24 say "[m]ost notably" because this Court specifically looked to Illinois' courts in recognizing a retaliatory discharge claim for asserting a workers' compensation claim in *Murphy*, a fact Deeds highlighted at page 17 of his Brief. Likewise, the Supreme Court looked to Illinois to support its conclusion in *Palmer*, 242 Kan. at 899-900 (citing *Palmateer v. Intern. Harvester Co.*, 421 N.E.2d 876 (Ill. 1981)). If this Court in *Murphy* and the Supreme Court in *Palmer* looked to Illinois' courts for guidance in those decisions, then this Court should likewise look to Illinois' courts now.

The guidance the Illinois courts provide clearly illustrates that wage payment statutes do not warrant further erosion of the at-will employment doctrine. In *Geary v. Telular Corp.*, the Illinois Court of Appeals specifically found that the IWPCA did not evidence a "clearly mandated public policy" sufficient to support a retaliatory discharge claim. 793 N.E.2d 128 (Ill. Ct. App. 2003). As illustrated below, *Geary* is remarkably similar factually to this case.

In *Geary*, the defendant employed the plaintiff at-will as a regional sales manager, paid at least in part with commissions. *Id.* at 130. In March of 1995, the defendant assigned the plaintiff to a Motorola Account Team, informing him that commissions would be "paid on a monthly basis for product *shipped* to Motorola at a rate of .3% based on revenue generated." *Id.* (emphasis added). In September of 1995, the defendant revised the commissions plan to provide for monthly commissions equal, to .5% "of all Motorola revenues generated by the Motorola Account Team." *Id.* In late September, the defendant won a contract with Motorola that ultimately resulted in a purchase order in March of 1996. *Id.* In late 1995 and early 1996, the defendant underwent reorganization and promoted the plaintiff to Director of Business Development-Motorola. *Id.* at 130-31. *25 The defendant

informed the plaintiff in April of 1996 that his new position would carry a base salary and a quarterly commission based on a percentage of a target plan rather than revenues. *Id.* The defendant paid the plaintiff all commissions earned under the former plan up to the change and then paid him under the new plan in July and November of 1996. *Id.* After the plaintiff verbally objected to the plan, the defendant terminated the plaintiff's employment. *Id.* at 130-31.

The plaintiff sued, claiming among other things retaliatory discharge in violation of public policy related to his objection to the new commission plan. Specifically, the plaintiff claimed he earned commissions under the old plan when the defendant gained the Motorola account (as opposed to when it shipped product to Motorola) and, as a result, the new plan denied him earned commissions, in violation of the IWPCA. *See generally id*

In affirming the lower court's grant of judgment as a matter of law, the Court of Appeals noted that "Illinois courts have on several occasions refused to expand the tort of retaliatory discharge to claims under the IWPCA finding that a discharge allegedly in retaliation for complaints about unpaid wages under the IWPCA does not violate a clearly mandated public policy." *Id.* at 134 (citing *McGrath v. CCC Information Sys., Inc.*, 731 N.E.2d 384 (Ill. Ct. App. 2000) and *Abrams v. Echlin Corp.*, 528 N.E.2d 429 (1988)); *see also Irizarry v. Illinois Cent. R. Co.*, 879 N.E.2d 1007, 1011-12 (Ill. Ct. App. 2007) (recognizing a restricted and narrow cause of action for retaliatory discharge). In so doing, the Court explained that the policy concerns underlying the IWPCA were economic and did not "strike at the heart" of the plaintiff's social rights, duties, and responsibilities. *Geary*, 793 N.E.2d at 134 (citing *McGrath*, 731 N.E.2d 384). Instead, *26 the plaintiff's claim "*was more in the nature of a private and individual grievance insufficient to justify a claim of retaliatory discharge.*" *Id.* (emphasis added).

This case is virtually on all squares with *Geary*, both factually and legally. Indeed, the plaintiff's claim in *Geary* almost mirrors Deeds' claim here. And, the KWPA and the IWPCA are similar in structure and purpose. In light of this Court's reference to Illinois for its conclusion in *Murphy*, it should likewise refer to Illinois for the appropriate conclusion here. This is especially so in light of the Supreme Court's similar reference to Illinois in *Palmer* for the correct conclusion.

Illinois is not alone in its conclusion. In fact, Nebraska courts have soundly rejected the expansion of the retaliatory discharge cause of action to include claims based on the Nebraska Wage Payment and Collection Act ("NWPCA"). *See, e.g., Malone v. Amer. Bus. Info.*, 634 N.W.2d 788, 793 (2001) (refusing to expand the tort of retaliatory discharge to encompass claims based on the NWPCA because it "does not represent a 'very clear mandate of public policy' which would warrant recognition of an exception to the employment-at-will doctrine") (citing *Ambroz v. Cornhusker Square Ltd.*, 416 N.W.2d 510 (1987) and *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 759 (1988)). In so doing, the *Malone* court followed the analysis of Illinois' courts and distinguished cases from other jurisdictions (Iowa and California) that have recognized a tort related to wage payment issues. *Malone*, 634 N.W.2d at 791-93. Specifically, the *Malone* court noted that, unlike the legislatures in Iowa and California, its legislature had not enacted statutory provisions (1) prohibiting an employer from discharging an employee because of a claim for unpaid wages or (2) making willful non-payment of wages a criminal matter. *Id.*

*27 The Kansas Legislature likewise has not enacted statutory provisions (1) prohibiting an employer from discharging an employee because of a claim for unpaid wages or (2) making willful non-payment of wages a criminal matter. *Id.* Considering the similarity between the KPWA and both the IWPCA and the NWPCA, this Court should follow the analysis of the Illinois and Nebraska courts to conclude no claim lies here. Like the statutes in Illinois and Nebraska, the KWPA is a collections statute that protects private economic interests, particularly the interests of low-income workers, and not the public welfare. In other words, courts that have considered claims like that which Deeds asserts have rejected them, just as the District Court did here. This Court should follow suit.

C. Even If The KWPA Included A Sufficient Public Policy, Deeds' Did Not Engage In Protected Activity Sufficient To Create A Triable Issue On Such A Claim.

Undoubtedly, protected activity is a necessary element of any prima facie case of retaliation. *See* PIK 4th Civil 124.56 (retaliatory discharge jury instruction); *Shaw v. Southwest Kansas Groundwater Mgmt. Dist. Three*, 42 Kan. App. 2d 994,

998-99, 219 P.3d 857 (2009); *Gonzalez-Centeno v. North Cent. Kansas Reg'l Juvenile Det. Facility*, 278 Kan. 427, 436-37, 101 P.3d 1170 (2004); *Goodman*, 276 Kan. at 589-90; *Rebarchek v. Farmers Co-op Elevator*, 272 Kan. 546, 552-54, 35 P.3d 892 (2001). As explained above, however, no Kansas court has yet recognized a retaliatory discharge claim related to the KWPA. Obviously then, no Kansas court has outlined what kind of conduct qualifies as protected activity for a retaliatory discharge claim based on the KWPA.

However, the courts' decisions in *Murphy*, *Hysten*, *Palmer*, and *Poull* provide guidance. In each of those cases, the plaintiff's conduct was clear. In *Murphy* and *Hysten*, the employee had obviously experienced a work related injury that implicated the *28 Workers' Compensation Act or FELA, respectively. *Murphy*, 6 Kan. App. 2d 488; *Hysten*, 227 Kan. 551. In *Palmer* and its progeny, the employee was clearly complaining about criminal activity. 242 Kan. 893. And, in *Poull*, the employee was clearly complaining about **elder abuse**. 2010 WL 1462763.

Here, Deeds' conduct lacks such clarity. Indeed, Deeds admits all he did was voice personal disagreement with a change in WRIMCO's commission schedule. In so doing, he complained that he believed the phase-out of trailer commissions was "retroactive" and "not right." See SOF, Part E. Deeds' personal disagreement is patently insufficient to qualify as protected activity. See *Goodman*, 276 Kan. at 592 ("[i]t would be both troublesome and unsettling to the state of the law if we were to allow a retaliatory discharge claim to be based on a personal opinion"); see also *Balfour v. Medicalodges, Inc.*, No. 05-2086-KHV, 2006 WL 3760410, *15 (D. Kan. 2006) ("To allow retaliatory discharge claims based on personal opinion 'would effectively do away with the employment-at-will doctrine.' "); *Stoermann-Snelson v. Saint Luke's Health System*, No: 07-2214-KHV, 2007 WL 4522492, *2 (D. Kan. 2007) (plaintiff's subjective opinion does not state a claim).

Courts in other jurisdictions agree. See *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342, 348 (Mo. 2010) (the public policy exception to the at-will doctrine is not so broad as to give protected status to an employee "for making complaints about acts or omissions he merely believes to be violations of the law or public policy"); see also *White v. Purdue Pharma, Inc.*, 369 F. Supp. 2d 1335, 1338-39 (M.D. Fla. 2005) (holding the same and recognizing that the plaintiff's proposed understanding "would place an onerous burden on the employer to anticipate all of its *29 conduct that an employee may reasonably believe is proscribed by a law, rule, or regulation" and place employers in a Hobson's choice); *Barnes v. Benham Group, Inc.*, 22 F. Supp. 2d 1013, 1022-23 (D. Minn. 1998); *Clark v. Modern Group Ltd.*, 9 F.3d 321, 332 (3rd Cir. 1993).

In light of the foregoing, Deeds had to do or say more than he believed the change was "retroactive" and "not right." Specifically, Deeds had to do or say something that put WRIMCO on notice that Deeds believed the KWPA was implicated. See *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135-36 (3d Cir. 2006) (to be protected activity, the complaint must have some discernible connection to an unlawful employment practice); see also *Barber v. CSX Distrib. Servs.*, 68 F.3d 694 (3d Cir. 1995) (In ADEA context, vague general complaint of unfairness and dissatisfaction, without specific implication of age discrimination, was not protected activity); *Sharpe v. MCI Commc'ns Servs., Inc.*, 684 F. Supp. 394 (S.D.N.Y. 2010) ("The onus is on the speaker to clarify to the employer that he is complaining of unfair treatment due to his membership in a protected class and that he is not complaining merely of unfair treatment generally.") (quotations omitted); *Harris v. Wackenhut Servs., Inc.*, 590 F. Supp. 2d 54, 78-79 (D.D.C. 2008) (" 'Not every complaint garners its author protection under Title VII.' "); *Coe v. Northern Pipe Prods., Inc.*, 589 F. Supp. 2d 1055 (N.D. Iowa 2008) (To qualify as protected activity, a plaintiff's complaint must attribute the impropriety of the alleged conduct to a violation of the law.); *Bain v. Wal-Mart Stores, Inc.*, 585 F. Supp. 2d 449 (W.D.N.Y. 2008) (for an employee's complaint to be protected activity, it must relate to an alleged violation of the law, e.g., Title VII. "Otherwise, any employee who is disgruntled or dissatisfied with any respect of his or her employment would ultimately *30 find relief in Title VII"). As the United States Court of Appeals for the Tenth Circuit has held, general complaints of unfair treatment do not qualify as protected activity where they do not put the employer on notice of an alleged violation of the law. *Petersen v. Utah Dep't of Corrs.*, 301 F.3d 1182, 1188-89 (10th Cir. 2002).

Here, it is uncontroverted that Deeds did not say or do anything to suggest he believed the KWPA was implicated. Deeds admitted that--at the time of his challenges--he was not aware of Kansas law, did not have a belief as to what Kansas law did/did not require, and never used the word "unlawful" (R. Vol. II, 317, 334, 345, 347-48). Simply, no one, including Deeds himself,

thought his challenges implicated the KWPA when he asserted them and/or when WRIMCO terminated his employment. In fact, the first suggestion the KWPA was implicated by Deeds' challenges occurred after he filed his wage claim and engaged counsel. *See* SOF, Part E.

As such, it is uncontroverted that WRIMCO could not have had an illegal motive at the time it made that decision. Obviously, such a motive is a requirement for his retaliatory discharge claim. *See Ali v. Douglas Cable Comm.*, 929 F. Supp. 1362, 1387 (D. Kan. 1996) (“The employee can recover only upon proving that the discharge was ‘based on,’ ‘because of,’ ‘motivated by,’ or ‘due to’ the employer’s intent to retaliate.”). With Deeds never suggesting, hinting, or claiming even that WRIMCO was refusing to pay him commissions he had already earned, that WRIMCO’s actions in any way implicated Kansas law (including the KWPA), or that WRIMCO’s action in any way violated Kansas public policy, there could not be a triable issue as to any such retaliatory intent.

*31 Deeds failed to argue otherwise in opposition to WRIMCO’s Motion for Summary Judgment (R. Vol. I, 73-76). In fact, he failed to argue his conduct qualified as protected activity under the KWPA (*Id.*). Deeds’ only suggestion he engaged in protected activity is found in his answers to WRIMCO’s interrogatories, in which he claimed to have told WRIMCO it could not “lawfully” phase out commissions and claimed he believed commissions “were unlawfully being phased out” (R. Vol. II, 400-01). However, Deeds later he admitted he told WRIMCO no such thing. Deeds’ admissions dispel any notion that he communicated his purported beliefs as to alleged “unlawfulness” to WRIMCO.

Further, Deeds specifically admitted he did not at any time before engaging counsel-after the termination of his employment-believe that the commission change was unlawful. *See* SOF, Part E. Not having the belief at any relevant time, Deeds could not have communicated it. And, the contradiction between Deeds’ clear deposition testimony and his self-serving interrogatory answers cannot create a triable issue to overcome summary judgment. *See Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 42-47, 661 P.2d 348 (1983).

In his Brief at pages 30 to 31, Deeds argues that courts recognize retaliatory discharge claims without the employee invoking or even knowing about the statute itself. In support, Deeds cites *Pilcher v. Bd. of County Comm’rs, Wyandotte County*, 14 Kan. App. 2d 206, 787 P.2d 1204 (1990). *Pilcher*, however, does not stand for the broad proposition for which Deeds cited it. Instead, *Pilcher* is limited to the appropriateness of a jury instruction on a workers’ compensation retaliation claim. In that context, the *Pilcher* court held that an employee could assert a workers’ compensation retaliation *32 claim if terminated (1) for filing a workers’ compensation claim or (2) for being absent from work due to a work-related injury. *Id.* at 215-16. *Pilcher* says nothing about whether or not an employee must invoke or know about the underlying statute. Deeds’ reliance on it for that proposition, therefore, is misplaced. Deeds’ reliance on two other Kansas cases, *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988) and *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), illustrate the point. In *Chrisman*, the employer “knew that the employee intended to file a workers’ compensation claim.” 242 Kan. at 774-75. In *Coleman*, the employer knew or should have known that the absences for which it was terminating the employee were work-related. 242 Kan. at 815-16.

In other words, the cases upon which Deeds relies demonstrate that the employer either must know or reasonably should know that the employee’s conduct is protected. If not, then there can be no triable issue as to the employer’s retaliatory intent.

If the Court were to agree with Deeds’ unsupported position, then it would in essence mean that no Kansas employer could terminate an employee for complaining about anything, for fear that the employee in question would later contend that his or her complaints implicated some Kansas statute that, as here, was not at the time on either party’s radar screen. That is especially so where the complaints are about negative changes in compensation. Whenever such a change to an existing compensation structure occurs, the employer is “breaking the agreement” embodied in that structure. However, that “break” does not implicate Kansas law where the compensation is not yet earned. *See, e.g., A.O. Smith Corp.*, 36 Kan. App. 2d at 542; *Salon Enterprises*, 29 Kan. App. 2d at 271.

*33 This Court should not do away with the employment at-will doctrine by creating an atmosphere wherein an employee can manufacture a retaliatory discharge claim by merely voicing personal disagreement with a change in compensation. As the court recognized in *Goodman*:

It would be both troublesome and unsettling to the state of the law if we were to allow a retaliatory discharge claim to be based on a personal opinion of wrongdoing. Such a holding, under these circumstances, would effectively do away with the employment-at-will doctrine, which has become a part of Kansas public policy.

276 Kan. at 592. Deeds failed before the District Court to demonstrate a triable issue existed regarding his participation in protected activity, an essential prima facie element of any retaliation claim. As such, the District Court properly granted summary judgment on Deeds' retaliatory discharge claim, and this Court should affirm that grant.

II. The District Court Properly Granted WRIMCO's Motion on Deeds' General Wrongful Discharge Claim.

A. Standard of Review

WRIMCO incorporates herein the Standard of Review set forth in Part LA above.

B. Deeds' General Wrongful Discharge Claim Fails As A Matter Of Law.

In Count I, Deeds invited the District Court to create an additional public policy retaliatory discharge exception to the at-will employment doctrine. In Count II, Deeds invited the District Court to create new tort. The District Court wisely refused that invitation. This Court should likewise.

1. No General Wrongful Discharge Claim Exists In Kansas

As explained above, this Court in *Murphy* recognized a retaliatory discharge public policy exception to the at-will employment doctrine for certain significant public policies. As further explained above, Kansas courts since *Murphy* have limited those *34 exceptions to retaliation claims, be those claims related to assertion of worker's compensation right, assertion of FELA rights, or reporting certain wrongdoing. Deeds recognizes as much in his recitation of the history of the cases since *Murphy*, which is at pages 15-31 of his Brief.

In II of his **ARGUMENTS AND AUTHORITIES**. Deeds requests that the Court untether the exceptions from the retaliatory discharge context and create a broad, substantive "wrongful discharge" claim. In essence, Deeds wants to read the requirement of protected activity out of the caselaw (and necessarily PIK) and further restrict an employer's right to terminate an employee's employment with good cause, no cause, or even wrong cause, without incurring liability. This Court should not take that unprecedented step.

No Kansas court has yet done so. Deeds implicitly recognizes as much in his Brief through his failure to cite a single Kansas case in support of his request. There are none.

The cases Deeds does cite-both of which are from foreign jurisdictions-are inapposite. Specifically, *Gould v. Maryland Sound Indus.*, 31 Cal. App. 4th 1137 (1995), is both factually and procedurally dissimilar. Factually, *Gould* relied heavily on the criminalization of wage payment violations in California statutes to identify a broad public interest. *Id.* at 1147-8. Here, the KWPA includes no such criminalization.

Procedurally, *Gould* considered the trial court's decision to grant the defendant-employer's demurrer of the claim, not a motion for judgment as a matter of law. As such, it did not address the merits of the plaintiff's claim, including whether or not he actually earned the commissions and vacation pay at issue. *Id.*

*35 *Rogers v. Savings First Mort. LLC*, 362 F. Supp. 2d 624 (D. Md. 2005), is even further afield. There, the court neither considered nor recognized a wrongful discharge claim at all. Instead, the plaintiffs asserted only a claim for unpaid commissions, as Deeds did before the DOL. *Rogers* is wholly irrelevant to Deeds' wrongful discharge claim, which likely explains why Deeds devoted only a single sentence to it in his Brief.

Simply, neither of the cases Deeds relies upon supports the existence of a general wrongful discharge claim in Kansas. The District Court properly concluded no such claim exists, and this Court should agree with that conclusion.

2. The Facts Do Not Suggest Such A Claim Should Exist.

Even if the Court is inclined to recognize a general wrongful discharge claim, this is not the case to do it. One, not even Deeds believes in his claim. Two, the facts do not support his claim.

As to Deeds' belief, he admitted in his deposition that he does not believe that WRIMCO terminated his employment either to deprive him of earned commissions or to "misappropriate" the Pictet account. Despite Deeds' counsel's claim that Deeds' testimony is irrelevant, this Court simply should not recognize a brand new cause of action that that plaintiff does not even believe in. *See* SOF, Part F.

The facts support Deeds' lack of belief. As to the commissions, Deeds admitted:

- He understood from his offer letter forward that, to earn commissions, he had to provide client service. *See id.* Parts B & C.
- He earned the trailer commission by providing primary client service. *See id.* Part C.

*36 • The July 2005 phasing out of trailer commissions coincided with the phasing out of his primary client service responsibilities on those accounts, which meant he would not longer be earning the trailer commission. *See id.* Part D.

As to the Pictet account, the uncontroverted facts were that:

- When he terminated Deeds' employment, Newton had no expectation that he would take over Deeds' accounts and certainly did not expect to receive commissions on them (he had not received them in the past on other accounts). *See id.* Part F.
- Newton did not exercise any authority to determine who took over which of Deeds' accounts or to determine whether or not that person would receive commissions on them. *See id.*
- At the termination of Deeds' employment, Newton did not know who would assume responsibility for Deeds' accounts, including Pictet. *See id.*
- Sundeen, not Newton, determined that Newton would assume responsibility for Pictet and receive commissions on newly invested money. *See id.*

In light of Deeds' belief and the uncontroverted facts outlined above, this Court should not create a brand new wrongful discharge tort for him. In asking otherwise, Deeds basically asks the Court to create a claim he does not believe in so he can then try to convince a jury that WRIMCO did something he does not believe it did. Nothing justifies such a step.

*37 Simply, nothing in Kansas law prevents an employer from terminating an employee's employment to avoid paying him additional compensation or to shift his accounts to another employee. Holding otherwise would turn the Kansas' at-will employment doctrine on its ear and involve Kansas courts in Kansas business decisions in an unprecedented manner. Neither the law nor the facts support such an intrusion.

III. The District Court Properly Granted WRIMCO's Motion On Deeds' Prevention Claim.

A. Standard of Review

WRIMCO incorporates herein the Standard of Review set forth in Part LA above.

B. Deeds Cannot Maintain A Prevention Claim

For his prevention claim, Deeds alleges WRIMCO terminated his employment to prevent him from satisfying a condition precedent to receipt of earned commissions. Specifically, Deeds claims that, in terminating his employment, WRIMCO prevented him from (1) performing ongoing client service and (2) continuing his employment. Both are true, but neither give rise to a prevention claim.

1. There Was No Contract On Which To Base A Prevention Claim.

Under Kansas law, the doctrine of prevention provides that a party to a contract cannot derive any benefit or escape any liability from his own failure to cause or failure to seek the happening of a condition precedent. *Morton Buildings*, 10 Kan. App. 2d at 200-01. In the context of Deeds' claim, a condition precedent is something an employee must do to receive earned commissions, e.g., be employed on the date of payment of commissions he or she has already earned. A prevention claim arises where the employer unjustifiably prevents the employee from satisfying that condition under a contract. *Id.* at 200. In other words, a party who fails to satisfy a contractual condition precedent may *38 avoid the consequences of his or her failure if the conduct of the other party to the agreement causes it. *See id.* Here, no prevention claim lies.

First, a contract is a predicate to a prevention claim. With Deeds an at-will employee at all times (R. Vol. I, 62; R. Vol. II, 350), there was obviously no contract on which to base a prevention claim. As Deeds acknowledges in his Brief, an employee cannot state a breach of contract claim absent an agreement as to the duration of employment.⁵ *Johnson v. Nat'l Beef Packing Co.*, 220 Kan. 52, 54, 551 P.2d 779 (1976). The absence of such an agreement bars any prevention claim.

That conclusion is in accord with this Court's decision in *Morton Buildings*, on which Deeds relied almost exclusively at summary judgment. In *Morton Buildings*, this Court rejected the prevention claims of two employees because (1) they were at-will employees and (2) no evidence of bad faith existed. *Morton Buildings*, 10 Kan. App. 2d at 201-02. In so doing, this Court recognized the limited nature of exceptions to the at-will employment doctrine, explicitly holding "an employee may be discharged with or without cause [and the] employee has no enforceable expectation of continued employment." *Id.* In other words, an at-will employees like Deeds cannot assert a prevention claim, as the District Court properly concluded.

***39 2. There Was No Condition Precedent To Receipt Of Earned Commissions.**

Deeds' prevention claim seems to conflate two separate and distinct ideas, namely (1) what he had to do to earn commissions (sell and service, whether primarily or secondarily) versus (2) what he had to do as a condition to receipt of earned commissions (nothing). WRIMCO's conduct prevented him from performing the former, not the latter.

A simple example illustrates the point: An employer tells an employee that it will pay the employee an annual bonus of \$10,000 if he sells 10,000 widgets and that, to receive the bonus, he must be employed on January 15 of the following year. The employee must sell the widgets to earn the bonus. If he does, then he must satisfy the condition precedent of being employed on January 15 to receive it. If the employer terminates the employee's employment before he earns the bonus (i.e., before he sells the requisite number of widgets), then that is not a prevention claim, even if the employer's sole motivation was to prevent him from earning the bonus. However, if the employer terminates the employee's employment on January 14 to avoid satisfaction of the condition precedent to paying the earned bonus, then that is a prevention claim.

Here, WRIMCO's actions prevented Deeds from continuing to earn commissions. They did not prevent him from performing a condition precedent to receipt of commissions he had already earned.

Indeed, WRIMCO did not contend before the District Court that any such condition precedent existed. Instead, WRIMCO contended:

- Deeds had to provide primary client servicing to earn trailer commissions. When it changed its structure to eliminate Deeds' primary client servicing responsibilities, it phased out the *40 compensation he received for those services, as it was entitled to do (R. Vol. II, 314-18, 321-23, 328-29; R. Vol. I, 214-18, 226). *See, e.g., A.O. Smith Corp.*, 36 Kan. App. 2d at 542; *Salon Enterprises*, 29 Kan. App. 2d at 271 (2000).
- Deeds had to provide secondary client servicing to earn commissions under the changed schedule after July 2005. With the termination of his employment, he no longer provided that servicing. (R. Vol. II, 314-18, 321-23, 328-29; R. Vol. I, 214-18, 226).

Every employer who terminates an employee's employment prevents him or her from earning additional compensation. That is the nature of a termination decision. But, preventing an employee from earning additional compensation does not a prevention claim make.

Deeds agrees. Indeed, Deed's contended both before the Department of Labor and throughout this litigation that no condition precedent existed to his receipt of earned commissions (R. Vol. I, 78-79). As the District Court explained, "Deeds disputes that continued employment or servicing of accounts was a condition precedent to earning commissions" (R. Vol. I, 295). Deeds cannot now attempt to create a triable issue by reversing course and claiming otherwise.

As the District Court further pointed out, "[e]ven if continued employment and/or client servicing was a condition precedent (notwithstanding [Deeds'] consistent and strenuous argument there was no condition precedent), the discussion cannot end there" (R. Vol. I, 296). Instead, there must be some kind of wrongful act to prevent the plaintiff from satisfying the condition. Here, there was no triable issue as to any such act.

*41 That is especially so in light of Deeds' admission that WRIMCO did not terminate his employment to avoid paying him earned commissions. *See* SOF, Part F. As the District Court correctly concluded, that admission necessarily means WRIMCO did not terminate his employment to prevent him from performing a condition precedent (R. Vol. I, 299).

It did not. Again, WRIMCO did not contend before the District Court that any condition precedent existed (R. Vol. I, 209-28; R. Vol. II, 312-331). In the absence of such a contention, Deeds had to demonstrate a triable issue as to the existence of such a condition. *See Morton*, 10 Kan. App. at 201 ("[t]he burden is on the party seeking to take advantage of the doctrine to prove its application"). Deeds wholly failed to meet that burden, especially in light of his agreement with WRIMCO that no condition precedent existed.

The cases Deeds cited in his Brief reinforce the foregoing. In each of those cases, the issue was satisfaction of a condition to receipt of *earned* commissions, not the work through which commissions were earned. *See Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 113 (2nd Cir. 1985) ("continued employment was... an express condition" of payment); *Stiglich v. Jani-*

King of California, Inc., No. D051811, 2008 WL 4712862, *10 (Cal. App. 4 Dist., Oct. 28, 2008) (recognizing that the issue was related to conditions precedent). As such, those cases are completely inapposite.

As the District Court recognized, Deeds' prevention claim is really an attempted end-around the at-will employment doctrine (R. Vol. I, 299-300). In making such an attempt, Deeds seeks not a narrow exception to the at-will employment doctrine that he *42 made with his retaliatory discharge claims, but instead to eviscerate it through a full, frontal attack. This Court should thwart that attempt.

IV. The District Court Properly Granted WRIMCO's Motion on Deeds' Unjust Enrichment Claim.

A. Standard of Review

WRIMCO incorporates herein the Standard of Review set forth in Part 1.A above.

B. No Unjust Enrichment Claim Lies In This Context.

For Deeds' unjust enrichment claim, the Court must assume that the DOL resolves his wage claim against him and that he had not earned as of the termination of his employment any of the commissions at issue. After all, Deeds admitted in his Brief at page 43 that his unjust enrichment claim was an alternative to his DOL claim. And, if the DOL resolves his wage claim in his favor, then it will order WRIMCO to pay him all earned but unpaid commissions.

With that assumption, the District Court properly concluded that there was no triable issue on that claim. Indeed, in context, Deeds' unjust enrichment claim is essentially that WRIMCO ought to have paid him more than it agreed to pay him. In other words, Deeds is basically asking the Court to inject itself into his employment relationship and, after the fact, re-structure his compensation package. No Kansas court has yet seen fit to take that drastic action after an employment relationship has concluded, and this Court should not be the first.

Further, Deeds' unjust enrichment claim requires a wrongful act. See *Babcock v. Carrothers Const. Co., LLC*, 2005 WL 3527117, *3 (Kan. Ct. App. 2005) (holding that unjust enrichment claim is barred absent wrongful conduct by the defendant) (citing *43 *Haz--Mat Response, Inc. v. Certified Waste Servs. Ltd.*, 259 Kan. 166, 177-79, 910 P.2d 839 (1996)); *Jenson v. Lee*, 67 Kan. 539, 73 P. 72 (1903) (recognizing quantum meruit claim by employee based on employer's wrongful act in terminating employment); see also *James v. Parsons, Rich. & Co.*, 70 Kan. 156, 78 P. 438 (1904); see also *County of San Bernardino v. Walsh*, 69 Cal. Rptr. 3d 848, 855-57 (Cal. Ct. App. 2007) (merely receiving a benefit from another is not enough; retention of that benefit must also be unjust due to some wrongful conduct by the receiving party); see also *Golden Pacific Bancorp v. Fed. Deposit Ins. Corp.*, 273 F.3d 509, 520 (2nd Cir. 2001) (under New York law, a cause of action for unjust enrichment accrues "upon the occurrence of the wrongful act giving rise to a duty of restitution").

Deeds' argument to the contrary is unconvincing, particularly considering that *Campbell-Leonard Realtors v. El Matador Apartment Co.*, 220 Kan. 659, 556 P.2d 459 (1976)--the only Kansas case upon which he relies--does not speak to whether or not wrongful conduct is required. Instead, the *Campbell-Leonard* court analyzed the defendant's theory that it received no benefit from the plaintiff. See generally *id.* Indeed, the very nature of an unjust enrichment claim implies the presence of some unfair or wrongful circumstance to sustain the claim. See *Estate of Sauder*, 283 Kan. 694, 719, 156 P.3d 1204 (2007) (citations omitted).

Here, there is no triable issue as to the existence of any wrongful act. As explained above, in terminating Deeds' employment, WRIMCO acted as it was entitled to act with an at-will employee.

As such, Deeds' unjust enrichment claim appears to be a frontal assault on the employment at-will doctrine in Kansas. Recognizing an unjust enrichment claim for Deeds under the circumstances of this case would allow any former employee-

including *44 those who voluntarily terminated their employment--to assert such a claim and attempt, after the fact, to re-negotiate their compensation and/or to continue receiving compensation.

A simple example illustrates the point: A partner at a large law firm develops a substantial book of business. The law firm terminates the partner after a dispute over the partner's compensation. In response, the partner sues for unjust enrichment, claiming that the law firm ought to have paid him more than it did and/or should have to continue paying him revenue it generates from the book of business that the partner developed.

No Kansas court has yet recognized an unjust enrichment claim in the foregoing scenario, and this Court should not. Simply, an unjust enrichment claim does not lie where the employee is no longer earning the amounts he claims. This Court should affirm the District Court's grant of summary judgment and refuse Deeds' attempt to undermine the employment at-will doctrine by stretching the tort of unjust enrichment beyond its limit.

Conclusion

For the reasons set forth above, this Court should affirm the District Court's grant of summary judgment in WRIMCO's favor on each of Deeds' claims.

Footnotes

- 1 Due to the procedural posture of the case, Deeds has testified under oath on three separate occasions: in his first deposition on March 19, 2009; in his wage hearing on May 21, 2009; and in his second deposition on March 23, 2010.
- 2 Admittedly, Deeds in his Errata Sheet (R. Vol. I, 275-76) struck the "for as long as I worked at Waddell & Reed" language. On that, two important points:
One: Deeds cannot create a triable issue through the clever use of an Errata Sheet. See *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) ("A deposition is not a take home exam."); see also *Burns v. Bd. of Comm'rs of County of Jackson*, 197 F. Supp. 2d 1278, 1292 (D. Kan. 2002) (a party cannot attempt to change his deposition testimony via errata sheet "to give more artful answers in his errata sheet which present clear, irreconcilable conflicts with those he originally gave" and where his counsel could have cross-examined him at the time); *Rios v. Bigler*, 847 F. Supp. 1538, 1546-47 (D. Kan. 1994) ("Although the errata sheet, like the affidavit, may be used to correct errors or to clarify or change an answer when a question is misunderstood, it may not be used to allow a person to alter what has been said under oath.").
Two: Deeds did not attempt to change the other instances cited herein, including *the exact same language* at R. Vol. II, 353. In other words, the testimony stands.
- 3 Deeds attempts to suggest otherwise by pointing out that Newton participated in the decision to reassign the Pictet account to himself. However, that decision occurred after the conclusion of Deeds' employment. The uncontroverted facts are that, at the conclusion of Deeds' employment, Newton did not know to whom that account would be assigned. And, Newton did not participate in the decision to allow him to earn commissions based on his additional work on Pictet. (R. Vol: II, 407-08)
- 4 Kansas courts have described the exception as "limited" or "narrow" in *Palmer v. Brown*, 242 Kan. 893, 897-98, 752 P.2d 685 (1988); *Armstrong v. Golblatt Tool, Co.*, 242 Kan. 164, 169, 747 P.2d 119 (1987); *Morriss v. Coleman Co.*, 241 Kan. 501, 512-13, 738 P.2d 841 (1987); *Anco Const. Co., Ltd. v. Freeman*, 236 Kan. 626, 629-30, 693 P.2d 1183 (1985); and *Rowland v. Val-Agri, Inc.*, 13 Kan. App. 2d 149, 151-52, 766 P.2d 819 (1988).
- 5 In his Brief, Deeds misunderstands the employment at-will doctrine, suggesting the doctrine relates only to the duration of employment. That is not so. Employment at-will means the employee may be terminated with good cause, no cause, or even wrong cause. *Goodman v. Wesley Med. Ctr.*, 276 Kan. at 589 (2003). Thus, while the doctrine certainly covers when an at-will employee may be terminated, it also covers the reasons (or lack thereof) for termination.