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Employment-At-Will and Wrongful Discharge in Ohio*

PREPARED BY: ELIZABETH DOMINIC, LSC STAFF ATTORNEY
REVIEWED BY: VIRGINIA MCINERNEY, LSC RESEARCH SUPERVISOR

Introduction

Ohio is an employment-at-will state, which means that, in the absence of a written employment agreement or a collective bargaining agreement, an employment agreement is terminable at will by either the employer or the employee for any reason that is not contrary to law. However, the Ohio Supreme Court has recognized various exceptions to this basic doctrine that are founded upon judicial doctrines of implied contract and public policy. Statutory limitations in both state and federal law on the employment-at-will doctrine also exist. An employee who is discharged in violation of a statute, public policy, or the terms of an express or implied contract is considered to have been "wrongfully discharged" and may bring an action for breach of contract or in tort. With respect to the employment-at-will doctrine in other states, only California, Louisiana, Montana, North Dakota, and South Dakota currently regulate termination from employment by statute.

Generally, an employer can discharge an employee for any reason that is not contrary to law, the terms of a written or implied contract, or public policy. Similarly, an employee who is not covered by an employment contract or collective bargaining agreement may quit at any time and without notice.

The employment-at-will doctrine

The general rule in Ohio is that "[u]nless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law."[1] There is a strong presumption in favor of an at-will contract "unless the terms of the contract or other circumstances clearly manifest the parties' intent to bind each other."[2] The Ohio Supreme Court has held, subject to the exceptions described below, that the right of an employer to terminate an employee's employment for any cause at any time is absolute and cannot be limited by principles that protect persons from gross or reckless disregard of their rights, or from willful, wanton, or malicious actions or acts done intentionally, with insult, or in bad faith.[3]

An employee who is covered by a collective bargaining agreement or an express employment contract may be discharged only in accordance with the terms of the agreement or contract.

* This Members Only Brief is an update of an earlier Brief on this subject dated October 21, 1996 (Volume 121 Issue 17).

Contractual exceptions

Collective bargaining agreements

In the case of an employee who is subject to a collective bargaining agreement, the written agreement normally will cover the grounds upon and the manner by which the employee can be discharged. The presence of a collective bargaining agreement generally supersedes actions for breach of implied contract and violation of public policy.[4] An employee who is governed by a collective bargaining agreement and who is discharged in a manner that is inconsistent with the terms of that agreement may seek redress through his or her union as specified in the agreement's grievance procedures.

An implied contract, originally, may arise in an employment-at-will context but is inferred by a court from the relationship between the employer and the employee and the circumstances surrounding those parties' transactions.

Express employment contracts

The elements of an express employment contract are the same elements required of any other contract. The employer must present a definite offer of continued employment, the employee must accept that offer, which means there must be a "meeting of the minds" as to what was offered and what was accepted, and there must be legally sufficient consideration.[5] If these elements exist, an express employment contract is created. An employer who then terminates an employee in derogation of the terms of the express contract may be liable for a breach of contract; similarly, an employee who quits also may be sued by his employer for breach of contract.

Implied contracts

The elements of an implied employment contract are the same elements as an express employment agreement; thus, there must be a definite offer, acceptance, and consideration.[6] The difference between the two, however, is that an express contract is an actual agreement with explicit terms often memorialized in writing. An implied contract, on the other hand, is a contract inferred by a court from the circumstances surrounding the transaction, making it a reasonable or necessary assumption that a contract exists between the parties by tacit understanding.

Ohio courts have recognized that the history of relations between an employer and employee, including the combination of employee handbooks, company policy, custom, course of dealing, and oral representations, may give rise to contractual or quasi-contractual obligations despite the fact that such relations arose in an employment-at-will context.[7] Because of this, the existence or nonexistence of an implied contract depends on facts and circumstances unique to each situation.

Employee handbooks. Employees sometimes claim that the existence of an employee handbook setting forth the employee's duties as well as disciplinary and grievance procedures alters the at-will relationship, and

Ohio courts have held that employee handbooks or personnel manuals, depending on the circumstances, can create contractual obligations. Like every contract, there must be a "meeting of the minds" in order for an employment manual to be considered a valid contract, *i.e.*, the parties must have a distinct and common intention that each party communicates to the other.[8] There also needs to be consideration, and an employee's continued employment after receipt of the handbook or personnel manual may constitute legally sufficient consideration.[9]

To avoid creating a contract or the impression of a contract through an employee handbook, employers often include in the handbook a disclaimer stating that the employee may be terminated at the employer's will. The Ohio Supreme Court, for example, denied recovery to an employee who claimed that the employee handbook created an implied employment contract because the handbook also unequivocally stated that the employee is an at-will employee who may be terminated at any time by the employer.[10] In another case, the Court held that, "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook."[11] If an employee signs a disclaimer stating that he or she understands the handbook is not intended to constitute an employment contract, the requisite meeting of the minds is lacking. Consequently, the employment remains at will, regardless of whether the employee actually read or understood the disclaimer.[12] However, there is a split of authority on whether or not a disclaimer creates an at-will employment relationship where the employee does not agree to the disclaimer.[13]

Promissory estoppel. Promissory estoppel, first applied to employment contracts in Ohio in 1985,[14] "is not a contractual theory but a quasi-contractual or equitable doctrine designed to prevent the harm resulting from the reasonable and detrimental reliance of an employee upon the false representations of his employer."[15] The test enunciated by the Ohio Supreme Court in such cases is whether or not the employer should have reasonably expected its representation to be relied upon by its employee, and, if so, whether the employee's expected action or forbearance actually resulted and was detrimental to the employee.[16] However, a promise of future benefits or career opportunities without a specific promise of continued employment is not sufficient to support a promissory estoppel exception to the employment-at-will doctrine. The courts have held that a promise of job security, discussions of future career development with the particular employer, or praise with respect to job performance do not, by themselves, invoke the promissory estoppel exception to the employment-at-will doctrine.[17]

Employee handbooks can create contractual obligations that alter the at-will relationship. However, a disclaimer in the handbook that the employment is at-will usually precludes a court finding anything other than an at-will employment relationship.

Courts may use the doctrine of promissory estoppel as an exception to the employment-at-will doctrine to prevent the harm resulting from the reasonable and detrimental reliance of an employee on the false representations of his employer.

Public policy exceptions

Originally, the Ohio Supreme Court held that there is no "public policy" exception to the employment-at-will doctrine.[18] In *Greeley v. Miami Valley Maintenance Contractors*, however, the Supreme Court reversed its earlier decision and held that "[p]ublic policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute. Henceforth, the right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy."[19]

The courts have held that it is against public policy to discharge an employee for a reason that violates a statute.

In *Tulloh v. Goodyear Atomic Corp.*, the Supreme Court overruled *Greeley* in part to hold that "absent statutory authority, there is no common-law basis in tort for a wrongful discharge claim."[20] However, in *Painter v. Graley*, the Supreme Court reversed *Tulloh* in part and set the current standard for establishing that a person was discharged in violation of public policy by stating that "a plaintiff must allege facts demonstrating that the employer's act of discharging [the person] contravened a clear public policy."[21]

An employer may be liable for backpay and compensatory and punitive damages if he discharges an employee in violation of public policy.

An employer can be sued in tort for a violation of public policy, which means that the discharged employee can recover back pay, compensatory damages, and punitive damages. An employee must satisfy four criteria in order to prevail in a claim of wrongful discharge in violation of public policy. These four criteria are as follows:

> That [a] clear public policy existed and was manifested in a state or federal constitution, statute, or administrative regulation, or in the common law (the *clarity* element).
>
> That dismissing employees under circumstances like those involved in the [employee's] dismissal would jeopardize the public policy (the *jeopardy* element).
>
> The [employee's] dismissal was motivated by conduct related to the public policy (the *causation* element).
>
> The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).[22]

In one case, for example, the Ohio Supreme Court found that an employer violated public policy when he terminated his employee because the employee had court-ordered child support payments deducted from his paycheck.[23] The wage-assignment laws specifically prohibit an employer from terminating an employee who has wages assigned. The statute, however, is limited to a $500 fine; there is no specific provision allowing the terminated employee a private right of action to seek reinstatement,

back pay, and benefits.[24] The Court concluded that it would frustrate the public policy expressed in the statute (providing child support) to permit an employer to terminate an employee for having wages assigned.[25]

Courts also have found violations of public policy when an employer discharged an employee for serving on a jury,[26] for providing truthful testimony that was unfavorable to the employer,[27] and for speaking with an attorney.[28] It is also a violation of public policy for an employer to discharge an employee in contravention of the state's antidiscrimination laws.[29] Additionally, numerous Ohio statutes prohibit termination of an employee but fail to provide a private right of action to a discharged employee.[30] Each of these statutes may provide a public policy exception to the employment-at-will doctrine.

It remains unclear whether a discharged employee can base a public policy tort claim on a statute that provides a specific private right of action to the employee. For example, under Ohio law an employee has a private right of action for damages if he is terminated because of prohibited discrimination[31] or in retaliation for filing a workers' compensation claim[32] or for "whistleblowing."[33] It seems that if the statute provides full relief in the private right of action, there can be no "piggybacking."[34] Conversely, if the statute provides only limited relief, some courts have held that "piggybacking" is appropriate while others have held that the specific statutory remedies override the public policy exception.[35]

Statutory exceptions

Ohio and federal law

A number of exceptions to the employment-at-will doctrine exist in both Ohio and federal statutory law. An employee may not be discharged for any of the following reasons:

- Voting or serving on a jury[36]
- Having a court-ordered child support wage assignment[37]
- Discriminatory reasons in contravention of state or federal anti-discrimination laws (*i.e.*, those that prohibit discrimination on the basis of age, race, sex, national origin, color, religion, pregnancy, handicap, or ancestry)[38]
- Filing a workers' compensation claim[39]
- Exercising rights to minimum wages or overtime compensation[40]
- "Whistleblowing"[41]
- Refusing to take a lie detector test[42]
- Having a criminal record that has been expunged[43]

Many state and federal laws prohibit an employee's discharge in certain specified circumstances.

Currently, only California, Georgia, Hawaii, Louisiana, Missouri, Montana, North Dakota, and South Dakota regulate termination of employment in statute. Most of these state statutes consider employment to be teminable at the will of either party absent an employment contract that states a definite period of employment. However, Montana prohibits discharge of an employee except for good cause.

- Engaging in concerted protected union activity under the National Labor Relations Act[44]

- Exercising rights under the Ohio Public Employers Risk Reduction Law or filing a complaint under the federal Occupational Safety and Health Act[45]

- Filing health, retirement, or disability claims that are considered benefit plans protected by the federal Employee Retirement Income Security Act (ERISA)[46]

- Filing for bankruptcy[47]

Ohio's Unemployment Compensation Law provides an additional, albeit indirect, statutory control on the arbitrary discharge of an employee. That law denies unemployment benefits to employees who were fired for "just cause." While the employer still may fire an employee for any reason, the employer will be required to pay for unemployment benefits to the employee if the Department of Job and Family Services, which administers the Unemployment Compensation Law, decides that the firing was for any reason other than just cause.[48] The Ohio Supreme Court also held that an employee's inability to perform the work required is sufficient to support a just cause termination.[49]

Other states

There are currently eight states that statutorily regulate termination from employment. Montana generally prohibits discharge except for "good cause." California, Georgia, North Dakota, and South Dakota, on the other hand, provide that in the absence of a contract, all employment relationships are terminable at the will of either party. Louisiana bases its employment-at-will doctrine on a long-standing statutory provision that states: "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning cause." In both Hawaii and Missouri, the employment-at-will doctrine still exists in common law; however, both states have enacted statutes to clarify the doctrine. The Hawaii statute explicitly provides that an employer can discharge an employee for reasons relating to the ability of the individual to perform the individual's job. The Missouri statute provides that employees whose employment is for a definite period of time, and who are discharged without cause before the expiration of the time period, can recover damages for wrongful discharge.[50]

Four states recently have considered or are considering legislation to amend or abolish the employment-at-will doctrines in their respective states. Mississippi considered legislation to abolish the employment-

at-will doctrine and create the Good Faith in Employment Act.[51] Oklahoma is considering H.B. 2972, which would require an employer to have just cause to terminate an employee.[52] Pennsylvania is considering legislation to make certain officers and employees in school districts at-will employees that may be discharged with or without cause.[53] Texas is considering H.B. 22B and H.B. 120A, both of which would create an exception to the employment-at-will doctrine for certain employees of the Lottery Commission.[54] Since 2001, 13 states have considered legislation to amend the states' current employment-at-will doctrines.[55]

Model Employment Termination Act

On August 8, 1991, the commissioners of the Uniform State Laws Commission approved the Model Employment Termination Act ("META") as a model law.[56] This act would eliminate all common law causes of action arising out of an employee's termination, including tort, defamation, emotional distress, and breach of implied contracts, in return for a statutory proscription against wrongful discharge except for "good cause." Essentially, META proposes to remove the uncertainty as to the amount of damages, if any, that a jury would award for wrongful discharge in return for certain, limited damages. However, torts that occurred independently of the termination itself, such as assault, false imprisonment, and malicious prosecution, as well as rights and claims under express contracts, statutes, or administrative rules, such as employment discrimination, "whistleblowing," and occupational safety and health laws, are not affected by META and, hence, remain actionable. This statutory protection and the commensurate abrogation of common law remedies would apply only to employees covered by META.

The Model Act provides three alternative methods of enforcement—arbitration, state-appointed hearing officers, or private court actions. Under META, remedies for a violation of the act's protections are limited to reinstatement, with or without back pay, and attorneys' fees for a prevailing party. In cases where reinstatement of the employee is impracticable, META authorizes severance pay up to a maximum of 36 months' pay in the most egregious cases, plus the value of fringe benefits lost, less likely benefits and earnings from employment elsewhere. Punitive damages are authorized only against an employer who retaliates against an employee for bringing a wrongful discharge action.

Thus far, no state has adopted the Model Employment Termination Act.

The Model Employment Termination Act would eliminate all common law causes of action in return for a statutory proscription on wrongful discharge except for good cause.

Citations

[1] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 103.

[2] *Henkel v. Educ. Research Council* (1976), 45 Ohio St.2d 249, 255, quoting *Forrer v. Sears, Roebuck and Co.* (1967), 39 Wis. 388, 393.

[3] *Mers*, 19 Ohio St.3d at 105; *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245.

[4] *See, e.g., Provens v. Stark County Dept. of Mental Retardation and Development Disabilities* (1992), 64 Ohio St.3d 252, 261 (Court declines to create a constitutional tort remedy where the employee has adequate redress through statutory and administrative enactments as well as through her collective bargaining agreement's grievance procedures).

[5] *See, e.g., Rogers v. Runfola Associates, Inc.* (1991), 57 Ohio St.3d 5 (employment contract providing that an employee can be discharged only for just cause in exchange for signing a covenant not to compete is a valid agreement); *Peters v. Mansfield Screw Mach. Prods. Co.* (Richland Cty. 1991), 73 Ohio App.3d 197.

[6] *Gargasz v. Nordson Corp.* (Lorain Cty. 1991), 68 Ohio App.3d 149.

[7] *Kelly v. Georgia-Pacific Corp.* (1989), 46 Ohio St.3d 134, 139, *citing Mers*, 19 Ohio St.3d at para. 2 of the syllabus; *Helle v. Landmark, Inc.* (Lucas Cty. 1984), 15 Ohio App.3d 1; *Hedrick v. Center for Comprehensive Alcohol Treatment* (Hamilton Cty. 1982), 7 Ohio App.3d 211. *See Pond v. Devon Hotels, Ltd.* (Franklin Cty. 1988), 55 Ohio App.3d 268 ("[A]lthough the handbook itself, standing alone, does not create an employment relationship other than one at will, when it is coupled with other circumstances, a contract other than one at will may be created.")

[8] *Cohen & Co. v. Messina* (Cuyahoga Cty. 1985), 24 Ohio App.3d 22, 24.

[9] *Sowards v. Norbar, Inc.* (Franklin Cty. 1992), 78 Ohio App.3d 545 (continued employment after issuance of handbook constitutes sufficient consideration to support implied employment contract).

[10] *Karnes v. Doctor's Hospital* (1990), 51 Ohio St.3d 139.

[11] *Wing v. Anchor Media* (1991), 59 Ohio St.3d 108, 110.

[12] *Kiel v. Circuit Design Technology, Inc.* (Cuyahoga Cty. 1988), 55 Ohio App.3d 63, para. 1 of the syllabus.

[13] *Compare Hanley v. Riverside Methodist Hospital* (Franklin Cty. 1991), 78 Ohio App.3d 73 (prior agreement that employment could only be terminated for just cause not altered by disclaimer where the employee wrote on disclaimer that he did not accept it) *with Gaumont v. Emery Air Freight Corp.* (Montgomery Cty. 1989), 61 Ohio App.3d 277 (disclaimer indicates employee's status is at will even though employee signed the disclaimer under threat of termination).

[14] *Mers*, 19 Ohio St.3d at 155.

[15] *Karnes v. Doctor's Hospital* (1990), 51 Ohio St.3d at 142.

[16] *Mers*, 19 Ohio St.3d at 105.

[17] *Wing*, 59 Ohio St.3d at 110-11; *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 131, 135-36; *Schwartz v. Comcorp, Inc.* (Cuyahoga Cty. 1993), 91 Ohio App.3d 639 (positive feedback from superiors regarding performance insufficient to alter at-will status); *Briner v. National City Bank* (Cuyahoga Cty. Feb. 17, 1994), 1994 WL 50673 (general discussions of future career development insufficient to alter at-will status).

[18] *Phung v. Waste Management, Inc.* (1986), 23 Ohio St.3d 100, *overruled by Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228.

[19] *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228.

[20] (1992), 62 Ohio St.3d 541.

[21] (1994), 70 Ohio St.3d 377.

[22] *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 69-70, quoting H. Perrit, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* 58 U. CIN. L. REV. 397, 398-99; *Painter*, 70 Ohio St.3d at para. 3 of the syllabus.

[23] *Greeley*, 49 Ohio St.3d at 233-234; see R.C. § 3121.39.

[24] R.C. § 3121.99.

[25] *Greeley*, 49 Ohio St.3d at 233-234.

[26] *Shaffer v. Frontrunner, Inc.* (Defiance Cty. 1990), 57 Ohio App.3d 18.

[27] *Sabo v. Schott* (1994), 70 Ohio St.3d 527.

[28] *Simonelli v. Anderson Concrete Co.* (Franklin Cty. 1994), 99 Ohio App.3d 254.

[29] *Collins*, 73 Ohio St.3d at 73 (there is "a clear public policy against workplace sexual harassment."); *Clipson v. Schlessman* (Erie Cty. 1993), 89 Ohio App.3d 230, 236 (against public policy to terminate employee because of his handicap).

[30] *See, e.g.*, R.C. § 2151.211 (prohibits terminating an employee for attending a delinquency proceeding in juvenile court pursuant to a subpoena); R.C. §§ 2939.121 and 2945.451 (prohibits terminating an employee for attending a grand jury or criminal proceeding pursuant to a subpoena); R.C. §§ 5101.61(E) and 5104.10 (prohibits terminating an employee for filing a report of neglect or abuse of an adult or a mentally retarded or developmentally disabled adult).

[31] R.C. Chapter 4112.

[32] R.C. § 4123.90.

[33] R.C. § 4113.52.

[34] *Schwartz v. Comcorp, Inc.* (Cuyahoga Cty. 1993), 91 Ohio App.3d 639.

[35] *Compare Haynes v. Zoological Society of Cincinnati* (Hamilton Cty. 1993), 9 Indiv. Employ. Rights Cas. (BNA) 124 (whistleblowing statute does not provide relief for emotional distress and economic damages, therefore a public policy claim is appropriate) *with Anderson v. Lorain Cty. Title Co.* (Lorain Cty. 1993), 88 Ohio App.3d 367 (no public policy claim allowed under the workers' compensation antiretaliation law).

[36] R.C. §§ 2313.18 and 3599.06.

[37] R.C. § 3121.39.

[38] R.C. §§ 4112.02 and 4112.14; 42 U.S.C. § 2000e *et seq.*

[39] R.C. § 4123.90.

[40] R.C. § 4111.13.

[41] R.C. § 4113.52; 42 U.S.C. § 5851.

[42] Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 *et seq.*

[43] R.C. § 2151.358.

[44] 29 U.S.C. § 158(a)(1).

[45] R.C. § 4167.13; 29 U.S.C. § 660.

[46] 29 U.S.C. § 1140.

[47] 11 U.S.C. § 525.

[48] R.C. § 4141.28; *see, e.g., Corbin v. Bureau of Employment Services* (Franklin Cty. 1991), 77 Ohio App.3d 626.

[49] *Tzangas, Plakas & Mannos v. Bureau of Employment Services* (1995), 73 Ohio St.3d 694.

[50] Cal. Lab Code § 2922 (2006); Ga. Code Ann. § 34-7-1 (2006); Haw. Rev. Stat. § 378-3(3) (2006); La. Civ. Code Ann. art 2747 (2006); Mo. Ann. Stat. § 290.130 (2006); Mont. Code Ann. §§ 39-2-901 to 39-2-915 (2006); N.D. Cent. Code § 34-03-01 (2006); S.D. Codified Laws § 60-4-4 (2006).

[51] S.B. 2398, 2005 Reg. Sess. (Miss. 2005).

[52] First Session of the 50th Legislative Session (2005).

[53] H.B. 1913 and H.B. 1914, 2005-2006 General Assembly, Reg. Sess. (Pa. 2005).

[54] 79th 1st and 2nd Called Session (2005).

[55] Alabama, Arizona, Arkansas, Delaware, Iowa, Maine, Mississippi, Nebraska, Oklahoma, Pennsylvania, South Carolina, Texas, and Wyoming.

[56] For a detailed analysis of the Model Employment Termination Act, see LSC Research Memorandum R-120-2483.

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9th Floor
Vern Riffe Center
Columbus, Ohio
614/466-3615

Director
Jim Burley

Assistant Director
Tom Manuel

Contributing Author
Elizabeth Dominic,
LSC Staff Attorney

Reviewer
Virginia McInerney,
LSC Research Supervisor

Layout
Jeanette Cupp