Members Brief

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Employment-At-Will and Wrongful Discharge in Ohio

Ohio is an employment-at-will state, which means that, in the absence of a written employment agreement or a collective bargaining agreement, either the employer or the employee can terminate employment 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 on judicial doctrines of implied contract and public policy. And both state and federal law impose statutory limits on the employment-at-will doctrine. 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.

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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

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

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]

Contractual exceptions

Collective bargaining agreements

In the case of an employee who is subject to a collective bargaining agreement (CBA), that agreement normally covers the grounds and the manner by which the employee can be discharged. The presence of a CBA generally supersedes actions for breach of implied contract and violation of public policy.[4] An employee who is covered by a CBA and who is discharged in a manner that is inconsistent with its terms may seek redress through the employee's union representative under the CBA's grievance procedures. In 2020, approximately 13.2% of Ohio employees worked in jobs covered by a CBA.[5]

Employment contracts

The elements of an 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.[6] If these elements exist, an employment contract is created. An employer who dismisses an employee in violation of the contract terms may be liable for a breach of contract; similarly, an employee who quits also may be sued by the employer for breach of contract.

There are two types of employment contracts: express and implied. An express contract is an actual agreement with explicit terms often put 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

[2] *Henkel v. Educ. Research Council*, 45 Ohio St.2d 249, 255 (1976), quoting *Forrer v. Sears, Roebuck and Co.*, 36 Wis. 2d 388, 393 (1967).

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

[4] See, e.g., *Provens v. Stark County Dept. of Mental Retardation and Developmental Disabilities*, 64 Ohio St.3d 252, 261 (1992).

[5] U.S. Department of Labor, Bureau of Labor Statistics, *Union Members in Ohio – 2020*, available here.

[6] See, e.g., *Rogers v. Runfola Associates, Inc.*, 57 Ohio St.3d 5 (1991); *Peters v. Mansfield Screw Mach. Prods. Co.*, 73 Ohio App.3d 197 (5th Dist. 1991).

despite the fact that those relations arose in an employment-at-will context.[7] Because of this, whether an implied contract exists 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" for an employment manual to be considered a valid contract; that is, the parties must have a distinct and common intention that each party communicates to the other.[8] There also needs to be consideration. An employee's continued employment after receiving the handbook or personnel manual may be sufficient consideration.[9]

Sometimes an employer may have an employee sign a disclaimer that an employee understands that the handbook does not constitute an employment contract. Absent fraud, this disclaimer will be upheld, although courts are divided on whether a disclaimer creates an at-will relationship when an employee does not agree to the disclaimer, particularly when the disclaimer modifies an already existing relationship.[10]

Promissory estoppel

Promissory estoppel first applied to employment contracts in Ohio in 1985.[11] Promissory estoppel is the principle that a promise made without consideration can still be enforced if the promisor should have reasonably expected the promisee to rely on that promise, and the promisee did so to the promisee's detriment.[12] The test developed by the Ohio Supreme Court in these cases is whether the employer should have reasonably expected the employer's representation to be relied on by an employee, and, if so, whether the employee's expected action or forbearance actually resulted and was detrimental to the employee.[13]

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[7] *Kelly v. Georgia-Pacific Corp.*, 46 Ohio St.3d 134, 139 (1989), citing *Mers*, 19 Ohio St.3d at para. 2 of the syllabus; *Helle v. Landmark, Inc.*, 15 Ohio App.3d 1 (6th Dist. 1984); *Hedrick v. Center for Comprehensive Alcohol Treatment*, 7 Ohio App.3d 211 (1st Dist. 1982). See *Pond v. Devon Hotels, Ltd.*, 55 Ohio App.3d 268 (10th Dist. 1988).

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

[9] *Sowards v. Norbar, Inc.*, 78 Ohio App.3d 545 (10th Dist. 1992).

[10] *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St.3d 108, 110 (1991) and *Kiel v. Circuit Design Technology, Inc.*, 55 Ohio App.3d 63, para. 1 of the syllabus (8th Dist. 1988); compare *Hanly v. Riverside Methodist Hospital*, 78 Ohio App. 73, 78-79 (10th Dist.) and *Gaumont v. Emery Air Freight Corp.*, 61 Ohio App.3d 277, 286 (2nd Dist. 1989).

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

[12] *Black's Law Dictionary*, 11th Ed. 2019.

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

However, a promise of future benefits or career opportunities without a specific promise of continued employment is not enough to support a promissory estoppel exception. 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.[14]

Public policy exceptions

Originally, the Ohio Supreme Court held that there is no "public policy" exception to the employment-at-will doctrine.[15] The Supreme Court has since overruled this decision. The current standard for establishing that a person was discharged in violation of public policy is "a plaintiff must allege facts demonstrating that the employer's act of discharging [the person] contravened a clear public policy."[16]

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 to prevail in a claim of wrongful discharge in violation of public policy. These four criteria are:

- 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).[17]

Courts have found violations of public policy when an employer discharged an employee for having court-ordered child support payments deducted from the employee's paycheck,[18] for serving on a jury,[19] for providing truthful testimony that was unfavorable to the employer,[20] and

[14] *Wing v. Anchor Media*, 59 Ohio St.3d 108, 110-11; *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131, 135-36 (1989); *Schwartz v. Comcorp, Inc.*, 91 Ohio App.3d 639, 647 (8th Dist. 1993).

[15] *Phung v. Waste Management, Inc.*, 23 Ohio St.3d 100 (1986), overruled by *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134, 162 (1997).

[16] *Painter v. Graley*, 70 Ohio St.3d 377 (1994).

[17] *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70 (1995), 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.

[18] *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 233-234 (1990).

[19] *Shaffer v. Frontrunner, Inc.*, 57 Ohio App.3d 18 (3rd Dist. 1990).

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

for speaking with an attorney.[21] It is also a violation of public policy for an employer to discharge an employee in contravention of Ohio's antidiscrimination laws.[22] Additionally, numerous Ohio statutes prohibit termination of employment but fail to provide a private right of action to a discharged employee.[23] Each of these statutes may provide a public policy exception to the employment-at-will doctrine. However, the Ohio Supreme Court has held that lack of a personal remedy for an employee does not always satisfy the jeopardy element if the statutory remedies sufficiently protect society's interest and discourage employers from engaging in the prohibited behavior.[24]

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 the employee is discharged in retaliation for filing a workers' compensation claim[25] or for "whistleblowing."[26] It seems that if the statute provides full relief in the private right of action, there can be no "piggybacking."[27] 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.[28]

Statutory exceptions

Ohio and federal law

In addition to the examples discussed above, a number of exceptions to the employment-at-will doctrine exist in both Ohio and federal statutes. An employee may not be discharged for any of the following reasons:

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[21] *Simonelli v. Anderson Concrete Co.*, 99 Ohio App.3d 254 (10th Dist. 1994).

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

[23] See, e.g., R.C. 2151.211 (prohibits discharging an employee for attending a juvenile court proceeding pursuant to a subpoena); R.C. 2939.121 and 2945.451 (prohibits discharging an employee for attending a grand jury or criminal proceeding pursuant to a subpoena); R.C. 5123.61(L) and 5104.10 (prohibits discharging an employee for filing a report of neglect or abuse of an individual with a developmental disability or reporting a violation of the child daycare laws or rules).

[24] *House v. Iacovelli*, 159 Ohio St.3d 466 (2020).

[25] R.C. 4123.90.

[26] R.C. 4113.52.

[27] *Schwartz v. Comcorp, Inc.*, 91 Ohio App.3d 639 (8th Dist. 1993).

[28] Compare *Haynes v. Zoological Society of Cincinnati*, 1993 Ohio App. LEXIS 6158 (1st Dist. 1993) (whistleblowing statute does not provide relief for emotional distress and economic damages, therefore a public policy claim is appropriate) (reversed on other grounds) with *Anderson v. Lorain Cty. Title Co.*, 88 Ohio App.3d 367 (9th Dist. 1993) and *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751 (no public policy claim allowed under the workers' compensation antiretaliation law).

- Voting or serving on a jury;[29]
- Exercising rights with respect to minimum wages or overtime compensation;[30]
- Refusing to take a lie detector test;[31]
- Having a criminal or juvenile record that has been sealed;[32]
- Engaging in concerted protected union activity under the National Labor Relations Act;[33]
- Exercising rights under the Ohio Public Employment Risk Reduction Law or filing a complaint under the federal Occupational Safety and Health Act;[34]
- Filing health, retirement, or disability claims that are considered benefit plans protected by the federal Employee Retirement Income Security Act (ERISA);[35]
- Filing for bankruptcy.[36]

Ohio does not have an exception to the employment-at-will doctrine based on one's vaccination status. However, several bills introduced by the 134th General Assembly propose to create such a statutory exemption.[37]

[29] R.C. 2313.19 and 3599.06.

[30] R.C. 4111.13.

[31] 29 United States Code (U.S.C.) 2002.

[32] R.C. 2151.357(G) and 2953.60.

[33] 29 U.S.C. 158(a)(1).

[34] R.C. 4167.13; 29 U.S.C. 660.

[35] 29 U.S.C. 1140.

[36] 11 U.S.C. 525.

[37] See Sub. H.B. 248 of the 134th General Assembly (As Pending in House Health Committee); H.B. 350 of the 134th General Assembly (As Introduced); Sub. S.B. 169 of the 134th General Assembly (As Pending in Senate Health Committee).