

The Legal Constraints on Discharge  
&  
Documentation and Verbal Communications  
Impacting the Right to Hire and Fire

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**The Employment-at-Will Doctrine**

Or

**“Grape Bubblegum Can Get You Fired”**

The employment relationship is simply a contract between the employer and employee. The employee agrees to perform the required labor or service, and the employer agrees to compensate the employee in return. There are essentially two varieties of employees: those with an express written contract setting out the rights and responsibilities of the employer and employee, and “at-will” employees. The latter variety encompasses the vast majority of workers.

A written contractual relationship is usually more beneficial to the employee than an at-will relationship. Employees who have a particularly valuable skill or unique experience are more likely to have a position from which to bargain for a written contract. The contract will detail the obligations of the employee, the benefits to which the employee is entitled and the circumstances under which the employer will be allowed to terminate the employment relationship. If the employer attempts to terminate the relationship prior to the expiration of the contract term, the employer must demonstrate that it has “good cause” for doing so under the contract, or else the employer will be in breach of the contract.

“At-will” employees, on the other hand, have only a minimal, unwritten agreement that they will be paid for services provided, with no guarantee of a duration of employment or restriction on the employer’s discretion in ending the relationship. The historical rule regarding at-will employees is that **“an at-will**

***employee may be terminated for good cause, for no cause, or even for cause that others might find morally indefensible.”***

A harsh rule, at least from the employee’s perspective. Many at-will employees are under the mistaken impression that they have a right to work and can only be terminated if the employer has a good reason. Many workers also believe that they have a right to due process in challenging the employer’s decision to terminate their employment. This is true in some states, but not in Kentucky, which has not strayed from the traditional at-will employment philosophy in favor of the “fair dealing” philosophy. When employees learn that they have very little in the way of a right to work and even less due process entitlement, the response is universal: “well, that’s just not fair!” Indeed, it seems to fly in the face of our modern concept of fair-play – that an employer can fire even the most industrious employee for the most minor infraction, or even for no reason at all. An employee can be fired simply because the employer dislikes the grape bubblegum the employee chews.

Why has the law taken such a hard line? To understand why, we must look back to the historical origins of our modern law. Kentucky’s laws trace back to those of Virginia, which Kentucky adopted when it became a separate state. Virginia’s laws, in turn, originated from those of England as a colony. Much of English law grew out of feudal concepts, where those who owned the land could dictate who lived and worked there. These feudal concepts carried forward into the industrial age, where factory owners replaced landowners as the holders of

the reigns of power. Just as there was no right to live on someone else's land and work their fields, there was no right to work in someone else's factory.

These ancient English law concepts conflict with modern legal principles that contracts between parties be fair to both sides, and that persons should not be discriminated against because of gender, race or other classification. To this end, the courts and legislature have been chipping away at the "at-will" employment doctrine. These efforts can be divided into two groups: court rulings which have found certain conduct by an employer to grant the employee more contractual rights than customary in an at-will relationship; and legislation specifically restricting an employer's discretion in terminating employees.

### **Statutory Restrictions on the Employment Relationship**

**Or**

### **"I'm From the Government, and I'm Here to Help."**

Both the federal and state governments have enacted a number of laws which regulate aspects of the employment relationship. Most of these laws grant rights to employees which they would not otherwise have under the at-will relationship, such as unpaid time off to care for a newborn child or accommodation of a physical disability in the workplace. The rights conferred by these laws are beyond the scope of this presentation. Our consideration of these laws will be limited to how they *restrict* the at-will relationship.

The majority of laws enacted by the legislatures are motivated by a desire to "level the playing field" for groups of persons who have historically been at a

disadvantage in competing for employment. As a consequence, many laws are applicable to certain categories of persons, and are considered “discrimination laws.” The most noteworthy of these are the Americans with Disabilities Act (ADA), the federal civil rights act commonly referred to as Title VII, the Age Discrimination in Employment Act (ADEA) and the Kentucky Civil Rights Act, which largely mirrors the ADA and Title VII. Other less commonly known laws are the Equal Pay Act of 1963 and the Kentucky Equal Pay Act. What these laws have in common is the restriction of termination decisions based upon the employee’s membership in a class of persons protected under the law. These “protected classes” include gender, race, religion, national origin (ethnicity), age over 40 and disability (which includes pregnancy).

Taking the “age over 40” protected class as an example, the protected class is comprised of employees aged 40 and over. Does this mean that you cannot fire an employee over 40 years of age? No, but you cannot fire the employee for the reason that the employee is over 40 (i.e. firing an older, more highly compensated worker so that the position can be filled by a younger employee with less compensation). As the “protected class” only includes employees over 40 years of age, can you fire an employee who is 25 years old because you think he or she is “too young for the job?” Technically, yes, because the employee is not a member of a protected class, and therefore the at-will employment discretion is not limited.

Taking the “religion” class as an example, the protected class is not simply members of a particular religious faith or sect, it is the issue of religion itself.

Obviously an employment decision cannot be based upon the fact that an individual subscribes to the Christian, Jewish, Muslim or any other religious faith, but what about the fact that a person subscribes to no faith, or advocates atheism? Just as an employer can not make employment decision based upon an individual's religious faith, the employer is likewise restricted from making decisions based upon a lack or rejection of religious faith. Working with these statutes can be challenging, because, not only do they regulate an employer's actions, they also regulate an employer's *motivation* for action.

In the typical employment discrimination claim under one of these laws, the employer will have a non-discriminatory explanation for why adverse employment action was taken (i.e. the employee was late to work too many times). The employee will counter that the explanation is a subterfuge, concealing the real, discriminatory reason (i.e. the employee was terminated due to bias against women in the workplace). The employee may support the contention with direct evidence of discriminatory intent (such as "this is a man's job" statements in the workplace by supervisors) or by demonstrating disparate treatment (i.e. women being terminated for late clock-in, when men are not).

Other laws are less concerned with remedying discrimination and are primarily directed toward requiring employers to provide workers with greater benefits or accommodation in the workplace than the at-will relationship would otherwise require. A prime example is the Family and Medical Leave Act (FMLA). Under the FMLA, employers are required to provide unpaid leave to employees for treatment of a serious medical condition of the employee or the

employee's immediate family, or to care for a newborn or newly adopted child. Not only must the employer provide the leave, the employer cannot terminate or retaliate against the employer for exercising the right to benefits under the law. This is true of most laws which provide some right or benefit to an employee, under the rationale that it would defeat the purpose of such laws if an employer were permitted to dissuade an employee from taking advantage of them through threat of retaliation.

In addition to the previously discussed landmark laws governing the employment relationship, there is a hodgepodge of state and federal laws which restrict the right to terminate an employee or forbid retaliation for exercising a right granted by the law. These include:

1. Workers' Compensation – an employee may not terminate or retaliate against a worker for applying for benefits. KRS 342.197.
2. Garnishment – an employee may not be terminated due to wage garnishment for any one indebtedness. KRS 427.140 and 15 U.S.C. 1647 (Consumer Credit Protection Act).
3. Jury duty – an employee must be permitted to perform jury service as ordered by the court. KRS 29A160.
4. Appearance at court proceeding as a witness – an employee must not be penalized for appearing at a legal proceeding in compliance with a court order or subpoena. KRS 337.415 and 28 U.S.C. 1875.
5. Voting – an employee may not be terminated for exercising the right to vote (and must be allowed time off to vote, as well).

6. National Guard and military – an employee must be permitted a leave of absence for the attendance at National Guard active duty or training. On return from leave, the employee must be reinstated to the employee's former position with no loss of wage, rate, seniority or other employment benefit. KRS 38.238 and 38 U.S.C. 2021 (Vietnam Era Veterans' Readjustment Assistance Act of 1974). In addition there are a number of statutes, some of which only apply to government agencies, which provide job protection for members of the military called to duty, and which are too complicated to summarize here.
7. Status as smoker or non-smoker – although an employee may restrict smoking on the business premises, the employer cannot discriminate against an employee because the employer is a smoker or non-smoker, and cannot require an employee to abstain from the use of tobacco outside the job. KRS 344.040(1).
8. Bankruptcy – an employee may not be discharged for the reason that the employee has been declared bankrupt by the courts. 11 U.S.C. 1 *et seq.*, 525 (b).
9. ERISA – employers may not discharge or retaliate against a plan-participant employee for exercising rights under a benefit plan established under the Employee Retirement Income Security Act of 1974. 29 U.S.C. 1001, 1140.
10. Observation of Sabbath – an employer may not terminate or discriminate against an employee for refusing to work on a day which the employee

“may conscientiously wish to observe as a religious Sabbath.” Note that this allows a Sabbath to be celebrated on a day other than Sunday. KRS 436.165(4)(a).

11. Employee polygraph examination – an employer may not discharge or discipline an employee for refusing to take a “lie detector” test, or take action against an employee based upon the results of such testing. Exception is made where the test is part of an ongoing investigation of economic loss or injury to the employer’s business. Such tests may only be administered when the employee had access to the property which is the subject of the investigation and the employer has reasonable suspicion of the employee’s involvement. As a general rule, “dragnet” investigation is not permitted, and there are specific notice requirements which must be followed. In any situation in which a polygraph examination is contemplated, proceed with extreme caution. KRS 207.140-240.
12. Union activities – the National Labor Relations Act prohibits discharge or retaliation against employees for participating in the formation of labor organizations or engaging in activity for the mutual aid or protection of employees. 29 U.S.C. 151 *et seq.*
13. Whistle blowing – several statutes regulating industry, commerce and workplace safety, such as OSHA and KOSHA, incorporate statutory protection for any employee making a report under the statute.

The area of employee collective bargaining is another aspect of employment law to which an entire seminar could easily be devoted. In general “collective

bargaining” involves contracts between employee representatives and the employer, establishing various agreements related to the terms and conditions of employment. For the most part, the entire field of law in this regard falls under the jurisdiction of the National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB). Regarding employee termination, the collective bargaining agreement will almost always modify the employment relationship so that the employer does not have at-will discretion in terminating employment. The agreement will set forth the basis upon which employment can be terminated, and will usually establish some mechanism by which the employee can challenge the employer’s decision. An employer is prohibited from retaliating against an employee for engaging in union organizing activities. Once a collective bargaining agreement is in place, the NLRA regulates employee’s conduct during strikes and picketing, and likewise regulates an employer’s response to such activities.

Public-sector employees (government employees) are treated in much the same way as private-sector employees. They, for the most part, hold terminable-at-will status. Exceptions are employees who are covered by the merit system administered under the state Personnel Board. Public school teachers are covered by a “tenure law” and police officers employed by local governments have special protections under the “Police Bill of Rights.” Some cities and counties in the state have enacted their own “civil service” regulations.

Moreover, because such employees are directly serving the government, any action taken by the government as their employer is “government action,” and, as

a consequence, public-sector employees enjoy protection under the Fourteenth Amendment (Due Process Clause) and the First Amendment (Freedom of Speech Clause) which are not applicable to the relationship between the private-sector employer and employee.

### **Judicial Restrictions on Termination Discretion**

**Or**

**“Because I Said So.”**

As previously discussed, many statutes have express anti-retaliation provisions. Kentucky courts have determined that some restrictions on an employer’s ability to terminate an employee are required as a matter of public policy, even where there is no explicit restriction against retaliation in the language of the statute. In the course of several opinions handed down over a period of years, the courts have prohibited termination of employment because the employee performed a public obligation or exercised a right guaranteed by constitution or statute, and which is relevant to the employee’s job or because an employee refused to engage in an illegal act which would result in the employee’s criminal liability or

One of the first court opinions in which the court defined the “exercise of right” theory involved an employee terminated in retaliation for filing a Worker’s Compensation claim for an on-the-job injury. The court ruled that the employee had a statutory right to file the claim, and if an employer could force the

employee to choose between exercising the right and keeping the job, the employer would have a “chilling effect” on the ability of employees to benefit from the law. This, the court decided, was not consistent with public policy. Since the opinion was rendered, an explicit anti-retaliation provision has been added to the Worker’s Compensation statute.

The prohibition against termination in response to an employee’s performance of a public obligation has been narrowly interpreted to only protect obligations related to the employment context. Essentially, the protection is for those **required by law** to make a report of wrongful activity. For example, teachers and healthcare workers are required to report suspected abuse. To date, courts have not been liberal in extending this area of protection.

Kentucky courts have likewise taken a position of narrow interpretation on the protection granted an employee for refusing to engage in illegal activity. While the courts have recognized the protection, the employee’s subjective belief that the activity will result in exposure to criminal liability is not sufficient. The activity refused must in fact be one for which criminal charges against the employee could result. For example, an employer might ask his or her assistant to lie to an IRS representative calling to discuss an audit of the company’s books, and tell the caller that the employer “was out of the office at the moment.” The assistant might refuse, under the mistaken impression that making this misrepresentation to the caller was somehow illegal. The employer could terminate the employee for the refusal, because there would be no criminal penalty in that circumstance. If the employer asked the assistant to lie under

oath about the company finances, however, the refusal would be protected activity.

### **Documentation and Verbal Communications Impacting the Right to Hire and Fire**

**Or**

**“Never say or write anything you wouldn’t  
want to see enlarged to poster size as a trial exhibit.”**

In the previous section, we considered the historical development and nature of the at-will employment relationship, and how the relationship is one of a very limited contract. Both prior to employment and during the employment relationship, an employer may inadvertently engage in conduct which serves to modify the at-will relationship by granting additional rights or protection.

#### **Oral Promises**

Kentucky state courts and federal courts applying state law have recognized that oral promises made by employers can sometimes elevate the employee from at-will status. In one case, a court held that oral promises to a job applicant that, after completing a “probationary period,” the employee would only be discharged “for good cause.” The court ruled that this created a limited contract of employment in which the employer was restricted from terminating the employee for any reason other than for good cause.

In another case, Playboy magazine asked an employee of a radio station to pose for nude photographs. The employee agreed to do so only after

receiving assurances from her employer that the photographs would not have any adverse impact on her employment. In fact, the station owner thought the disk jockey's appearance in the magazine would create publicity and increase listener audience. The owner underestimated conservative backlash, and terminated the employee when advertisers began pulling ads in protest. The court held that the assurance by the employer that the photographs would have no adverse employment effect modified the at-will relationship so that the employee could not be fired for any reason associated with the publication.

However, general statements made to prospective employees that they have a "great future" with the employer are too general to create a modification of the at-will relationship. There is no clearly defined line between oral promises and general optimism about the employee's future prospects. Care must be exercised in communicating with prospective or current employees so that nothing that looks like a promise is made.

### **Written Promises**

The obvious vehicle for a written promise is a letter offering employment. This may either be the "conditional offer," wherein an employer notifies an employment candidate that he or she is offered employment conditional on satisfaction of certain conditions, such as a drug test, background check, or the "final offer," where by the employer notifies the candidate that they are offered employment outright, or that they have passed the requirements of the conditional offer. An employer must exercise care not to make statements that

appear to guarantee a minimum term of employment or restrict the employer's discretion in terminating the employment relationship. For example, the offering letter should not state "we are pleased to offer you employment for an initial term of one year." The employer may intend for this to mean "we want you to work for us for a year to see how you do, and then we'll consider keeping you on, but we can still fire you any time," but the employee will argue this means "we guarantee employment for at least one year." This was exactly the situation presented in a 1993 Kentucky Court of Appeals Case, in which an employee received a letter confirming employment in which the employer stated "this project position will last a minimum of thirteen months." The employee was terminated prior to the expiration of the thirteen month term, and argued that the letter constituted a contract. The court held that "if there is more than one reasonable inference to be drawn from [the letter] the question should be submitted to the jury. In other words if the writing is ambiguous, the factual question of what the parties intended by it is for the jury."

Employee handbooks can also contain statements providing fodder for an argument that the employee has something greater than at-will status. In early cases, the courts sometimes found that provisions in employee handbooks lessened the employer's discretion in termination, and formed a contract of employment. However, employee handbooks are a valuable tool for business, and serve to inform employees of their rights and obligations with the employer. The courts, recognizing that a Pandora's Box was about to open, held that a clear statement in the handbook that it did not constitute a contract would defeat

any expectation on the part of the employee that a contract had been formed. Any employee handbook should begin on the first page, in clear and conspicuous language, with a statement that it is not a contract of employment and that the employee is at all times an at-will employee, subject to discharge at any time within the employer's discretion.

**“I don't know why it is in the handbook, it has always been there.” – An aside about “probationary periods.”**

Does your employee handbook make reference to a “probationary period?” Do you utilize an initial probationary period at the beginning of employment? Why? If your answer is something like “so the employee knows we can fire him/her for any reason during that time,” look down now to see which of your feet you have shot.

If the employee is an at-will employee, he or she can be fired at any time for any reason. If an employer makes a statement that an employee can be fired at any time for any reason during the employee's probationary period, where does that leave the relationship after the expiration of that period? Is the employee now subject to termination only for good cause, as though the employee had a contract? This is the argument many employees have made, and some have won. Unless you intend to have a different standard for termination after a probationary period, or use the probationary period for a well-thought business related purpose you may be well advised to eliminate the provision.

