EMPLOYMENT AT WILL

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I. INTRODUCTION

This paper has been cobbled together as "cliff notes" for the general practitioner seeking to identify issues under Pennsylvania law related to illegal discharge or wrongful termination of employment. It is by no means exhaustive, but a presentation of issues arising when the employment relationships goes bad, and general statements of applicable rules of law.

As a general proposition under Pennsylvania law, in the absence of a contract, all employees are employed at the will of their employer, which means they may be terminated at any time. Employers are free to be "bad" or incompetent employers, may make irresponsible business decisions concerning personnel, and may terminate their employees for any reason, for a bad reason and for no reason at all. Employers are only constrained from terminating employees by statutory or common law exceptions to the general rule.

The term wrongful discharge is almost a misnomer under Pennsylvania law. There is no cause of action against an employer for "wrongful discharge" per se, absent some compelling public policy exceptions, which exceptions the courts have construed narrowly. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); Clay v. Advanced Computer Applications, Inc., 522 Pa. 86, 559 A.2d 917 (1989). The courts have by and large refused to weaken the extremely strong presumption of employment of will, finding wrongful discharges in only limited circumstances. McLaughlin v. Gastrointestinal Specialists, 561 Pa. 307 (2000).

There are exceptions to the general rule of at-will employment. First, parties are free to contract for specific terms of employment, including the duration of employment (either as employees or independent contractors). Employment contracts are gaining popularity for persons with specialized skills and for executives, or highly compensated employees. As a policy matter, these contracts make good sense for the employer and the employee. Expectations are clearly laid out on both sides: the employee is protected from an otherwise arbitrary termination and a loss of valuable salary and benefits, and the employer can protect himself by including a "cause" clause for termination.

Second, there are many statutory exceptions to the general rule. One of the largest exception to the general rule is found in Title VII, 42 U.S.C. § 2000e, which prohibits taking adverse employment actions against an employee for discriminatory purposes, namely sex, race and/or national origin. An employer may not make employment distinctions based upon these impermissible classifications. Many other statutory exceptions are cited below.

Third, there are overarching considerations of public policy that protect employees from termination and/or adverse employment consequences. The courts have

found that the societal good often outweighs the employer's rights in a variety of circumstances. See Shick v. Shirey, 552 Pa. 590, 716 A.2d 1231 (1998).

Finally, public employees have constitutional protections in their employment that do not exist to employees in the private sector. If a public employee can establish a "property right" to continued employment that interest cannot be denied absent due process constraints.

II. CONTRACTS OF EMPLOYMENT

A. Express Contracts

The clearest exception to the at-will presumption is when the parties, by express contract, agree to an employment relationship outside of the at-will parameters. This contract can be written or oral, but must show a clear intent by the parties to form a contract for a definite period of time in order to override the at-will presumption. General promises to continue employment generally are not sufficient to constitute a contract of employment. There must be "a mutual assent to employ and to be employed," which contains all the elements of a contract, in order to constitute a valid and binding contract. Kistler, Inc. v. O'Brien, 464 Pa. 475, 483, 347 A.2d 311 (1974). Parties attempting to overcome Pennsylvania's at-will presumption must show clear and precise evidence of an [oral] employment contract for a definite term. Scully v. US WATS, Inc., 238 F.3d 497 (3d Cir. 2001).

1. Employee Handbooks

The question often arises as to whether representations made as part of an employee handbook constitute employment contracts. The best answer would appear to be no, given adequate disclaimer language in the handbook itself, and the courts wariness of impinging upon the at-will presumption. The better argument appears to be that the handbooks are informational in nature, and not contractual. If an employee handbook contains appropriate, conspicuous disclaimer no contract of employment likely will be found.

Sample disclaimer language that will largely preserve the at-will presumption:

> **Neither this handbook nor any other Company document confers any contractual right, either express or implied, to remain in the Company's employ. Nor does it guarantee any fixed terms and conditions of your employment. Your employment is not for any specific time and may be terminated at will, with or without cause and without prior notice, by the Company or you may resign for any reason at any time. No supervisor or other representative of the Company (except the President) has the authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the above.**

This language should appear in large font, bold type or capital letters and be conspicuously located in the front of the document, and not buried in fine print in the text.

In determining whether in individual cases, a handbook constitutes and employment contract, the courts look to the reasonable expectations of the parties. Absent an indication by the employer of an intent to create a legally binding contract, the at-will employee cannot reasonably be said to believe that his at-will status has been legally changed by the handbook. Lutheran v. Loral Fairchild Corp., 455 Pa. Super. 364, 688 A.2d 211, 215 (1997); Martin v. Capital Cities Media Inc., 354 Pa. Super 199, 222, 511 A.2d 830 (1986). Without a definite contract to the contrary, the reasonable expectations of the parties in an employment setting are that the employee will perform work for the employer for as long as they both desire. Martin at 213.

For further discussion of the contractual significance of employee handbooks see K.H. Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment- Employer Beware,* 5 J. Law and Commerce 207 (1985); Darlington v. General Electric, 350 Pa. Super. 183, 504 A.2d 306 (1986); Banas v. Matthews Corp., 348 Pa. Super. 464, 502 A.2d 637 (1985).

B. Implied Contracts

In order for the courts to find an implied in fact contract, there must be a showing that the parties did not intend the relationship to be at-will, plus additional consideration must pass from the employee to the employer such that the employee "bestows legally sufficient detriment for the benefit of the employer beyond the services for which he was hired" or when the employee undergoes substantial hardship other than services which he or she was hired to perform. Zysk v. FFE Minerals USA, Inc., 225 F. Supp. 2d 482 (E.D. Pa. 2001); Geiger v. AT&T Corp., 962 F. Supp. 637 (E.D. Pa. 1997).

Usually it is a question for the jury as to whether the additional consideration was supplied. Permenter v. Crown Cork & Seal Co., 38 F. Supp. 2d 372 (E.D. Pa. 1999), aff'd, 210 F.3d 358 (3d Cir. 2000). The courts have found evidence of additional consideration in limited instances, such as when an employee had sold his home, moved across country and turned town substantial consideration elsewhere, before they would find an implied in fact contract. See Cashdollar v. Mercy Hosp. of Pittsburgh, 406 Pa. Super. 606, 595 A.2d 70 (1991) (sufficient consideration given where employee left secure employment, uprooted his pregnant wife and two-year-old child and sold his home based on his understanding that he was going to a job where his special talents would be employed, and was fired shortly thereafter); but see Veno v. Meredith, 357 Pa. Super. 85, 515 A.2d 571, 580 (Pa. Super. 1986) (no additional consideration when employee was fired after eight years over a difference of opinion with his employer, even though employee had originally moved from Newark to Pennsylvania and had foregone other employment opportunities over the years),

C. Collective Bargaining Agreements

Employees who are members of a union have their employment rights protected under their respective collective bargaining agreements. This is not to say that these employees cannot be terminated as "at-will" employees, but their employment "contract" usually contains a "just cause" provision, which delineates the circumstances under which an employer can affect an adverse employment action.

These rights are further insured and therefore protected through grievance and arbitration procedures to remedy any unjust demotion or dismissal.

III. PUBLIC POLICY EXCEPTIONS

The courts have found in narrow circumstances that certain public policies that are of benefit to society as a whole are sufficient to protect an employee from being terminated from employment.

The at-will employment doctrine recognizes the employer's right to exercise "free reign" over its business and, if necessary, to "rid itself of a troublesome employee" without fear of a wrongful discharge lawsuit. McLaughlin, supra at 176, citing Turner v. Letterkenny Fed. Cred. Union, 351 Pa. Super. 51, 505 A.2d 259 (1985); Rossi v. Pennsylvania State University, 340 Pa. Super. 39, 489 A.2d 828 (1985). To fit within the public policy exception, the employer's conduct must "go to the heart of a citizen's rights, duties, and responsibilities or the discharge is not wrongful." Booth v. McDonnell-Douglas Truck Services, Inc., 401 Pa. Super. 234, 585 A.2d 24 (1991).

In order to recover, an employee must show a clear mandate of public policy expressed in the Constitution, legislation, administrative regulations, or judicial decision which prohibits or mandates the conduct and which led to the employee's discharge. Hunger v. Grand Central Sanitation**,** 447 Pa. Super. 575, 670 A.2d 173, appeal denied**,** 545 Pa. 664, 681 A.2d 178 (1996); Jacques v. Akzo Int'l Salt, Inc., 422 Pa. Super. 419, 619 A.2d 748 (1993); Accord Gordon v. Lancaster Osteopathic Hospital Assn., Inc., 340 Pa, Super. 253, 489 A.2d 1364 (1985). To fall within the public policy exception, the discharge must "strike at the heart of a citizen's social rights, duties and responsibilities." Smyth v. Pillsbury, 914 F. Supp. 97 (E.D. Pa. 1996)(citations omitted).

For a sampling of cases where Pennsylvania courts have recognized public policy violations see: Field v. Philadelphia Electric Co., 388 Pa. Super. 400, 565 A.2d 1170 (1989)(discharge of employee for reporting illegal activity to Nuclear Regulatory Commission where he had a statutory duty to do so); Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (wrongful discharge for refusal to consent to urinalysis and property search where the act tortiously invaded the employee's privacy); Brown v. Hammond**,** 810 F. Supp. 644 (E.D. Pa. 1993) (discharge for employee's refusal to engage in fraudulent billing practices); Hanson v. Gichner Systems Group, Inc**.** 831 F. Supp. 403 (M.D. Pa. 1993) (employee had cause of action for discharge for refusal to lie to federal investigators); Paralegal v. Lawyer**,** 783 F. Supp. 230 (E.D. Pa. 1992) (discharge of

paralegal for testifying against lawyer); Shick v. Shirey, 552 Pa. 590, 716 A.2d 1231 (1998) (discharge in retaliation for employee's filing of workers' compensation claim); Raykovitz v. K-Mart Corp., 445 Pa. Super. 378, 665 A.2d 833 (1995); Highhouse v. Area Transportation, 443 Pa. Super., 120, 660 A.2d 1374 (1995) (discharge in retaliation for filing unemployment compensation claim); Perry v. Tioga Cty., 168 Pa. Cmwlth. 126, 649 A.2d 186 (1994) (cause of action for wrongful discharge will lie if the employee has been retaliated against for conduct actually required by law or refusing to participate in conduct actually prohibited by law); Kroen v. Bedway Security Agency, Inc., 430 Pa. Super. 83, 633 A.2d 628 (1993) (employee fired for refusal to take lie detector tests which are prohibited by statute); Field v. Philadelphia Elec. Co., 388 Pa. Super. 400, 565 A.2d 1170, 1179 (1989) (safety inspector was terminated for reporting dangers at nuclear reactor as required by statute); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (employee fired for serving statutorily required jury duty).

IV. STATUTORY PROHIBITIONS

In certain circumstances state and federal law prevent an employee from being terminated for illegal purposes. With respect to the discrimination statutes, the burden falls to the employee to make out the prima facie case of discrimination, which the employer may rebut with legitimate business reasons for the discharge. The burden then shifts to the employee to show that the employer's proffered reasons were pretextual in nature.

A. Title VII, 42 U.S.C. 2000e, et seq., prohibits discrimination in terms of employment for reasons of race, sex, religion, and national origin, or in retaliation for making a claim of unlawful discrimination.

Note that the Supreme Court recently expanded the scope of retaliation claims under Burlington Northern Railroad v. White, 2006 US LEXIS 4895 (June 22, 2006) to include actions that have a "materially adverse" impact on a reasonable employee. This is the most fertile area of discrimination claims.

B. Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., prohibits terminating or taking adverse employment actions on the basis of age.

Note: It is not a violation of the ADEA where age is a bona fide occupational reasonably necessary to the normal operation of the particular business. See Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 105 S. Ct. 2743, 86 L. Ed 2d 321 (1985).

C. Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. § 951, et seq., prohibits discrimination in terms of employment for reasons of race, sex, religion, and national origin, or in retaliation for making a claim of unlawful discrimination.

D. American With Disabilities Act, 42 U.S.C. § 12101, et seq., prohibits discrimination in the terms of employment against persons with disabilities or those perceived as having disabilities.

E. The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq., prohibits employers who contract with the federal government from discriminating in employment against qualified individuals with a disability.

F. Civil Rights Act of 1971, 42 U.S.C. § 1983, prevents public employers from depriving an employee from rights secured under the constitution while acting "under color of state law" without due process of law.

G. The Family Medical Leave Act, 29 U.S.C. § 2601 et seq., prohibits discrimination or retaliation against an individual for requesting and/or using medical leave.

H. The Uniform Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, et seq., prohibits discrimination in terms of employment for taking time off for military duties.

I. Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1001, et seq., prohibits terminating an employee to prevent him from vesting in benefits under a pension plan.

J. Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. 1514A, prevents retaliating against an employee of a publicly traded entity for reporting violations of SOX, SEC Regulations or other federal law preventing fraud against share holders. Violations can result in criminal and civil penalties.

K. Pennsylvania Whistleblower Law, 43 Pa. Cons. Stat. § 1421, et seq., prevents termination of a public employee for reporting fraud or illegal acts.

L. The Jury System Improvement Act of 1978, 29 U.S.C. § 1875, et seq., prohibits an employer from discharging, threatening to discharge, intimidating, or coercing any permanent employee for participation in jury service.

V. RIGHTS OF PUBLIC EMPLOYEES

Certain public employees such as police officers and tenured professors at state funded institutions have additional guarantees to their continued employment, by virtue of the constitution and/or statutory protections.

Tenure in public employment can exist by "legislative grace." Stumpp v. Stroudsburg Mun. Auth., 540 Pa. 391, 658 A.2d 333, 334 (Pa. 1995)(quoting Scott v. Phila. Parking Auth., 402 Pa. 151, 166 A.2d 278, 281 (Pa. 1960)). Examples of "legislative grace," whereby the Pennsylvania General Assembly has precluded the

dismissal of public employees on a summary basis include the Civil Service Act, see 71 Pa. Cons. Stat. § 741.1 et seq., and the Public School Code of 1949, see 24 Pa. Cons. Stat. § 1-101, et seq. Elmore v. Cleary, 399 F.3d 279, 283 n.4 (3d Cir 2005) (citations omitted).

Public employees may be able to assert a "property interest" in continued employment under 42 U.S.C. § 1983, which employment cannot be terminated absent due process of law. Board of Regents v. Roth, 408 U.S. 564 (1972). To have a property interest in a job . . . a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment." Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005) (citing Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Whether a person has a legitimate entitlement to -- and hence a property interest in -- his government job is a question answered by state law. Id.

A "for-cause" termination provision in an employment agreement may establish a protected property interest. Linan-Faye Constr. Co. v. Housing Auth., 49 F.3d 915, 932 (3d Cir. 1995) (holding that a contract right is recognized as property protected under the Fourteenth Amendment where the contract itself includes a provision that the state entity can terminate the contract only for cause). Note that the designation of the "property interest" does not guarantee continued employment, but requires certain due process procedures under Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), including to "a pretermination opportunity to respond, coupled with post-termination administrative (or judicial) procedures" in carrying out the termination. Id. at 1496.

VI. CONCLUSION

Claims sounding in wrongful discharge still tend to be disfavored in Pennsylvania, but sometimes it's all you got! These cases are very fact specific, especially in the application of the "public policy" exception. Much more compelling, and able to survive summary judgment motions, will be discrimination and retaliation claims, if there is sound evidence of discriminatory decision making and adverse employment consequences.