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EMPLOYMENT AT WILL: THE LEGAL PERSPECTIVE

Introduction

Employment at will, a common law doctrine, has dominated employment law in the United States for over a century. Simply defined, this rule says that, absent a contract stating otherwise, either member of the employment relationship (employer or employee) can terminate the relationship at their will at any time, for virtually any reason, including no reason at all. The rule stems from an 1884 court decision, was solidified in subsequent rulings, and today, despite many challenges, is applied in virtually all states, including Colorado. The authors have compiled information from cases, texts, periodicals, as well as knowledge from personal experiences, to first address the case development to the modern definition, then the current application and exceptions, and finally, the implications due to these exceptions.

Common Law Development to Current Definition

The employment at will doctrine stems from prior case rulings, so it is appropriate to investigate some of its case history. Together, these cases will help to establish the modern definition of employment at will.

Payne v. Western & Atlantic R.R. Co. (1884)

Payne was a merchant who sold consumer goods in Tennessee. He filed suit against the Western & Atlantic Railroad, alleging that the company had distributed a flyer saying any worker "who trades with L. Payne from this date will be discharged" (Hogler, 1989, p. 3). Payne said that this action ruined his business. The Tennessee Supreme Court ruled in favor of Western & Atlantic; in their opinion, the court stated that "All may dismiss their employees at will, … for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of a legal wrong" (p. 3). They further said, "it is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause, as the employer" (Reynolds & Reynolds, para. 3). This quickly became the standard in U. S. employment law, and became known as employment at will. The dissenting judges in this case issued a strong warning that this doctrine exerted an unfair amount of control over employees; this dissent has received more attention in modern times, and its effects will be discussed below. (Hogler, 1989)

Adair v. U. S. (1908)

The *Payne* case established employment at will as a viable doctrine in U. S. common law. Less than twenty-five years later, the doctrine would be discussed in the U. S. Supreme Court. Adair was an employer who fired an employee for joining a union, and was prosecuted for violating "a federal statute affording railroad workers the right to join and form labor unions" (Hogler, 1989, p. 4). The Supreme Court found in favor of Adair, saying, "Congress did not have the constitutional power to regulate employment" (Hogler, 1995, p. 43). This decision left the interpretation of employment at will up to individual states, and helped to solidify it as a legitimate practice.

NLRB v. Jones & Laughlin Steel Corp. (1937)

Less the thirty years after the *Adair* decision, employment at will was contended once again at the Supreme Court, providing the first recognized exception to the employment at will doctrine. In its ruling, the Court essentially said, "The company remained free to hire and fire employees as it

chose; it could not, however, discipline or discharge an employee for the purpose of interfering with the employees' protected rights" (Hogler, 1989, pp. 4-5). After 1937, then, the modified definition of employment at will became, *all may dismiss their employees at will, for good cause or for no cause, but not for an illegal cause*. This definition is still the widely accepted one for employment at will in current practice.

Current Practices and Exceptions

Today, the employment at will doctrine applies to up to 75% of U. S. employees (Fisher, et al., 1993). Judicial and statutory exceptions to employment at will have developed in order to protect employees from being wrongfully discharged (Muhl, 2001). Judicial exceptions, including public policy and implied contract, are the result of case decisions in various states, and statutory exceptions are the result of federal and state laws that employers must obey. Thus, to file a claim of wrongful discharge against an employer, a plaintiff must be able to identify a clear breach of an exception to employment at will.

Public Policy Exceptions

"The essence of the public policy exception is that an employee will have a recognized claim for wrongful discharge if such discharge is contrary to a clear mandate of public policy" (Davidovich, 2000, para. 5), such as if an employee is discharged due to serving their social capital obligation of jury duty or military service (Reynolds & Reynolds), for filing a workers' compensation claim, or for "whistleblowing," which is making public protest against an employers' "improper business activities" (Hogler, 1989, p. 6). Additionally, public policy extends to cases of a professional employee, such as an accountant or doctor, who is asked by the employer to violate the employee's professional code of ethical conduct, even if that code is not practiced by the employer (Davidovich, 2000); this exception can be clearly seen in *Mariani v. Blue Cross/Blue Shield of Colorado* (Kourlis, 1996).

The public policy exception is the "most widely accepted exception," and is currently applied in 43 of 50 states (Muhl, 2001, p. 4), including Colorado. In the states where the exception is applied, public policy is generally defined as an "explicit, well-established public policy of the State," existing in the state constitution and statutes (p. 4), but in practice, the definition is "left for courts to determine on a case-by-case basis" (Lusky, 1998, para. 2).

This exception stems from a California case, *Petermann v. Teamsters Local 396* (1959), where an employee was discharged for not lying in court, even though the employer had demanded it (Hogler, 1989). The court found in favor of the discharged employee, recognizing "that an employer's right to discharge an employee could be limited by consideration of public policy … [which covers] acts that had a 'tendency to be injurious to the public or against the public good' " (Muhl, 2001, p. 5). A more recent example of a public policy case is *Blair v. Honda of America Mfg., Inc.,* filed in Ohio in 2002. In this case, the plaintiff filed suit for wrongful discharge due to taking too much sick leave. The sick leave she took, however, was the result of being exposed to materials at work that caused allergies. The court found that the employer violated a clear mandate of public policy by making the employee choose between her health and her job. (Shaw, 2002)

Remedies for an employee who is found to have been wrongfully discharged due to a violation of public policy include lost wages, damages for emotional injury and pain and suffering, and punitive damages (Hogler, 1995).

Implied Contractual Exceptions

A more controversial exception to employment at will is when the court finds that the employer breached an implied contract with the employee. In *Continental v. Keenan* (1987), the court referred to this exception by saying, "this presumption of 'at-will' employment, however, should not be considered absolute, but rather should be reputable under certain circumstances" (Vollack, 1987, section III). Such circumstances include:

- Statements in an employee handbook indicating that discharges will be for just cause only;
- The longevity of an employee's service and implied seniority rights;
- The provision of employment benefits that are dependent upon continued service (such as stock options), and
- *Promissory estoppel,* or detrimental reliance on an employer's promise.
  (Reynolds and Reynolds).

Promissory estoppel was first cited by courts as a legitimate wrongful discharge claim in *Grouse v. Group Health Plans* (1981), in Minnesota. A modern example is the 1999 Nebraska Supreme Court case, *Goff-Hamel v. Obstetricians & Gynecologists, P. C.* After working for a medical clinic for eleven years, the plaintiff was approached by the defendants with an offer of employment. The plaintiff accepted the offer and gave notice to her current employer. One day before the agreed-upon start-date, the new clinic called the plaintiff and told her not to report to work, because they had decided not to hire her after all. The plaintiff sued for breach of an oral contract. The court found that the plaintiff "had a right to assume she would be given a good faith opportunity to perform her job duties," and that she detrimentally relied upon the promise of a job offer in order to quit her existing job. (Fahleson, 1999, line 81)

In *Collins v. Colorado Mountain College* (2002)*,* the plaintiff claimed she was wrongfully discharged despite clear language in the employer's policy manual. The plaintiff, though, was a temporary employee, and "the policy manual expressly states that CMC's grievance procedure is not available to temporary employees" (Plank, 2002, section II). So, in this instance, despite an implied contract, the employer triumphed.

The exception of implied contracts is applied in 38 of the 50 states (Muhl, 2001), including Colorado, and has perhaps the furthest reaching implications for employers because of its subjectivity, which will be discussed below.

Statutory Exceptions and Additional Exceptions

Employers must obey U. S. statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), in addition to state statutes where applicable. For example, *EEOC v. Waffle House* (2002) was filed by a government administration on behalf of the employee, under the ADA (Stevens, 2002). In cases such as this, the employers are found guilty of violating statutes, meaning that employment at will is not a viable defense.

Some advocate dismantling employment at will completely, rather than just making exceptions. In 1987, Montana created the "first statute altering the common law rule of employment at will" (Hogler, 1989, p. 9), the Montana Wrongful Discharge Act. "The law prohibits all Montana employers from discharging employees without good cause" (*Legal guide to human resources,* para. 2). Moreover, the Uniform Law Commissioners (ULC) drafted the Model Employment Termination Act (META). META says that "employees cannot be terminated without good cause" (Safran, 2002, para. 3), and provides a framework for proper termination procedures, as

well as limits on damages that an employee may collect. META is not a statute, but is a suggested model compromise for states considering such legislation; forty states are currently looking at doing so. (2002)

Additionally, certain groups have contractual protections and do not fall under employment at will. This includes union members and tenured professors and teachers (Fisher, et al., 1993). There are more exceptions to employment at will other than those discussed above, and certainly additional exceptions will continue to be defined through case law. Opponents of employment at will contend that these exceptions help to balance a law that is, in their view, clearly sided towards the employer, as noted originally in the dissenting opinion of the 1884 *Payne* case.

Managerial Implications and Recommendations

Lawsuits related to wrongful discharge are not rare, especially in the current economic climate. "During periods of increased downsizing and layoffs, employee litigation is often times a product of desperation… that may lead otherwise loyal workers to take their employers to court…." (PR Newswire, 2002, para. 2). In light of this reality, there are many managerial implications, and subsequent recommendations, developed by the authors of this white paper.

1. Know the law. Employers must understand employment at will, and its exceptions, especially as the doctrine is applied in their state. This accountability must not be given solely to the human resources department, but is one that all in the company, especially those who hold managerial positions, must strive to understand and be able to articulate.

2. Keep a paper trail. In the case that a discharged employee brings suit against an employer, the employer must be able to defend themselves against the claim by showing documented evidence of poor performance and/or unacceptable behavior on the part of the employee. Paper trails should also be kept to provide clear evidence that there were no illegal actions or public policy violations.

3. Select wording in employee handbook carefully. Retain an employment law expert to draft appropriate language in an employee handbook, regarding the application of employment at will and any formal termination procedures, that all employees read and sign. Include an explanation of employment at will in all new employee orientations.

4. Explain the policy when making an offer. Recruiters and hiring managers should explain employment at will at the time of the offer, and include a statement in the offer letter. Additionally, the offer should be referred to as "contingent," so that if rescission is necessary, there is no cause for promissory estoppel. Suggested language for offer letters includes:

"Nothing herein or in any of our discussions may be construed as a contract or guarantee of employment for a definite period of time. The employment relationship will be at-will." (Offer letter issued by Level 3 Communications, 2000)

"Just as you may terminate your employment at any time, with or without cause, [company name] reserves the same rights, that is, it may also terminate you at any time with or without cause…. Change in the economy, markets and technology is inevitable. For this reason and others, [company name] cannot contract or even imply that your employment will continue for any particular period of time…. Nothing contained in this letter, or other communications, creates or implies an employment contract for any specific period of time." (Offer letter issued by U S WEST Communications, 1999)

Following such recommendations will help to ensure that wrongful discharge lawsuits are rare.

Analysis and Conclusion

Is employment at will, a doctrine first relied upon in the nineteenth century, still a legitimate employment practice today? In *Sabine Pilot Service, Inc. v. Hauck* (1985), Justice Kilgarlin issued his declaration against employment at will: "Absolute employment at will is a relic of early industrial times, conjuring up visions of sweatshops described by Charles Dickens…. The doctrine belongs in a museum, not in our law" (Reynolds and Reynolds, para. 15). Such an opinion seems to rely upon the antiquated view that workers are victims of a relentless corporate empire that seeks to belittle and control its employees.

Out of all lawsuits filed in 2001 regarding employment issues, over 70 percent were found in favor of the plaintiff (the employee or former employee), and the average amount of damages awarded to the plaintiff was $200,000 (PR Newswire, 2002). Additionally, there are strict wrongful discharge statutes in Europe, yet the annual dismissal rate is four percent, the same as in the U.S. Higher turnover rates do exist in the U. S., but due primarily to employees quitting voluntarily, as is their right according to employment at will. (Reynolds and Reynolds) Both of these illustrations show that employees still retain a great degree of power in the employment relationship, and that the benefits of employment at will do not rest solely with employers.

Proponents of employment at will argue that this doctrine is essential to respecting our "personal freedoms" to negotiate. People who are "competent enough to marry, vote, and pray," are also competent enough to enter into employment relationships with an understanding of their expectations and rights. Furthermore, employment at will serves an important economic purpose: "If an employee can be fired at any time and for any reason, that employee has every incentive to be productive. Productivity creates job security. And if the employee can quit anytime, the firm has every reason to be responsive to the employee's concerns." There is a "large negative impact on employment growth in states with the most exceptions to the employment-at-will doctrine," meaning that the freer both employers and employees are in their obligations to one another, the more the U. S. economy will benefit. (Reynolds and Reynolds, para. 12, 28, 41)

Perhaps the most effective solution to minimize the risks associated with employment at will, for both employees and employers, is to create a mutually beneficial environment where voluntary resignations and discharges are rare. For employees, this means accepting responsibility to weigh employment decisions carefully, both the decision to accept employment, and thus ensure a proper "fit," and the possible decision to eventually leave. Employees also have an ethical obligation to be productive and help contribute to the success of the company that has entrusted them. On the other hand, employers should foster social capital-intensive environments where employees feel valued and have opportunities for career development. Because the cost of recruiting senior managers equals twenty to twenty-five percent of their annual salary (DeRuyter, 2002), it is more cost effective for employers to spend more up-front, recruiting and retaining talented people, than to spend money back-filling employees who have quit, or to risk wrongful discharge lawsuits. Such "values-based management," according to Carl Anderson (1997), ensures higher morale and "improves … institutional structure and performance" (p. 38).

Employment at will is a fundamental common law in the U. S. that has withstood the test of time, now in its third century of application and interpretation. When applied rationally, consistently, and appropriately, its implications have, and will continue to, guarantee an environment that benefits both sides of the employment relationship.

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