

## AT WILL EMPLOYMENT

By Judith A. Stoll, Esq. \*

As a general rule, when an employee is hired without a contract setting a definite duration of employment, the employment is “at will.” Employment at-will means that the employee may be discharged from employment at any time, for any reason or no reason, as long as the discharge is not for an illegal reason.<sup>1</sup>

New York courts have long recognized that employees who have no contractual promise of continued employment under specific circumstances or for a specific period of time may be discharged - at any time - without cause. An employee who is hired “at will” has no legal claim for wrongful or abusive discharge, no matter how unfair or cold-hearted her discharge may seem.

However, even when an employer believes it has hired an employee “at will”, the employer may have inadvertently made promises that curtail its ability to discharge the employee. For example, New York courts have held that an employee is not truly “at will” where the following statements were made to the employee, either orally or in an application for employment or employee handbook:

- employees will only be discharged for “cause”;
- employees will be discharged only after specific progressive discipline and an opportunity to correct performance or conduct deficiencies;
- employees who are discharged have an opportunity for an internal review and appeal of discharge decisions.

Even a statement that employees are subject to a specified “probationary period” can be interpreted as created a contractual promise to continued employment once the employee successfully completes his or her probation. However, vague and ambiguous oral statements

---

<sup>1</sup> The “at-will” doctrine is a creature of state common law. This article will discuss the doctrine as it applies in New York, but since the application of the doctrine varies somewhat from state to state, local counsel should be consulted regarding the application of the doctrine in other states.

such as “Your job is secure” or “As long as you do a good job, you have a job for life” are not sufficient to overcome an employee’s “at will” status.

To insure that employees’ at-will status is preserved, employers should always have an affirmative statement in their employment applications and handbooks providing as follows: “This [application][handbook] is not a contract of employment. Your employment with the Company is ‘at will,’ That means that either you or the Company may terminate the employment relationship at any time, for any reason.” If your company has a trial period for new employees, avoid using the term “probation.” Instead, provide for an “Introductory Period” during which the employee and the Company get to know each other. Make sure you state that even after the successful completion of the Introductory Period, employment with the Company is still “at will.” Similarly, if there is a discussion in your manual of employee discipline, be sure to add that progressive discipline will be followed as a general rule, but that the Company reserves the right to terminate the employment relationship at will at any time and for any reason. Finally, be sure that management employees do not promise that applicants that the company does not discharge employees without cause and/or without progressive discipline.

Assuming you are careful about preserving the “at will” status of your employees, it is crucial to remember that even “at will” employees cannot be terminated in violation of law. Federal and New York State statutes enumerate a long list of illegal reasons for discharging employees. Under federal law, employees cannot be terminated because of race, color, religion, national origin or gender (Title VII of the Civil Rights Act of 1964), or because of age (Age Discrimination in Employment Act) or disability (Americans with Disabilities Act. New York State and, where applicable, New York City law, also prohibit termination on the basis of race, color, religion, national origin, gender, age and disability, and also on the basis of sexual orientation, marital status, veteran’s status, citizenship and genetic predisposition. Employers are also prohibited from terminating employees of public companies because they have disclosed conduct which constituted a fraud against shareholders (the federal Sarbanes-Oxley Act), because they have disclosed an imminent threat to public health and safety (New York’s so-called “Whistleblowers Statute”), because of their engagement in a lawful outside activity (New

York's so-called "Smoker's Protection Act"), because they have filed a claim for Workers Compensation or disability (Workers Compensation Law, Section 120) or to prevent them from vesting in an ERISA-covered plan (ERISA). All of the statutes prohibiting discriminatory discharge also prohibit discharging an employee in retaliation for his/her complaints that his/her employee has engaged in unlawful discrimination.

An employee who claims he/she has been discharged in violation of one of the above statutes has the ultimate burden of proving that the employer's motivation for the discharge was unlawful. However, once the employee makes a claim that his/her termination was in violation of law, the employer has the burden of coming forward with a legitimate, nondiscriminatory explanation for the discharge. If a jury finds the employer's explanation for the discharge is false or lacking in credibility, it has the liberty to - and frequently does - infer that the real reason is discriminatory.

Therefore, even though an employees may be "at will" and can be discharged without cause, the employer should never rely on the "at will" status as an explanation for an employee's termination. Every employment discharge should have a clearly articulable reason that is both legitimate and truthful, whether it is based on the employee's poor performance or misconduct or the employer's business needs to reduce or reorganize its staff.