Employment-At-Will Won't Help:
How To Protect Yourself When You Believe That Your Job Is In Jeopardy

By Parisis G. Filippatos ©

While the economy seems to be bettering and the job market tightening,[1] no employee is ever secure in her or his job, especially in strong "employment-at-will" jurisdictions such as New York, New Jersey, Connecticut and Pennsylvania. "The employment-at-will doctrine avows that, when an employee does not have a written employment contract and the term of employment is of indefinite duration, the employer can terminate the employee for good cause, bad cause, or no cause at all."[2] This means that unless you have an actual or implied employment contract, which typically has to be in writing, you can be fired from your job for any reason or for no reason. This is, indeed, a precarious position. Thus, in an employment-at-will jurisdiction, the only protection you have under the law is from being fired for an unlawful reason – i.e., a reason prohibited by statute.

Before we focus on what this protection means, let's address certain exceptions to the employment-at-will doctrine:

(1) Employment under contract – if you have a written employment agreement that states the terms and conditions of your employment, including time, place, duration and rate of pay, then you are entitled to have that contract honored and can sue your employer for "breach of contract" if you are fired in a manner that violates your agreement. Note that typically, employment contracts have a "termination for cause" provision that states you can only be fired for good cause – not for any reason or no reason as the employment-at-will doctrine allows.

(2) Unionized employment – if you are a member of organized labor and belong to a labor union that has a collective bargaining agreement ("CBA") with your employer, you cannot be fired without resort to a grievance process that allows you to challenge your termination and the reasons behind it.

(3) Public employment – if you work in the public sector you are likely protected by a CBA or civil service laws (either federal, state or local) that limit your employer's ability to terminate your employment without just cause and due process.

(4) Common Law exceptions to the employment-at-will doctrine – courts in various jurisdictions have recognized three basic exceptions to the employment-at-will doctrine: (a) termination for a reason that violates a public policy; (b) terminations after an implied contract for employment has been established through an employer's representation of continued employment to an employee, in the form of either oral assurances to the employee, or reasonable expectations created in the employee by handbooks, policies or other written statements issued by the employer; or (c) an implied covenant of good faith and fair dealing read into the employment relationship, meaning that the

[1] Reuters, Lucia Mutikani, July 10, 2018: *U.S. Job Quits Rate Hits 17-Year High; Labor Market Tightening*, https://www.reuters.com/article/us-usa-economy/u-s-job-quits-rate-hits-17-year-high-labor-market-tightening-idUSKBN1K02BA

[2] Charles J. Muhl, *Employment at Will*, Monthly Labor Review, January 2001, at 3.

termination must be for good cause and cannot be made in bad faith or with intentional malice. While New Jersey, Connecticut and Pennsylvania recognize some public policy exception to the employment-at-will doctrine (New York does not) -- and New York, New Jersey and Connecticut will enforce an implied employment contract under certain circumstances (Pennsylvania will not) – none of these four jurisdictions will read an implied covenant of good faith and fair dealing into the at-will employment relationship.[3]

In short, there is no such thing as "wrongful termination" in an employment-at-will jurisdiction. If you work in New York, New Jersey, Connecticut or Pennsylvania and you're ***not*** under some kind of contract – public or private, union or not, actual or implied – then you can be fired for any reason, or for no reason, as long as you are not fired for a reason prohibited by statute. So, what can you do to protect yourself as an at-will employee?

Simply put, (a) be aware of your workplace environment; (b) know your statutory rights; and (c) document your concerns:

First, make sure that you are, indeed, an at-will employee who is not governed by some sort of contractual or quasicontractual relationship.

Second, determine whether you belong to any "protected category" that the law prohibits as a reason for termination. These protected categories generally pertain to some immutable characteristic that you possess, which the law disallows as a reason for an "adverse employment action" – i.e., some detrimental action taken against you by your employer. Taking New York as an example, you are protected through a combination of federal, state and local laws from being treated badly on the job because of your age, criminal conviction, disability, gender, gender identity, ethnicity, leave status, national origin, pregnancy race, sex, or sexual orientation.

Third, examine if and how you are being disadvantaged in your workplace and whether you are being treated differently in a negative way – i.e., being discriminated against – because of your membership in one or more of these protected categories.

Fourth, if you believe that you are the victim of discrimination, immediately raise your concerns in writing with the Human Resources department of your employer as soon as possible, and expressly state that you believe you are being discriminated against for specific reasons – e.g., I believe I am the victim of race discrimination because I am African American and was disciplined for being late to work by my Caucasian supervisor while several of my similarly situated Caucasian colleagues were not. The reason this fourth element is so important is because it can become your ticket out of employment-at-will jeopardy.

Fifth, cloak yourself in the anti-retaliation provisions of the law. All of the anti-discrimination laws mentioned above that protect you against discrimination based on

[3] *Id.*at 4, Exh. 1.

some immutable characteristic also protect you from relation by your employer because you complained about such discrimination in good faith. This means is that if you have a reasonable belief that you are being singled out and treated badly at work because of your age, disability, gender, race, etc., and you complain about it in writing to your Human Resources department, your job will likely be protected for the next three to six months. This is because the law presumes any adverse employment action – such as firing – taken by an employer against an employee shortly after he or she complained of discrimination is retaliatory even if the underlying complaint of discrimination is ultimately proven to be unfounded. Put another way, if there is a "temporal nexus" between the "protected activity" – i.e., complaining in good faith about discrimination – and the adverse employment, then retaliation is presumed under the law and you can sue your employer. Because your employer knows this, once you register a good faith complaint of discrimination, you are unlikely to be fired while an investigation is conducted and until a reasonable period of time has lapsed – i.e., anywhere from three to six months. Two obvious exceptions to this general rule are (1) your complaint of discrimination is frivolous or falsified or (2) after you complain of discrimination, you commit an offense on the job, which can form a reasonable basis for your termination.

The best course of action for an employee at risk of being fired is to become keenly aware of her or his workplace environment, educated about the statutory protections involved, and vigilant in appropriately documenting any concerns of discrimination or retaliation. Given these complex and arduous tasks, and the power imbalance inherent in the employment relationship, the best thing to do if you believe your job is in jeopardy is to contact an experienced employment lawyer who can help you to navigate optimally through the minefield of employment-at-will.