ACCO NEW OFFICER TRAINING

ASK BEFORE YOU FIRE

At-Will Employment and its Exceptions

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Discrimination Claims

Race	Sex	National Origin	Religion	Color	Title VII Retaliation	Age	Disability
33.9 %	30.4 %	9.8%	4.1%	3.8%	48.8%	21.8%	31.9%

U.S. Equal Employment Opportunity Commission Website

Numbers do not add up to 100 because some charges allege multiple bases.

Employment considerations

1. Is the employee a whistle-blower?
2. Has the employee been injured on the job or filed a workers' compensation claim?
3. Is the employee a minority, a woman, pregnant, in the military, serving on a jury, or of a certain ethnic background, religion, or sexual preference?
4. Is the employee over age 40?
5. Is the employee disabled in any way?
6. Has the employee exercised rights under the FMLA, FLSA, OSHA, Clean Air Act?
7. Has the employee filed a discrimination or harassment claim?
8. Is the employee exercising rights protected by the First Amendment?
9. Does the employee have any possible discrimination claim?
10. AM I FIRING THE EMPLOYEE FOR ANY OF THESE PROTECTED REASONS?

At-Will Employment

At-will employees are hired for an indefinite duration. The general rule is that they are terminable at will, without cause, by either party, without incurring liability for breach of contract.

Traditionally, they may be discharged for good cause, for no cause, or even for a morally wrong cause.

This doctrine has been greatly weakened over the years by federal and state statutes.

Statutory Employees

Under Oklahoma law, elected County officials have the authority to appoint or commission deputies to assist them in carrying out their duties. Sheriff's deputies are a classic example, in that Sheriff's Deputies are appointed and commissioned by a Sheriff.

One example of a statutory employee stems from Title 19, Okla. Stat. 547, which states that "The Sheriff shall be responsible for the official acts of the undersheriff and deputy sheriffs, and may revoke such appointments at the pleasure of the sheriff, provided, however for counties with a population of 500,000 or more persons, according to the latest decennial census, with the exception of chief deputies and undersheriffs, all deputy sheriffs and detention officers shall serve a five year probationary period during which the deputy sheriff or detention officer shall be considered an at-will employee. After the five-year probationary period, such deputy sheriff or detention officer shall not be discharged except for good cause."

Though statutory employees are not the same as at-will, for termination purposes, they are similar.

Statutory employees are still subject to most of the federal and state exceptions to the at-will doctrine.

Contract Employees

An employee that has been promised a definite duration of employment, meaning the employee generally can only be terminated for “just cause.”

Prohibited Basis for Discharge

Race, Color, National Origin

Sex, Gender, Genetic Makeup

Religion, Creed

Age, Marital Status, Pregnancy, Disability, Smoking

Union Activity, Military Status, Jury Service, Whistleblower Activity

Exercising rights under the ADA, Bankruptcy Act, Clean Air Act, Consumer Credit Protection Act, FMLA, FLSA, First Amendment, OSHA, Title VII, and Workers' Compensation Act

Sexual orientation?

State Law Exemption- Public Policy

Termination in violation of public policy is an exemption to the at-will employment doctrine.

Public policy is violated when an employee is terminated for refusing to participate in illegal activity, performing an important public obligation, exercising a legal right or interest, exposing some wrongdoing by an employer, performing an act that public policy would encourage, or for refusing to do something that public policy would condemn.

An employee must show that he/she falls within a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory, or decisional law.

State Law Exemption-Whistleblowing

Oklahoma law protects both internal and external whistleblowers who establish a sufficient public policy violation from retaliatory discharge by their employers.

The whistleblowing must be something more than mere differences of opinion or dissatisfaction with management. It must be something more, such as fraudulent activity or criminal misuse of funds.

State Law Exemption- Workers' Compensation

An employee may not be terminated for his/her exercise of rights under the Workers' Compensation Act.

To succeed on this claim, a plaintiff must establish: 1) employment; 2) a job-related injury; 3) medical treatment so that the employer is put on notice or a good faith start of workers' compensation proceedings; and 4) consequent termination.

There must be evidence that the termination was significantly motivated by retaliation for the exercise of the employee's workers' compensation rights.

State Law Exemption- Oklahoma Anti-Discrimination Act

Prohibits discrimination in employment on the basis of race, color, national original, creed, age, religion, or genetic makeup.

Damages are limited to equitable relief, including reinstatement, back pay, and liquidated damages limited to a doubling of back pay.

Punitive damages and emotional distress damages are not allowed.

State Law Exemption- Oklahoma Smoker Protection Act

Prevents employers from discharging or disadvantaging employees for being a nonsmoker, or for smoking during nonworking hours.

Also prevents employers from requiring as a condition of employment that employees abstain from smoking during nonworking hours.

Tortious Interference

1. Applies to individuals, rather than the County generally
2. Can be for an Existing Business relationship or prospective economic advantage
3. Applies when an individual, even a supervisor, is acting intentionally, in bad faith, maliciously.
4. Requires intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship has been disrupted.
5. The interference must be the purpose of the tortfeasor's act, and their motive must include a desire to interfere and disrupt the business relationship

Federal Statutes Exceptions

There are many federal statutes which also provide exceptions to at-will employment, including:

- Americans With Disabilities Act
- Family and Medical Leave Act
- Age Discrimination in Employment Act
- Equal Pay Act
- Fair Labor Standards Act
- Occupational Safety and Health Act
- Judiciary and Judicial Procedure Act
- Clean Air Act
- Consumer Credit Protection Act
- Uniform Services Employment and Re-employment Rights Act
- Title VII
- The Bankruptcy Act

Enforcement Agencies-EEOC

The EEOC has the authority to investigate employment allegations under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

A charging party must file their charge of discrimination within 180 days with the EEOC, or 300 days if the charge was initially filed with the Oklahoma Attorney General's Office of Civil Rights Enforcement.

180 days after the Charge was filed, the charging party may request a Right to Sue Letter. The EEOC may also grant a Right to Sue Letter on its own after performing an investigation.

After receiving a Right to Sue Letter, the charging party has 90 days to file a lawsuit, or may be barred forever from bringing those claims.

EEOC (continued)

The time period for filing a Charge is triggered by notice of the allegedly discriminatory act.

The time period for filing a Charge is subject to waiver, estoppel, and equitable tolling.

The failure to file a Charge may result in dismissal of a federal complaint for failure to exhaust administrative remedies.

The Oklahoma Attorney General's Office of Civil Rights Enforcement is a state agency similar to the EEOC. It investigates allegations of employment discrimination under the same theories as the EEOC.

Americans with Disabilities Act (ADA)

Enforced by the EEOC. Covers employers with 15 or more employees.

Provides liability for discrimination in employment, as well as, for failure to take affirmative steps to accommodate.

Damages include compensatory damages, lost wages and benefits, future wages and benefits, punitive damages (except these are not recoverable against a governmental employer), and attorney fees and costs.

ADA (continued)

A plaintiff must prove that he/she is a *qualified individual with a disability*.

A "qualified individual with a disability" is an individual with a *disability* who, with or without reasonable accommodation, can perform the essential functions of the employment position at issue.

A "disability" includes having a physical or mental impairment, having a record of a physical or mental impairment, or being regarded by your employer as having a physical or mental impairment, that *substantially limits* one or more major life activity.

"Substantially limits" means the inability to perform *major life activities* that an average person can perform, or significant restrictions as to condition, manner, or duration under which he/she can perform a particular major life activity.

ADA (continued)

"Major life activities" include caring for oneself, walking, seeing, hearing, speaking, breathing, learning, reproducing, working, or performing manual tasks that are central to one's daily life.

"Essential functions" means the basic, fundamental duties of the job, not including marginal functions of the position.

Employers are required to reasonably accommodate qualified individuals with a disability to enable them to perform the job, unless the accommodation imposes an undue hardship on the employer.

Reasonable accommodation is any effective modification or adjustment that makes it possible for the employee with a disability to enjoy the same benefits and privileges of employment that are available to any other employees.

ADA (continued)

A reasonable accommodation could include making facilities readily accessible, job restructuring, modified work schedules, reassignment to a vacant position, modification of equipment, modification of exams, training materials, or policies.

Creation of a new position or indefinite leave are not reasonable accommodations.

If the employee with a disability poses a direct threat to the health and safety of himself or others in the workplace, then there is no liability for employers under the ADA.

Age Discrimination in Employment Act (ADEA)

Enforced by the EEOC. Covers employers with 20 or more employees.

Prohibits discrimination against employees or applicants that are age 40 or older, with an exemption for executives and high-policy making employees.

The ADEA is violated if the age of the employee actually motivated the employer's decision and had a determinative influence on the outcome.

ADEA (continued)

There is also liability for age-based harassment of protected persons by supervisors or coworkers.

Damages are the same as under the ADA, except that punitive damages are not available. Instead, liquidated damages of double actual damages are available if the discrimination was “willful.”

Family Medical Leave Act (FMLA)

Not covered by the EEOC. Covers employers with 50 or more employees.

Claims *can be* investigated by the Department of Labor.

Under the FMLA, eligible employees must have worked for a covered employer for a total of 12 months, with at least 1250 hours over the previous 12 months.

Eligible reasons for leave include birth and care of a newborn of the employee, caring for immediate family member (spouse, child, or parent) with a serious health condition, or to take medical leave when the employee is unable to work because of a serious health condition.

FMLA (continued)

Provides eligible employees with up to 12 weeks of leave, and makes it unlawful for employer to interfere with, restrain, or deny the exercise of any right provided by the FMLA. Also unlawful to discharge or discriminate against any individual for opposing any practice or involvement in any proceeding related to the FMLA.

Upon return, an employee must be restored to his/her original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

Damages include lost wages and benefits, monetary loss to the employee, liquidated damages, and equitable relief, including reinstatement or promotion.

Uniform Services Employment and Reemployment Rights Act (USERRA)

Covered by the Department of Labor, not the EEOC.

Applies to all employers regardless of size.

Requires employers to release an employee from his/her work duties to fulfill a military obligation, and then re-employ the employee upon return from service.

Also requires employees to be “escalated” into higher positions that they would have attained with “reasonable certainty,” just as if they had been employed the whole time.

USERRA (continued)

To establish a violation of USERRA, a plaintiff must only show that the employer took an adverse action against the employee, based in part on the employee's military service.

Damages include lost wages and benefits, liquidated damages in an amount double the lost wages and benefits, injunctive relief, temporary restraining orders, contempt orders, and attorney fees and costs.

Title VII

The broadest of all federal employment statutes. Applies to all employers with 15 or more employees. Enforced by the EEOC.

Prohibits discrimination in employment with regard to race, color, sex (gender, sexual orientation), national origin, pregnancy, or religion.

An employment practice is illegal under Title VII if race, color, religion, sex, national origin, or pregnancy are a motivating factor, even if other factors also motivated the practice or decision.

Title VII (continued)

Employment practices under Title VII include termination, failure to hire, or otherwise discriminating against an individual.

Protects employees or applicants from retaliation. Retaliation, based on the filing of a complaint or on opposing a practice based on a Title VII ground, is prohibited by Title VII.

Title VII (continued)

In very narrowly defined circumstances, an employer can discriminate based on a protected trait where the trait is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business. An employer must prove: 1) a direct relationship between the protected trait and the ability to perform the job; 2) that the trait relates to the essence or central mission of the business; and 3) that there is no less restrictive or reasonable alternative.

Damages: Plaintiffs are entitled to be made whole, including back pay and benefits, front pay and benefits, injunctive relief, compensatory damages, mental pain and suffering, punitive damages, attorney fees, and sometimes reinstatement or promotion. There is a cap, however, for compensatory and punitive damages, which increases based on the number of employees working for an employer.

Title VII Hostile Work Environment

Though not explicitly mentioned in the Act, Title VII also protects employees from hostile work environments.

A hostile work environment is one that is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

Title VII Sexual Harassment

Sexual harassment is a form of sex discrimination prohibited by Title VII.

Sexual harassment can include groping, fondling, unwelcome sexual advances, requests for sexual favors, verbal abuse of a sexual nature, sexually suggestive, degrading or vulgar remarks or gestures, demeaning or derogatory remarks, or the display of sexual pictures, objects or other materials in the workplace when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Isolated teasing, isolated offhand comments, ordinary horseplay, infrequent sexual flirtation, sporadic or occasional use of abusive language, and isolated non-serious incidents are not sufficiently severe or pervasive to alter the employee's terms or conditions of employment to be actionable under Title VII.

Title VII Sexual Harassment Quid Pro Quo

One form of Sexual Harassment is Quid Pro Quo harassment, whereby a supervisor obtains sexual consideration from an employee by withholding or threatening to withhold a tangible benefit, such as continuing employment, a promotion, or an increase in wages from the employee.

The employee must prove that the harassment was sufficiently severe or pervasive to constitute a change in the terms and conditions of employment, if the harassment does not end in a tangible job effect.

Where there is no tangible effect on the employee's conditions of employment, the employer may still be liable, unless it can show that it had a proper anti-harassment policy and grievance procedure in place, which the employee failed to use.

Title VII Sexual Harassment
Quid Pro Quo (continued)

To establish Quid Pro Quo harassment, a plaintiff must show:

1. He/she belongs to a protected group;

2. He/she was subjected to unwelcome sexual harassment, based upon sex; and

3. The employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.

Title VII Sexual Harassment – Hostile or Offensive Work Environment

To establish this type of Title VII sexual harassment, a plaintiff must show: 1) he/she belongs to a protected group; 2) he/she was subjected to unwelcome sexual harassment that was sufficiently severe or pervasive as to alter the terms and conditions of employment; 3) the harassment was based on sex; and 4) the harassment affected a term, condition, or privilege of employment.

When deciding if harassment is sufficiently severe or pervasive, courts look to the frequency of the conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating, or a mere offensive utterance, and whether the conduct interfered with the employee's work performance.

The environment must not only be subjectively perceived as hostile and abusive, but also one that a reasonable person would likewise find hostile and abusive.

Employer Liability for Sexual Harassment

When the harassment was perpetrated by a co-employee, not a supervisor, the employee also must prove that the employer knew, or should have known, of the harassment and failed to take prompt and appropriate action to stop the behavior.

Courts will consider whether an employer has instituted appropriate policies to address sexual harassment, with an effective complaint or grievance procedure, as well as, whether the aggrieved employee utilized the procedure.

Sexual Harassment Policies

Should include:

- Specific prohibition of sexual harassment
- Discussion of results of sexual harassment
- Prohibition against retaliation
- Remedies available
- Investigative procedure to address whether sexual harassment has occurred, and what to do if an allegation is unfounded, and how to address the final determination.

Equal Pay Act (EPA)

The Equal Pay Act prohibits employers from discriminating on the basis of sex by paying wages to employees at a rate less than the rate paid to employees of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions.

To establish a case, an employee must show: 1) Different wages are paid to employees of the opposite sex; 2) The employees perform substantially equal work on jobs requiring equal skill, effort, and responsibility; and 3) The jobs are performed under similar working conditions.

The four affirmative defenses which allow unequal pay for equal work are when the wages are set pursuant to a: 1) seniority system; 2) merit system; 3) system which measures earnings by quantity or quality of production; or 4) any other factor other than sex.

Fair Labor Standards Act (FLSA)

The FLSA, enforced through the DOL, establishes a national minimum wage, guarantees time and a half overtime in non-exempt positions, and prohibits oppressive child labor.

Section 215(a) of the FLSA provides that it is unlawful to discharge or in any other manner discriminate against any employee because such employee filed a complaint or instituted any proceeding under or related to the FLSA.

To establish a claim of FLSA retaliation, a plaintiff must show: (1) he or she engaged in activity protected by the FLSA; (2) he or she suffered adverse action by the employer subsequent to or contemporaneous with such employee activity; and (3) there is a causal connection between the employee's activity and the adverse action.

Federal Consumer Credit Protection Act and Oklahoma Consumer Credit Code

Federal law prevents employers from discharging any employee because their earnings have been subject to garnishment for any indebtedness. There is a split of authority as to whether the federal statute provides a private cause of action.

A similar state statute also provides a private cause of action.

Bankruptcy Act

Prevents government employers from denying employment, discriminating in employment, or terminating an individual on the basis of a past bankruptcy or dischargeable debt.

Provides a private cause of action.

42 U.S.C. 1983

This federal statute allows Plaintiffs to assert claims alleging discrimination in violation of the Equal Protection Clause of the 14th Amendment, or alleging discrimination related to expressions of protected speech under the 1st Amendment.

14th Amendment

Local government employees may assert a civil cause of action alleging discrimination in violation of the equal protection clause of the 14th Amendment. This includes disparate treatment and hostile work environment on the basis of race and gender.

Such a claim is essentially the same as a Title VII claim, so an employee bringing a claim under the 14th Amendment would effectively avoid the EEOC exhaustion requirement and the compensatory damages cap.

A 14th Amendment Claim can also be brought against government officials in their individual capacities, in addition to the governmental entity

Burdens of proof for harassment and employment discrimination under the 14th Amendment are essentially the same as under Title VII.

1st Amendment

The First Amendment provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peacefully to assemble, and to petition the government for redress of grievances.

Under the 1st Amendment, government employees cannot be discharged, promoted, or hired for their political beliefs, or because they belong to a certain political party.

Many new officials like to clean house, and terminate the previous administration's employees. This is a great way to face a lawsuit for violation of the 1st Amendment's right to political association.

Potential Defendants in a 1st Amendment Case include the County, and the County official or supervisor in their individual capacity. There is no limit on compensatory damages, and punitive damages are also available against the elected official or supervisor in their individual capacity.

1st Amendment Case Examples

Jantzen v. Hawkins, 188 F.3d 1247 (10th Cir. 1999)

A candidate was terminated from the position of Deputy Sheriff upon announcing that he would run against the incumbent Sheriff, and Deputy Sheriffs and jailers were also terminated after supporting the candidate.

The 10th Circuit held that political affiliation and/or beliefs were not substantial or motivating factors in the termination of the candidate for office of County Sheriff, and the termination thus did not violate his First Amendment Political Association rights, where he testified that the only reason he was fired was because he was a candidate for Sheriff against his own boss.

To determine whether political loyalty is an appropriate requirement of a public employee's job, the Court must analyze the nature of the employee's duties and responsibilities. If political loyalty is an appropriate requirement, then termination of the employee due to his/her political beliefs or political affiliation will not violate the First Amendment.

1st Amendment Case Examples

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)

- The Supreme Court ruled that an employee's expression, namely a memo, pursuant to his official duties is not the result of speech as a citizen, and thus not protected by the First Amendment. Restricting speech that owes its very existence to the public employee's professional responsibilities does not infringe any liberties the employee might enjoy as a private citizen.

Green v. Board of County Commissioners of Canadian County, 472 F.3d 794 (10th Cir. 2007)

- The 10th Circuit ruled that even if not explicitly required as part of an employee's day-to-day job responsibilities, activities stemming from, and of the type of, activities that an employee is paid to do are also not protected by the First Amendment.

Drug Testing

In Oklahoma, under the Standards for Workplace Drug and Alcohol Testing Act, drug testing can only be performed in certain circumstances.

Applicant Testing may be performed as a condition precedent to a conditional offer of employment, provided it is required for all applications for a particular employment classification.

Reasonable Suspicion Testing is allowed if the employer has reasonable suspicion that the employee has violated a written policy of the employer.

Post Accident Testing is permissible if the employee, or another person, has sustained a work-related injury or the employer's property has been damaged.

Drug Testing (continued)

Random testing is permissible for police or peace officers, employees who have drug interdiction responsibilities, employees who are authorized to carry firearms, employees who are engaged in activities that directly affect the safety of others, and employees who work in direct contact with inmates in the custody of DOC, or who work in direct contact with juvenile delinquents in the custody of DHS.

Scheduled periodic testing is permissible if it is routinely scheduled for all members of an employment class or group, and the employee is in one of the classes enumerated in the preceding paragraph immediately above.

Post rehabilitation testing is allowed for a period of 2 years after a confirmed positive drug test or participation in a drug or alcohol dependency program under an employee benefit plan, or at the request of the employer

Drug Testing (continued)

Employers must first adopt a written detailed policy setting out the specifics of their testing program before requesting or requiring drug testing.

Employees must be given 30 days notice before the institution or change of a drug testing policy.

Disciplinary action, other than temporary suspension or temporary transfer, may not be taken based upon a positive result, unless the result has been confirmed by a second test.

Disciplinary action may be taken against an employee that refuses to undergo testing.

An employee aggrieved by a willful violation of the Standards for Workplace Drug and Alcohol Testing Act may bring a civil suit.