

THE ONE THAT GOT AWAY

Turning the workplace fish story into an employment law checklist

By Jacklyn J. Ford

By Jacklyn J. Ford,
Vorys Sater
Seymour and Pease



As a summer associate in a large firm 15 years ago, I looked forward to my first exposure to transactional law. I was an aspiring deal-maker. Both public and private-sector deals were, it seemed to me, a form of “happy law” – finish the deal and see the happy faces of those who could now go on to build their businesses, create new jobs, or provide better services. By the end of the summer, however, I was forced to face the truth. As someone who loved story-telling, I was unlikely to find true happiness in the world of business contracts. Thus began my career in employment law.

Employment lawyers have (or think they have) heard it all. From sexual harassment cases to executive meltdowns, they have heard almost every story the (sometimes naked) city has to tell. Part of the fascination of these stories lies in their familiarity, since all of us are, or have been, employees. The same is true of our clients – regardless of our area of legal practice, most of our clients either employ people or are employed themselves. Consequently, even the general practitioner is well advised to have a working understanding of the basics of employment law, and to pay particular attention when the client’s story includes any of the following core issues.

Employment at Will

In Ohio and virtually everywhere else, employment-at-will is the rule. Stated simply, employment-at-will creates a presumption that the employment relationship may be terminated by either party for any time for any reason – or for no reason at all – as long as the “true reason” is not illegal. The list of “illegal reasons” varies by jurisdiction, but typically includes terminations motivated by improper criteria, such as protected class status; various forms of retaliation; and “public policy” violations. Other more common causes of terminations – poor performance, rule-breaking, and the like – are legal, even when the fired employee doesn’t agree with the employer’s decision.

Protected Classes and Discrimination

Under Title VII of the Civil Rights Act of 1964 and parallel state laws, employers may not discriminate against employees or applicants on the basis of such criteria as race, religion, gender, national origin, disability, age (applicable to those over 40), or pregnancy. In some jurisdictions (including Columbus) sexual orientation discrimination is also prohibited by local ordinance, while other cities and states prohibit discrimination on the basis of such criteria as height, weight, or appearance.

Harassment

Many employees – and some employers – seem to believe that any sort of “harassment” is illegal. Other than criminal conduct, “harassment” is likely to be illegal only if it is either (1) so severe that it rises to the level of intentional infliction of emotional distress (“IIED”), or (2) based on a protected class. In Ohio, the threshold for an IIED claim is extremely high, limited to behavior that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 6 Ohio St.3d 369, 375 (Ohio 1983) (citing authorities). Very little in the employment relationship can meet this stringent test.

Sexual harassment and other forms of discriminatory harassment are subject to a much vaguer standard than IIED claims. In “hostile environment” cases, plaintiffs must demonstrate that they were subject to severe and pervasive behavior which was offensive to them and would be offensive to a reasonable person. In a “quid pro quo” case, the plaintiff must show that an employer conditioned a work-related benefit on sexual favors or similar activity. In both types of harassment cases, the employer’s actions and responses – whether the company ever provided preventative training, for example, and what it did once it knew or should have known of the misconduct – can have a significant impact on the ultimate liability.

The bottom line question for each employer and employee to ask is nearly always – would I be proud to explain to a judge or jury – or to my family – why I acted as I did? In a large percentage of cases, the answer to that simple question can go a long way in exposing potential strengths and weaknesses in employment-related matters.

Non-Retaliation and Whistle-Blowing

Many employment-related statutes include protections against both underlying misconduct and against retaliating against employees who assert their rights under those statutes. For example, non-discrimination statutes prohibit retaliation against those who complain in good faith of discriminatory practices. Similarly, the Sarbanes-Oxley Act added a new level of whistleblower protection for public companies by requiring the establishment of procedures for confidential reporting of certain types of finance-related issues.

Minimum Wage and Overtime

The Fair Labor Standards Act and a labyrinth of state laws require employees to be paid the minimum wage and to be paid time and one half for all hours worked over 40 in a week. Some classes of employees are “exempt” from these requirements – typically those who are paid on a salary and meet a “duties” test to ensure that they are performing administrative, professional, or other “exempt” work. New federal rules on exemptions became effective last summer, and many states – particularly California – have developed their own aggressive standards for classifying employees as non-exempt.

For the storytellers and listeners among us, the American workplace is a gift, a source of seemingly endless drama. It is also the foundation for an increasingly complex practice area with both opportunity and peril for the unfamiliar practitioner. Given the inevitability of employment-related issues embedded in nearly all areas of practice, the general practitioner is well advised to develop a working knowledge of employment law basics.



jfford@vssp.com