



# GOLDBERG SEGALLA <sup>LLP</sup>

SAYING GOODBYE:  
Ending the Employment Relationship  
Without Getting Sued  
Latha Raghavan, Esq.



## Philadelphia

1700 Market Street  
Suite 1418  
Philadelphia, PA 19103-3907  
267.519.6800  
FAX 267.519.6801

## New York

111 John Street  
Suite 800  
New York, NY 10038-3002  
646.253.5400  
FAX 646.253.5500

## Buffalo

665 Main Street  
Suite 400  
Buffalo, NY 14203-1425  
716.566.5400  
FAX 716.566.5401

## Princeton

301 Carnegie Center Drive  
Suite 101  
Princeton, NJ 08540-6227  
609.986.1300  
FAX 609.986.1301

## Hartford

Blue Back Square  
65 Memorial Road/Suite 340  
West Hartford, CT 06107-2434  
860.760.8400  
FAX 860.760.8401

## Rochester

2 State Street  
Suite 805  
Rochester, NY 14614-1342  
585.295.5400  
FAX 585.295.8300

## Syracuse

5789 Widewaters Parkway  
Syracuse, NY 13214-1855  
315.413.5400  
FAX 315.413.5401

## White Plains

170 Hamilton Avenue  
Suite 203  
White Plains, NY 10601-1717  
914.798.5400  
FAX 914.798.5401

## Long Island

200 Old Country Road  
Suite 210  
Mineola, NY 11501-4293  
516.281.9800  
FAX 516.281.9801

## Albany

8 Southwoods Boulevard  
Suite 300  
Albany, NY 12211-2364  
518.463.5400  
FAX 518.463.5420



## **SAYING GOODBYE: Ending the Employment Relationship Without Getting Sued** **Latha Raghavan, Esq., Goldberg Segalla, Albany, New York**

Saying goodbye may not be easy, but considering the immeasurable costs of retaining an employee who frustrates the economic efficiency or other vital goals of the law firm, it is sometimes necessary. In order to avoid the risks and concerns of wrongful termination lawsuits, it is wise for the employer firm to be familiar with the basis of such actions and know how best to prevent them.

Since employees of law firms are not public employees, and are generally not unionized, they, along with the majority of the working population are mostly “at will” employees.<sup>1</sup> Under the “at will” doctrine, the employer may terminate the employee without providing a reason, but nevertheless, wrongful termination lawsuits abound.

### Wrongful Termination Based on Federal Laws or Statutory Exceptions to “At Will” Employment

The most common wrongful termination claims are based on one of the federal laws or their state counterparts protecting employees by prohibiting termination based on specified reasons or actions. For example, Age Discrimination in Employment Act (ADEA)<sup>2</sup>; Title VII of the Civil Rights Act prohibiting discrimination based on race, color, religion, gender, sexual orientation or national origin<sup>3</sup>; or the Whistle-Blower Protection Act<sup>4</sup>; or the Americans With Disability Act (ADA)<sup>5</sup>; or the National Labor Relations Act (NLRA)<sup>6</sup> protecting collective bargaining and unions.

When a discriminative motive is shown, the employer is required to show that the termination is “job related for the position in question and consistent with business necessity.”<sup>7</sup>

There are additional state statutes affecting the employers’ right to terminate an employee and it is important for the employer to be aware of these statutes in the state or states that affect the firm. Some states, for example, prohibit an employer from terminating (or taking any adverse action) against an employee for engaging in off-duty legal activities (for example,

---

<sup>1</sup> Unless they work in Montana, the only state which has adopted wrongful discharge statutes which, amongst other requirements, require the employer to show just cause for terminating an employee. Mont. Code Ann. §39-2-901 et seq.

<sup>2</sup> 29 USC §621-634 (1988).

<sup>3</sup> 42 USC §2000e-2000e-17 (1988).

<sup>4</sup> Pub. L. No. 101-12, 102 Stat. 16 5 USC (1989).

<sup>5</sup> 42 USC §12101-12213 (1990).

<sup>6</sup> 29 USC §151-169 (1982).

<sup>7</sup> 42 USC §2000-e

political activity, recreational activity, consumption of alcohol or other legal products<sup>8</sup>) provided such activity does not create a material conflict of interest at work.<sup>9</sup>

Further examples of laws that affect the employers' right to terminate "at will" include The Federal Uniformed Services Employment and Reemployment Act (USERRA)<sup>10</sup> which actually releases the returning employee from "at will" status and requires the employer terminate only for just cause for a period after the return (the period depending on the length of employment).

While it is not the intent of this paper to produce an exhaustive list of the laws that limit or affect the employers' right to terminate "at will", the examples provided above should alert the law firm employer to the importance of knowing and complying with the laws that apply in its relevant jurisdictions.

#### Wrongful Termination Based on Judicially Created Exemptions to the "At Will" Status

Where the terminated employee is outside the protections of the anti-discriminatory and other statutes affecting the employment relationship, a lawsuit for wrongful termination may still arise under a claim of breach of express or implied contract; breach of implied covenant of good faith and fair dealings or under theories of tort.

The terminated employee may dispute the "at will" status and claim that there was a promise of job security. Courts have found that some personnel manuals or application forms contain promises of job security that may erase the "at will" claim of the employer. See *Seebolt v. Westmoreland Coal Co.*<sup>11</sup> (employee manual stated employee will be given "ample opportunity to correct such problem" may rebut at will status); *Weiner v. McGraw-Hill, Inc.*<sup>12</sup> (employment application contained an assurance against termination without just cause).

If there were oral representations of job security, the employer may be liable for terminating the employee without just cause. See *Foley v. Interactive Data Corp.*<sup>13</sup> (where the employer's statement "if you are loyal . . . and do a good job, your future is secure" was sufficient to create an enforceable implied promise not to terminate); *Shebar v. Sanyo Business*

---

<sup>8</sup> NY Labor Law §201-d (McKinney's Suppl).

<sup>9</sup> Colo. Rev. Stat. Ann. §24-34-402.5; N.D. Cent. Code §14-02.4-03.

<sup>10</sup> 38 USC §4311.

<sup>11</sup> 703 F.Supp. 1235 (WDVA 1989).

<sup>12</sup> 57 NY2d 458; 443 NE2d 441 (NY 1982).

<sup>13</sup> 47 Cal. 3d 654, 657, 765 P.2d 373, 384 (VA 1988).

*Systems Corp.*<sup>14</sup> (where the employee was assured he would have a job for life and relied on it); *Kestenbaum v. Pennzoil Co.*<sup>15</sup> (implied contract requiring good reason to terminate was created when employer stated that the employment would be long-term and permanent). However, in some jurisdictions the Courts determine if an oral assurance was part of the bargaining process in order to find a contract. See *Rowe v. Montgomery Ward & Co.*<sup>16</sup> (where the statement “as long as they generated sales, they had a job” was not sufficient to erase the at-will employment).

Former employees may find a limited opportunity to challenge the “at will” doctrine under the theory of breach of an implied covenant of good faith. This theory rests on a claim that every contract imposes upon the parties a duty of good faith and fair dealings. The courts have been reluctant to apply this principle broadly since the covenant of good faith and fair dealings, if broadly applied to all employment terminations would result in a whole-sale rejection of the employment “at will” doctrine. See *Murphy v. American Home Products Corp.*<sup>17</sup> (finding that no implied covenant of good faith exists in employment termination of an “at will” employee).

Where it is recognized, the breach of an implied covenant of good faith and fair dealings is applied to employment termination in order to provide the terminated employee benefits that the employee had already earned. See *Fortune v. National Cash Register Co.*<sup>18</sup> (where the employer discharged the employee and refused to pay earned commissions). Since this is a contract theory, there is no punitive damages available.

Another area of judicial erosion of the “at will” doctrine arises in tort claims recognized by the court. A discharged employee may claim intentional infliction of emotional distress. Since such a claim requires a showing that the employers’ conduct was so outrageous and extreme, as to go beyond bounds of decency and be regarded as utterly intolerable by civilized society, it is difficult to show that the typical discharge meets this standard. See *Biven Software Inc. v. Newman*<sup>19</sup> (where, although the employer’s comments may be horrifying or traumatizing, there was no outrageous or extreme conduct), but see *Nance v. MD Health Plan,*

---

<sup>14</sup> 544 A2d 377 (NJ 1988).

<sup>15</sup> 766 P2d 280 (N.M. 1988).

<sup>16</sup> 473 NW2d 268, 275 (Mich 1991).

<sup>17</sup> 448 N.E.2d 86 (NY 1983).

<sup>18</sup> 364 N.E.2d 1251 (Mass. 1977).

<sup>19</sup> 222 Ga. App. 112, 473 S.E.2d 527 (1996).

*Inc.*<sup>20</sup> (where employer’s questioning which signals to co-workers a belief that plaintiff is a homosexual can be extreme and outrageous conduct.)

A discharged employee may claim a tortious invasion of privacy that arises when an employee “snoops” to obtain information leading to the discharge. The employer may not invade areas where there is a reasonable expectation of privacy. See *Rogers v. International Business Machines, Corp.*<sup>21</sup> (where there was no invasion of privacy when employer interviewed co-workers and checked company records and did not invade plaintiff’s seclusion or private life). A discharged employee may also claim intentional interference with economic relationship or defamation often arising from the former employers’ statements of reference to a prospective employer. See *Exxon-Mobil Corp. v. Hines*<sup>22</sup>.

These examples of judicial erosion of the “at will” doctrine should again alert the employer to the many avenues available to the disgruntled terminated employee to commence suit. The question begs, in light of all this, what can an employer do to protect itself against such claims by a terminated employee? The old adage “an ounce of prevention is worth a pound of cure” applies.

#### Steps to Take to Avoid Suit by a Terminated “At Will” Employee

1. Refrain from any commitment concerning continued employment or job security.
  - Ensure all written job applications and employee manuals contain unequivocal and conspicuous language that the employment will be only “at will” and explain in writing that either party may terminate the employment relationship at any time for any reason.
  - Have each employee sign a receipt acknowledging receipt of handbook and understanding of “at will” status, and maintain these.
  - Set forth a clear and prominent disclaimer in the employee handbook that any policy statements are NOT legally binding.
  - Make no oral statement of job security and train all management that no one is to make statements of job security.

---

<sup>20</sup> 47 F.Supp.2d 276 (D.Conn. 1999).

<sup>21</sup> 500 F.Supp.867 (W.D. Pa. 1980).

<sup>22</sup> -- S.W.3d – 12008 WL 50941 (Tx. App. 2008).

2. Set forth and follow clear anti-discrimination policies.
  - Provide a grievance procedure.
  - Be aware of morale issues and harassment opportunities related to fraternization and nepotism and provide clear policies.
  - Ensure that the firm policies are applied uniformly and that there is no discriminatory enforcement of policy.
  - Expressly reserve the right to modify or disregard policies.
3. Maintain thorough documentation:
  - Document all employee absences and tardiness.
  - Keep copies of standard personnel documents and all performance evaluations.
4. Ensure that a human resource representative or another management staff is present at all personnel meetings with an employee, including at the time of termination.
5. Document an Exit Interview.
6. Do not defame the former employee when a reference is requested.
7. Strive to be fair.
  - Decent and considerate behavior from the employer throughout the course of the relationship avoids lawsuits upon termination and makes good business sense.
  - Be caring and sensitive as required
  - Show empathy and care for an injured or sick employee
  - Your behavior throughout the relationship will be recalled by the employee after termination, therefore use the opportunity to frame the employees' mind.

Saying goodbye may not be easy, but it may be done without fear of litigation as long as there is an awareness of the potential claims and steps have been taken to avoid them.