

Public Policy and Employment at Will in Colorado

By: Nathan Davidovich
Copyright (c) April 2011

As an employment lawyer I receive many inquiries from people, who have been fired from a job, wanting to know if they have any remedy. Often, they find themselves surprised by the sudden downturn of their economic fortunes. They can't believe that, after working for a company as a dedicated employee for many years, they are suddenly on the street. The purpose of this article is to briefly discuss the law, as it exists in the State of Colorado, pertaining to wrongful discharge, and one of several avenues, which provide relief in certain situations. If you feel that you have been a victim of a wrongful discharge from your employment, it is important that you know your legal rights, and the actions you must take to prevent loss of your right to a remedy. **This article is not designed to provide legal advice or render legal opinions for specific situations. The law in other states may vary from Colorado on these issues. For specific legal questions, contact the attorney of your choice. If you wish to consult with the author on any matter relating to Colorado employment issues, you may contact him at (303) 825-5529 or by email at nathandavidovich@talk-law.com.**

WHAT IS EMPLOYMENT "AT-WILL"?

It is the law in Colorado, as in most states, that, in the absence of an explicit contract to the contrary, every employment is presumed to be an "at-will" employment. What this means is that either the employer or the employee are free to terminate the employment at any time for no cause whatever and without notice. As originally applied, employment "at-will" meant that both employer and employee could terminate or change the employment relationship without thereby being subjected to legal liability for the termination. However, with the passage of time, courts have begun to recognize the need to balance the right of an employer to have unfettered discretion to hire and fire against the interest of the employee in holding on to a job. The courts began to consider the means of reaching a proper balance of interests.

With the passage of the various civil rights laws prohibiting discrimination based on race, sex, age, religion, disability and national

origin, there were some boundaries enacted to impose liability in employment cases, which, previously, might be considered as employment "at-will". Those laws generally meant that, in "at-will" employment, the employer could still fire the employer for any reason or no reason, but not for a prohibited reason. A prohibited reason would be a violation of any federal or state statutes prohibiting discrimination, or where the termination contravenes other statutory provisions, examples of which will be discussed herein.

WHAT IS THE PUBLIC POLICY EXCEPTION TO EMPLOYMENT "AT-WILL"?

Recognizing the need to protect the interests of both employer and employee, courts have created a number of exceptions to the employment "at-will" relationship that impose legal liability on the employer in a situation where discrimination did not exist. One of those exceptions is the public-policy exception to employment "at-will". A California court first recognized this exception in 1959 in a case where a business agent for a local union claimed that he was fired as a result of his refusal to testify falsely before a legislative committee. He filed a lawsuit for wrongful discharge and the California Appellate Court held that although he was an employee "at-will" and generally terminable at the will of the employer, such right to discharge an at-will employee may be limited by "considerations of public policy." The court held that "it would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute." Since that case, Colorado and the majority of states now recognize a cause of action for wrongful discharge pursuant to the public-policy exception to the "at-will" employment doctrine. The essence of the public-policy exception is that an employee will have a recognized claim for wrongful discharge if such discharge is contrary to a clear mandate of public policy.

In *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992), the Colorado Supreme Court first recognized the tort of wrongful discharge in violation of public policy, and held that in order to establish such a claim the following four elements must be shown:

[1] That the employer directed the employee to perform an illegal act

as part of the employee's work related duties;

[2] That the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen;

[3] That the employee was terminated as the result of refusing to perform the act directed by the employer; and,

[4] That the employee had a reasonable belief that the action ordered by the employer was illegal, and that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order was based such reasonable belief.

In other words, the employer's knowledge is mandated in order to give the employer the essential fair notice and fair opportunity to make an appropriate employment decision.

Since the *Lorenz* case, the Colorado courts have expanded the protection to include not only a refusal to perform the directive, but also a protest of the order, followed by termination. The Colorado have also agreed with a number of other jurisdictions have which have recognized that non-statutory sources, including professional ethical codes, such as a professional code applicable to accountants, may provide the basis for a public policy claim. Employees who are professionals have a duty to abide not only by federal and state law but also by the recognized codes of ethics of their professions. Following ethical codes are central to a professional employee's activities, and at times, there may be a conflict between the demands of an employer and the employee's professional ethics. A professional employee forced to choose between violating his or her ethical obligations or being terminated is placed in an intolerable position, and should not be put to the choice of either obeying an employer's order to violate the law or losing his or her job. There are still grey areas as to what type of activity has sufficient public interest and benefit to be broadly classed as public policy. In order to interfere with an employer's business decisions the questioned activity must concern behavior that truly impacts the public, and must be specific enough to direct the bounds of proper behavior. In order to qualify as public policy, the ethical obligations must be designed to serve the interests of the public rather than the interests of the

professional employee. Violation of the Ethics code of a private association will not generally support a public policy claim.

TYPES OF CASES THAT HAVE ALLOWED PUBLIC POLICY CLAIMS

It should be noted that, as with any other claim for wrongful discharge, these types of cases are dependent upon the particular facts of each case. The general type of cases where claims have been allowed under a public policy theory includes the following:

1. Refusal to participate in illegal activity;
2. The employee's refusal to forsake the performance of an important public duty or obligation;
3. The employee's refusal to forego the exercise of a job-related legal right or privilege, such as filing a worker's compensation claim;
4. The employee's "whistleblowing" activity or other conduct exposing the employer's wrongdoing. It should be noted that if there is a specific state or federal statute to protect a whistleblower, a claim could only be made under that statute;
5. The employee's performance of an act, that public policy would encourage, under circumstances where retaliatory discharge is supported by evidence of employer's bad faith, malice, or retaliation; and,
6. Wrongful discharge claim predicated on employee's jury duty.

YOUR RIGHTS AS A "WHISTLEBLOWER"

In addition to the discussion above, there are many federal and state statutes that protect an employee for reporting illegal conduct on the part of the employer. There are federal statutes such as the Sarbanes-Oxley Act (SOX), which protect employees reporting illegal conduct by publicly held companies or their subsidiaries or affiliates. The federal False Claims Act covers employees reporting fraudulent claims against the government. The recently enacted FDA Food Safety Modernization Act protects employees in the food industry. There are many other federal and state acts providing protection to employees. Each act has various administrative requirements and time requirements which must be met in order to allow an a claim. It is therefore critical to consult with an experienced employment attorney in a

timely manner.

AMOUNT OF RECOVERY

If you fall under an exception to the doctrine of employment "at-will", and if your facts support a finding of liability, you may recover the salary and benefits that would have been earned, but for the discharge, as well as damages for emotional trauma, and attendant physical suffering, punitive damages, if supported by the facts, and court costs. Depending on your individual circumstances, you may be entitled to additional recoveries under Federal rather than state law.

CONCLUSION

The ability to fight against a wrongful discharge involves analysis of multiple factors, specific to your case. Many of these factors have not been discussed in this article. Learn more about protecting your rights by selecting a competent lawyer to represent you.

[Nathan Davidovich](#) practices employment law in the state of Colorado, and he is available for consultation on any matters arising in the state of Colorado. Please contact Nathan Davidovich by email at nathandavidovich@talk-law.com, or by telephone at (303) TALK-LAW/ (303)825-5529.

Nathan Davidovich, Attorney at Law
Davidovich Law Firm, LLC
219 S. Holly Street
Denver, Colorado 80246
Phone: 303-825-5529/(303) TALK-LAW
Email: nathandavidovich@talk-law.com
Web: <http://www.talk-law.com>