PROTECTING AT WILL EMPLOYMENT

EMPLOYMENT AT-WILL IN PENNSYLVANIA:
Don't Have the Tables Turned Against You!

The Basics

Given the plethora of rules and regulations that have sprung up to complicate the employee-employer relationship in the past 30 or so years, the average person is probably surprised to learn that the general rule in Pennsylvania is that an employee may be discharged "**at any time, for any reason, or for no reason whatsoever**." Darlington v. General Elec., 504 A.2d 306, 309 (Pa. Super. 1986), quoting Henry v. Pittsburgh & Lake Erie R.R., 21 A. 157 (Pa. 1891).

At its most basic, the employment at-will doctrine can be viewed as the natural consequence of the ideals inherent in the founding of our country which lie at the bedrock of the American way of life: the freedom: the freedom to work where one wishes without the supervision or involvement of the government. As a general rule, an at-will employee has no claim against an employer for termination of employment or, as it is more popularly phrased, "wrongful discharge." Paul v. Lankenau Hospital, 569 A.2d 346, 348 (1990). Contrary to popular perception, the courts continue to invigorate the at-will doctrine -- zealously guarding a doctrine more than 100 years old. "As our previous jurisprudence has shown, this Court has steadfastly resisted any attempt to weaken the presumption of at-will employment in this Commonwealth." McLaughlin v. Gastrointestinal Specialists, 750 A.2d 283, 290 (Pa. Super. 2000). In thinking about the at-will doctrine, emphasis is usually placed upon the affect (often unfairly portrayed as

harsh or detrimental) which it has on the employee who can be fired at any time; however, the doctrine is a two-way street and can often benefit employees by providing them the freedom to move from one job to next as the market dictates without fearing legal action from their former bosses.

As with every rule, there are exceptions to the at-will doctrine. Though the strong presumption remains that an employee can be fired at any time and for any reason, there are certain limited situations where an employee will be able to surmount the at-will obstacle to bring a successful lawsuit against his or her employer. Of course, the trick for the employer is to avoid creating those situations where its at-will rights are unwittingly relinquished or called into question. Avoiding such pitfalls will significantly reduced the possibility that an aggrieved employee will resort to legal action.

The Exceptions To Employment At-Will

[Note: although the following sections will continually refer to "employees," it is important to keep in mind that independent contractors may be treated the same as traditional employees for many of these exceptions. Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3d Cir. 2003). Employers should thus remain vigilant: simply applying a label to a worker (i.e., "independent contractor") does not automatically afford the employer with immunity from otherwise available legal remedies].

An employer can squander the protections of employment at-will in four principal ways. In no particular order, they are: (1) express contract; (2) statute; (3) implied contract; and (4) when the discharge conflicts with public policy. Rapagnani v. Judas Co., 736 A.2d 666 (Pa. Super. 1999).

A. Express Contract

Remember, contracts can be both oral and written! What you say to an employee can and will be used against you later. If you, as the employer, wish the employment to be strictly at-will (thus avoiding separation difficulties down the road), you should explicitly and in no uncertain terms put language in the contract that the employment relationship is at-will for both parties, and can be terminated at any time and for any reason whatsoever. Also include language to the effect that no oral promises have been made to the employee contrary to what is contained in the written agreement.

Employment is presumptively at-will. The employee has the burden of overcoming this presumption, by alleging either that an express contract has been created by word or deed, or that the contract provides for discharge only in the event of "just

cause" or some other specified contingency. Holewinski v. Children's Hospital of Pittsburgh, 649 A.2 712 (Pa. Super. 1994). An employer's past firing practices of only discharging employees for "cause or overriding business considerations" will not surmount the presumption of at-will employment. Schoch v. First Aid Bancorporation, 912 F.2d 654 (3d Cir. 1990). Similarly, evidence of a subjective expectation on the part of the employee of a guaranteed employment period, or based upon vague superlatives made by the employer, is insufficient. Ross v. Montour R. Co., 516 A.2d 29 (Pa. Super. 1986).

Written, oral or partially written and partially oral representations may rebut the presumption of at-will employment. Moyer v. Heilveil, 49 A.2d 514 (Pa. Super. 1946). Here, specificity is the key. In the case of Scully v. US WATS, Inc., 238 F.3d 497 (3d Cir. 2001), the court was faced with a vague, general employment contract that recited an intention for the employment relationship to be "at-will" versus some specific statements by the employer, witnessed by third persons, that the contract was "for two years." The employee prevailed.

A further way in which an employer relinquishes its at-will rights can occur when language in a contract as to the length of an assignment creates a definite term of employment sufficient to overcome the at-will presumption. Janis v. AMP, Inc., 856 A.2d 140 (Pa. Super. 2004). In Janis, the employee pointed to a portion of the contract which stated "the assignment is expected to last three years but no more than five years." After trial on the issue, the jury found in favor of plaintiff and awarded $117,384. So, if faced with a similar factual situation, you will want to include necessary disclaiming

language in the contract to guard against any implication that the employment is anything other than at-will.

A few more examples will suffice. Statements assuring employment "until retirement", "for life," and " sometime between 12 and 18 months" have all been held to lack the exactitude required to rebut the strong presumption of employment at-will. Marsh v. Boyle, 530 A.2d 491 (Pa. Super. 1987). However, it is important to keep in mind that no "magic language" exists in this area - and while the above statements were ultimately found to have no contractual effect, this only occurred after lengthy litigation.

A possible area of confusion involves a situation in which a salary is computed to a specific time period. The employee may attempt to argue that this creates a term of employment. However, this is not the case. Booth v. McDonnell Douglas Truck Service, Inc., 585 A.2d 24 (Pa. Super. 1990). Similarly, a definite term is not added to the employment relationship if the employee is merely encouraged that he will not be fired if there is "continued good performance." McWilliams v. AT & T Info. Sys., Inc., 728 F. Supp. 1186 (W.D. Pa. 1990).

One frequent trouble area for employers is what to do with a probationary employee who successfully completes his/her probationary period, but, for whatever reason, is not wished by the employer to be retained for permanent employment. Has the completion of the probationary period resulted in an enforceable expectation of a future job? The answer is, no. Courts have consistently held that a promise of permanent employment after completion of a probationary period, and nothing more, is too broad to be enforced. Scott v. Extracorporeal, Inc., 545 A.2d 334 (Pa. Super. 1988). However,

where an employer and employee agreed that the hiring would be on a "trial basis," that term meant a "reasonable" trial basis, and the court deemed that one day on the job was not a reasonable testament to whether employee could perform the work. Steinberg v. 7-Up Bottling Co. of Philadelphia, 636 A.2d 677 (Pa. Super. 1994).

Although this is not a seminar on contract writing, one should always keep in mind that the best, most effective bulwark against litigation is a thorough, well-written contract. Prudence dictates that employers should exercise the utmost caution in making any statement (oral or in writing) that later may be construed as having guaranteed employment for any length of time. In the end, the time spent carefully thinking about and crafting an appropriate employment contract will yield future benefits: not only may it serve to discourage a disgruntled ex-employee from entering into litigation, but if a lawsuit ultimately does ensue, such a contract -- whose terms are definite and unambiguous -- will go a long way in short-circuiting what could otherwise be lengthy and expensive litigation.

B. Statutes

Since the 1960s, both state and federal legislatures have caused an erosion of the at-will doctrine through the enactment of several statutory prohibitions that restrict the employer from taking action in the presence of specially defined facts. Often, in addition to protecting the employee from losing the job, these statutes may also provide monetary remuneration to the employee and, in some cases, require the payment of attorney fees by the employer in the event that the employment action violated the statute. The following

statutes are some of the more prominent and are illustrative to the many statutory exceptions to the at-will doctrine.

1. The Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-22213. (Prevents discrimination on the basis of disability. Note: the definition of what is or is not a disability is heavily dependent on the employee's particular health problems as well as the job activities usually performed).

2. The Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654. (Prohibits termination or demotion for taking defined leave).

3. The Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-628. (Prevents termination on the basis of age - with "age" having been defined, in some cases, to begin at 40).

4. Title VII, 42 U.S.C.A. §§ 2000e-2000e-17. (Undoubtedly the most well known of the statutory exceptions. Prevents termination on the basis of a person's race, creed, color, sex or national origin, also precludes employers for negatively retaliating for the making of such claims).

5. The Pennsylvania Human Relations Act, 43 Pa. C.S. §§ 951-963. (Protections offered are more broad and sweeping than its federal counterpart. Proscribes employment discrimination on the basis of sex, race, color, creed, ancestry, age, national origin, non-job related disability, or in retaliation for the making of such claim. Also, an employee cannot be discrimination against for having a GED as opposed to a high school diploma).

6. The Pennsylvania Whistleblower Law, 43 Pa. C.S. §§ 1421-1428. (Applies only to public employees to prevent their termination for reporting illegal acts. As will be noted below, the definition of a "public employee" is an expanding one, covering more employees in varying industries than would initially be thought).

7. The Jury System Improvement Act of 1978, 28 U.S.C.A. §§ 1875. (An employee cannot be fired for serving on a jury).

8. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301-4333. (Prohibits termination of employees for fulfilling the requirements of their military service).

9. The Criminal History Records Information Act, 18 Pa. C.S. §§ 9101-9183. (An employer may only consider felony and misdemeanor convictions and then only to the extent that they relate to the employee or applicant's suitability for employment in a specific position).

The above statutory exceptions are not meant to be exhaustive: they are only a few of the many federal, state and possibly local laws affecting the employment relationship.

C. Implied Contracts

Employee Handbooks

So, you have carefully looked over the written contract, making certain that it did not contain any express guarantees, terms of employment, etc.; you've even kept quiet and avoided talking to your employee out of fear that you would say something in conflict with the existing contract. And, it goes without saying that you would never violate one of the statutory prohibitions regarding employment discrimination. That said, you now find yourself embroiled in a lawsuit! How? Why? The answer is simple: you gave out an employee handbook that in a few pages of careless, self-promotional jargon swept away the presumption of the at-will relationship. The at-will doctrine is not a warm and fuzzy concept, talking about it when someone is hired is akin to discussing a pre-nuptial agreement with your spouse the day of the wedding. Nevertheless, in the employment materials given to any new hire, explicit reference should be made THAT THE EMPLOYMENT IS AT-WILL. A moment's unpleasantness will save many headaches later on.

The third manner in which an employee may seek to overcome the at-will presumption is through arguing the existence of an "implied contract." As its name suggests, an "implied contract" is not really a contract at all. Rather, it is a judicial construction, created when the words or deeds of the employer have created in the mind of the employee an expectation of employment, usually contingent upon the happening of certain events. Almost without fail in these types of cases, the "employee handbook" will be pointed toward as the basis for the implied contract.

Of course, while one should never be too careful in what one writes or says, the specter of the "implied contract" should not have a chilling effect upon communications with employees. The burden placed on the employee to prove the existence of an implied contract is heavy indeed, and courts have been extremely reluctant to declare contracts for employment in situations where neither party intended this to be the case: thus saving employers from their unwitting mistakes in all but the most extreme cases.

To prove an implied contract, the employee must make a clear showing that: (1) the employer intended to offer employment for a definite time period or to terminate the employee only for good cause, and the employee accepted the offer; or (2) the employee provided a special benefit or service beyond the scope of the duties for which he or she was hired ("additional consideration"). Anderson v. Haverford College, 851 F.Supp. 179, 181 (E.D. Pa. 1994). The burden on the employee is "very great" and requires a showing of a "clear statement or course of conduct" intended to modify the at-will relationship. DiBonaventura v. Consolidated Rail Corp., 539 A.2d 865, 867 (Pa. Super. 1988).

Keep in mind that it is for the court to interpret the handbook provisions, utilizing the reasonable person standard, to determine whether the employer evidenced an intention to be legally bound by its terms. Ruzicki v. Catholic Cemeteries, Inc., 610 A.2d 495, 497 (Pa. Super. 1992). Under the reasonable person analysis, a handbook is only enforceable as a contract if a reasonable person in the same position as the employee would interpret its provisions as showing an intent to overcome the at-will presumption. Schoch v. First Fid. Bancorporation, 912 F.2d 654, 660 (3d Cir. 1990).

The mere existence in the handbook or a corporate policy regarding termination is not enough to alter the at-will relationship. Richardson v. Charles Cole Memorial, 466 A.2d 1084 (Pa. Super. 1983). The employer in Richardson published an employee handbook that said that the employer's policy was to offer continuous employment to all employees whose work was satisfactory. The court held that the employer's unilateral act of publishing a handbook did not amount to a meeting of the minds necessary to create a contract.

In Martin v. Capital Cities Media, Inc., 511 A.2d 830 (Pa. Super. 1986), the plaintiff was hired without any contract (thus, the default at-will relationship existed), but was given a handbook that gave examples of several acts that violated the employer's standards and which were grounds for discipline. The handbook stated that it could be modified at any time for any reason. The plaintiff was discharged for one of the reasons not enumerated in the handbook. She then sued for breach of contract, pointing toward the language of the handbook and contending that it bound the employer's hands as to discharge. The court rejected this argument, finding for the employer. In its opinion, the

court specifically recognized the inclusion of the phrase "this handbook can be modified at any time," which unequivocally indicated the intention of the employer to not be bound by its terms.

A key recent case in this area is Luteran v. Loral Fairchild Corp., 688 A.2d 211 (Pa. Super. 1997). It is illustrative of the wide latitude courts allow to employers to include language in handbooks which, at first blush, appears to alter the at-will status quo. In Luteran, the employee asserted that the handbook contained clear and unequivocal language which established that he could only be fired for just cause. The specific provision argued over concerned the reasons for discharge and, in relevant part, is reproduced below.

> You may only be discharged for cause. Some examples of just cause are excessive tardiness, absenteeism, insubordination, dishonesty, pilferage, incompetence, inefficiency, intoxication, use of drugs on the job, attempting to influence fellow employees to limit production and deliberately damaging company property or injuring a co-worker.

Based on the above language, rather sensibly, the employee argued that the employer created an implied contract whereby he could only be discharged for objective cause. In disregarding this argument, the court also disregarded the language in the employment handbook: dismissing it as nothing more than an "aspirational statement by the employer listing actions that generally will not be tolerated" and that the list serves nothing more than an "information function." Luteran has been cited by many commentators as an exemplar of the courts' great reluctance to find an implied contract from the contents of an employee handbook.

However, the implied contract theory is still viable, even if it is not accorded great favor by the courts. In Bauer v. Pottsville Area Emergency Med. Servs., Inc., 758 A.2d 1265 (Pa. Super. 2000), the court interpreted a provision in an employee handbook that stated "any employee scheduled for at least 36 hours per week for a period of 90 consecutive days will be treated as a full-time employee." The handbook then went on to detail all of the benefits provided to such employees who reached full-time status. Bauer, the employee, worked the necessary days to reach full-time as set forth in the handbook. The employer, however, argued that its handbook, in another section, specifically states that all employment is at-will and reserves to the employer the right to terminate employment at any time and for any reason whatsoever. Basically, this is a perfect example of an employer seeking to have its cake and eat it, too: on the one hand, encouraging an employee to enter its employ by displaying a favorable list of benefits and employee friendly policies; all the while, on the other hand, disclaiming all of those items a few pages later. One should always be careful to refrain from such contradictory written statements as the courts will view these with considerable skepticism.

Applying the reasonable person test, the court found that someone in Bauer's position "would understand that his continued performance would bear fruits of his employer's policies." Id. at 1269. Ultimately, the court declared the existence of an implied in fact contract based on the language of the handbook.

The Bauer case brings up an interesting point: how can an employer safely "disclaim" away promises made in the handbook so that they are not later interpreted by a court to be contractually binding, thereby obliterating the at-will presumption? It is an

absolute must for every employer who issues a handbook to include within it an "appropriate, conspicuous disclaimer if they wish to ensure employment at-will." Martin v. Capital Cities Media, Inc., 511 A.2d 830 (Pa. Super. 1986). (One will note that the attempted disclaimer in Bauer was not conspicuous to the average person). A noticeable, prefatory statement at the beginning of the handbook that the contents of the handbook "are not intended to give rise to any contractual obligations or to establish an exception to the employment at-will doctrine" -- appropriately highlighted in bold lettering and larger typeset -- will serve to rebuff any challenge to the at-will presumption. Ruzicki, 610 A.2d at 496.

The following are examples of suggested handbook disclaimers which should be sufficient to preserve the at-will relationship in the midst of the promulgation of a handbook. Again, any such language almost certainly should appear prominently in the front of the handbook, and, in an overabundance of caution, it is probably not a bad thought to also put it at the end, as well. Always remember, that unless you intentionally want to forgo the at-will relationship, always, always use qualifying language and statements of policy in handbooks and statements of policy!

> The foregoing personnel policies are not a binding contract, but a set of guidelines for the implementation of personnel policies. The Company explicitly reserves the right to modify any of the provisions of these policies at any time and without notice. Notwithstanding any of the provisions of these policies, employment may be terminated at any time, either by the employee or by the Company, with or without cause.

or

> These are statements of policy which the Company fully expects to follow. However, they are subject to change from time to

> time, do not confer any obligation on the Company or right to employment. While we hope in general that everyone's employment is long-lasting, employees are free to resign at any time just as the Company may terminate employees at any time for any reason not prohibited by law.

Legal Aspects of Employee Handbooks and Policies, Business Laws, Inc., § 1.001 (1998 & Supp. 2005); Alan D. Berkowitz, Employment Law - West's Pennsylvania Forms, § 2.6 (1998 & Supp. 2004). Note: These are two of many good examples found within these texts.

Additional Consideration

As noted above, the second way in which an employer can "impliedly" relinquish the at-will presumptions if the employee provides substantial additional consideration to the employer and termination of employment would result in great hardship or loss to the party known to both employer and employee when the contract was made. Permenter v. Crown Cork & Seal Co., Inc., 38 F.Supp.2d 372, 379 (1999), aff'd 210 F.3d 358 (3d Cir. 2000); Darlington v. General Elec., 504 A.2d 306, 314 (Pa. Super. 1986). Probably the first example that comes to mind is that of an employee who goes overseas for a job, selling his house in the process, only to find a termination notice six months later.

Normally, as in the express contract situation, oral representations by the employer regarding the term of the employment have been held insufficient to overcome the at-will presumption. See, Veno v. Meredith, 512 A.2d 571, 597 (Pa. Super. 1986) (no contract formed when employer told employee that he expected to retire with him and raise their children together); Darlington v. General Elec., 504 A.2d 306 (Pa. Super. 1985) (employer's promise of long-term employment did not create employment

contract). However, when statements by the employer concerning the term or manner of employment cause the employee to take what would otherwise be an extraordinary action, additional consideration may be present; as a consequence, the at-will relationship may be altered. The rules as stated in Darlington is:

> A court will find additional consideration when an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform.

Darlington, 504 A.2d 306 (Pa. Super. 1985).

Application of this principle is seen in Cashdollar v. Mercy Hospital of Pittsburgh, 595 A.2d 70 (Pa. Super. 1991), where the court upheld a jury verdict in favor of plaintiff on his breach of implied contract claim. The plaintiff, Cashdollar, (who no doubt had been told his whole life to go into the banking profession), left his job as Vice President of Human Resources at a hospital in the state of Virginia for a similar position at Mercy Hospital. Mercy had apparently convinced him to leave his job and promised him future opportunities were he to come to Pennsylvania. Sixteen (16) days later, after taking the position, Cashdollar found himself bankrupt (i.e., fired). Under the facts of the case and the conduct undertaken by plaintiff, the jury found an implied contract to be present.

Importantly, the additional consideration exception has enabled plaintiffs to get their breach of contract claims before juries where, because of their often unique circumstances, they stand to be looked at in a sympathetic light. Thus, when encouraging

a prospective employee to move or to take any other action that is out of the ordinary, careful wording should be used to guard against a later finding of an implied contract.

Mostly, the avoidance of implied contracts is a straightforward matter of common-sense. For example, in Scullion v. Emeco Industries Inc., 580 A.2d 1356 (Pa. Super. 1990), plaintiff turned down some significant financial incentives to remain with his old employer in California, left California and bought property in and moved to Pennsylvania. His new employer assured him that "this is the last job you will ever have." After three months of employment, plaintiff was discharged. The court held that these facts, without any disclaimer by the employer, were sufficient to support an implied contract action. Similarly, in Greene v. Oliver Realty, Inc., 526 A.2d 1192 (Pa. Super. 1987), the plaintiff, for a period of 24 years voluntarily accepted wages significantly lower than those which were paid to union employees and which were available to plaintiff based on employer's implied promise that he would have lifetime employment. Such masochistic behavior on the part of plaintiff created the factual basis for an implied contract.

Again, however, it is important to note -- and cannot be noted enough in these employment matters -- that where the parties' intention regarding the issue of at-will employment is memorialized and agreed upon in an unambiguous writing, the intent of the parties will be ascertained from the document itself. Walden v. St. Gobain Corp., 323 F. Supp.2d 637, 646-47 (E.D. Pa. 2004). The facts in Walden were essentially similar to those in Cashdollar, Scullion and a plethora of other cases where implied contracts were found based on the new employee's relocation to a far away place. The defining

difference in Walden, however, was the presence of a signed writing re-affirming the at-will relationship. Therefore, even if an employee could establish that he or she gave substantial additional consideration to the employer, the unambiguous terms of a writing will completely preclude that employee from establishing that the consideration constituted a modification of the at-will presumption.

Thus, the moral of the story remains that the careful spelling out of the employment relationship in well-drafted document will stave off unnecessary litigation.

D. Wrongful Termination (When All Else Fails …)

If an aggrieved employee cannot make a case for breach of an express contract or an implied one (through a handbook or additional consideration arguments), and if the employer has not violated one of the many statutory prohibitions to termination, then that employee's last resort is to file a lawsuit alleging the tort of wrongful termination. Traditionally, this has been one of the more limited exceptions to the at-will presumption, but has been widened somewhat by enactment of "whistleblower" laws in several states. (Although referred to in the "statutes" section of these materials, whistleblower laws are really a codification of the theories inherent in wrongful discharge claims and so will be addressed in greater detail herein).

Termination in Violation of Public Policy

As a general rule, an at-will employee has no claim against an employer for termination of employment or "wrongful termination." Paul v. Lakenau Hospital, 569 A.2d 246, 348 (Pa. 1990). Exceptions to this rule have been recognized only in the most limited of circumstances where discharges of at-will employees would threaten clear

mandates of public policy. Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. Super. 1989).

The Pennsylvania Supreme Court first addressed the wrongful termination action in Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974), and it remains the seminal case in this area. Like the fictional Willy Loman, the plaintiff in Geary roamed the country for many years selling steel-based products. However, the combination of new products and new supervisors caused Geary problems and ultimately lost him his job. His sales numbers declined, when asked why, he responded that he could not sell products that were unsafe. When his superiors did not listen, Geary took his complaints to the company vice-president. He heard Geary out: the product was re-tested, found to be unsafe and then withdrawn from the market. Geary, unfortunately, was not around to witness the fruits of his labor: he was fired. Geary sued for wrongful discharge, contending that he was fired for reporting product defects -- something he contended furthered an important public policy, i.e., safety of consumers and workers. The court rejected this argument, noting that Geary had not engaged in any activity constitutionally or legislatively required of him. Thus, the court established the precedent that a wrongful discharge lawsuit will only be valid where an employee is terminated as a result of his or her compliance with or refusal to violate the law. In most instances, this is a difficult hurdle for an employee to overcome.

Since Geary, the rule has been expanded somewhat to include discharges which threaten "clear mandates of public policy." These have been defined by the courts as follows:

> The sources of public policy include legislation; administrative rules, regulation or decision; and judicial decisions. In certain instances, professional code of ethics may contain an expression of public policy. … Absent legislation the judiciary must define the cause of action in a case-by-case determination.

Cisco v. United Parcel Serv., Inc., 476 A.2d 1340, 1343 (Pa. Super. 1984).

Employees alleging wrongful discharge in violation of public policy must be certain to identify Pennsylvania public policy; a violation of federal law or policy will not suffice. In McLaughlin v. Gastrointestinal Specialists, 750 A.2d 283 (Pa. 2000), the court narrowed what can be considered public policy, instructing that "the public policy of this Commonwealth must be implicated, undermined or violated."). Accordingly, an employee in not protected after objecting to marketing methods allegedly violating the Securities and Exchange Act of 1984, nor will the regulations of the Food and Drug Administration serve as the basis for a wrongful discharge claim. Kelly v. The Retirement Plan For Certain Home Office, 2003 WL 22070527 (E.D. Pa. 2003); Castro v. Air-Shield, Inc., 78 Bucks Co. L. Rep. 94, 101 (Aug. 20, 2004).

Keep in mind, however, that a claim for wrongful discharge in violation of public policy is not allowed where a statutory remedy is available. For instance, an employee alleging racial discrimination cannot bring a tort action for wrongful discharge since the conduct of the employer is already prohibited by state and federal laws which offer the employee specific remedies.

The following cases are illustrative of the types of situations in which the public policy exception will be found to apply:

(a) In Shick v. Shirey, 716 A.2d 1231 (Pa. 1998), the court held that discharging an employee in retaliation for filing

a workers' compensation clam violated the public policy exception.

(b) The rationale of Shick was expanded in Rothrock v. Rothrock Motor Sales, Inc., 810 A.2d 114 (Pa. Super. 2002), where the Superior Court held that a cause of action for wrongful discharge could be found when an employee is terminated for not dissuading a fellow employee to file for workers' compensation. "It is repugnant to the same public policy and anathema to the historical balance inherent in the workers' compensation law to allow an employer to evade public policy by firing someone else who refuses to engage in what has been determined to be an unlawful act." Id. at 119.

(c) An employee cannot be fired for filing an unemployment compensation claim. Raykovitz v. K-Mart Corp., 665 A.2d 833 (Pa. Super. 1995).

(d) In Field v. Philadelphia Elect. Co., 565 A.2d 1170 (Pa. Super. 1989), an employee stated a claim for wrongful discharge when he was fired for reporting safety violations to the state environmental protection agency.

Significantly, an employee will be unsuccessful when he/she is fired for refusing to perform an act which he/she believes violates the law, but in fact it does not. In Clark v. Modern Group Ltd., 9 F.3d 321, 328 (3d Cir. 1993), a CFO was terminated for reporting auto expense reimbursements as taxable income on the company's tax returns when the company insisted that he not do this. The employee had a reasonable belief that not to report the income was an unlawful act. The court held, however, that there was no action for wrongful discharge. The gist of the court's opinion provides a nice overview of the difficult burden placed upon the employee who seeks to use the public policy exception to surmount the at-will presumption.

> An at-will employee invoking Pennsylvania's public policy exception must show his discharge offended a clear mandate of

> public policy by resulting from conduct on the part of the employee that is required by law or from the employee's refusal to engage in conduct prohibited by law … Absent a violation of law, it is difficult for an at-will employee seeking recovery for wrongful discharge to point to a common law, legislative or constitutional principle from which a clear public policy exception to Pennsylvania's doctrine of at-will employment could be inferred.

Id. at 328.

Similarly, in Hineline v. Stroudsburg Electric Supply Co., Inc., 559 A.2d 556 (Pa. Super. 1989), an employee was discharged for disconnecting the employer's surveillance cameras. The employee alleged that the cameras violated the Pennsylvania Wire Tapping Act. He had the good faith belief that he was stopping an illegal act. The court held that, even if that was the case, the employee was not charged or granted authority under the law to enforce the Wire Tapping Act. The termination was declared not to be wrongful.

Pennsylvania Whistleblower Act

If you're an employee, why go through the rigmarole of the above exceptions to at-will employment: all you have to do is just "whistle!" Well, its not that easy under the Pennsylvania Whistleblower Act, §§ 1421-1428, but the Act has in some instances significantly whittled away an employer's unfettered ability to make termination decisions.

In relevant part, the Whistleblower Law states as follows:

> No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or person acting on behalf of the employee makes a good faith report, verbally or in writing, to the employer or appropriate authority of any wrongdoing or waste.

43 Pa. C.S. §1423.

On its face, this statutory language applies only to public employees. Stated another way, for private employers, whistleblowing activities do not constitute an articulated public policy of the Commonwealth to provide employees with an exception to the at-will doctrine. See, Brown v. Hammond, 810 F.Supp. 644 (E.D. Pa. 1993). (Pennsylvania's whistleblower's law does not create an expression of public policy sufficient to fall within the narrow exception from the employment at-will doctrine and does not form a basis for allowing a wrongful discharge action).

However, rather recently, the courts have given an expansive definition of who is or who is not a "public employee" for purposes of the law. From the statute, an employee is defined as "a person who performs a service for wages … under a contract of hire, written or oral, express or implied, for a public body." 43 Pa. C.S. §1422. In Denton v. Silver Springs Nursing Home, 739 A.2d 571 (Pa. Super. 1999), the court declared that the phrase "funded in any amount by or through" meant that any healthcare facilities which received Medicaid funding (via the state) fell within the parameters of the Whistleblower Law. This ruling truly widens the scope of the act, most likely in a manner never contemplated by the legislature. Accordingly, if your business is the recipient of monies or funding by the state, whistleblowing may be a protected activity.

Importantly, however, the conduct protected by the Whistleblower Law is the report of "wrongdoing" by a public body. If the aggrieved employee is fired for making a report of activity that does not rise to the level of "wrongdoing," then the statute does not provide a remedy. What is "wrongdoing?" It is defined by statute as "a violation which is

not of a merely technical or minimal nature of a federal or state statute or regulation, of a political sub-division ordinance or regulation or of a code of conduct or ethics designed to protect the interests of the public or employer." 43 Pa. C.S. §1422. This rather convoluted definition acts to severely limit the type of claims that an employee can bring.

The case of Riggio v. Burns, 711 A.2d 497 (Pa. Super. 1998) probably provides the best illustration of the Whistleblower Law in operation -- showing both its purposes and limitations. There, a neurologist who worked in the hospital brought a whistleblower claim alleging that she had been terminated by the hospital for objecting to the continued practice of surgical procedures which, in her opinion, jeopardized patient safety. Not only did she discuss her view with her fellow physicians, she brought the matter to the attention of the hospital president and board of directors. (At issue was that resident physicians were placing electrodes in the brains of epileptic patients without proper supervision, resulting in one patient death and several comas).

Interestingly, the plaintiff in Riggio did not and could not argue that she was terminated for acting pursuant to public policy, i.e., a wrongful discharge claim. See, Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974) (acting out of concern for public safety is not sufficient to claim public policy protection, plaintiff must rather point to some constitutional or legislative basis for his or her conduct).

Plaintiff asserted that her complaints were in relation to activity that completely disregarded the legal and ethical duties placed upon all healthcare providers "expressed not only by state and local medical societies, but by statute." Plaintiff pointed toward the Health Care Facilities Act, 35 P.S. §§448.101-448.904, and the Medical Practices Act of

1985, 63 P.S. §§422.1-422.45, in support of her contention that she had reported the requisite "wrongdoing."

Yet, even in light of the above statutes, the court determined that the facts did not present a cognizable claim under the Whistleblower Law. It narrowly instructed that "wrongdoing," as defined by the Whistleblower Law, does not encompass negligence principles unless a specific statute, regulation, or code of conduct or ethics is violated by the tortious act or omission. Riggio, 711 A.2d 497. Rather, the statutes (or other writings) cited by a plaintiff must specifically prohibit the action being reported to acquire the protection of the Whistleblower Law. Id. at 502. The Riggio court observed that even if conduct is negligent, below the standard of care, or dangerous to the safety of the public, it does not constitute actionable "wrongdoing" unless the conduct in question is specifically prohibited by some authoritative document. The moral of Riggio is that, in theory, while many traditionally non-governmental employers may find themselves subject to the Whistleblower Law, in practice, it will be very difficult for an employee to sustain a claim - and then only if the employer is engaging in an activity which it really should not be doing in the first place. And, if this is the case, then a whistleblower lawsuit is the least of the employer's worries.