

Claim spotting in employment law — the initial steps

By Paul F. Bell; Bell Law Firm, L.L.C.; Baton Rouge, Louisiana

Negativity is underrated, especially in employment law where most potential clients have no lawsuit.

Most employment terminations are legal because the employment-at-will (EAW) doctrine applies. It is a crude, unfair, and simple law. A checklist of the initial steps in determining if an employer fired an employee illegally follows.

Discussion in this article is limited to terminations and those subject to EAW. Discussion of those terminated also includes those who resign provided 1) the employee complained to the employer of illegal discriminatory acts or was disclosing illegal acts that the law protects; and 2) the employer's acts against the employee were so intolerable that a reasonable person in the employee's position would have felt compelled to resign.¹

The first step in determining whether wrongful termination occurred is to find out if the employee was subject to EAW or enjoyed greater protections. Employment-at-will law allows employers to fire employees for any or no reason at all — with some exceptions.²

Ask the fired employee if she was a member of a union, was employed by the government, was tenured, or had an employment contract for a certain period. If she says yes to any of these questions, she is not subject to EAW. I will not discuss these types of employees further here. They should see an employment attorney.

If the employee is subject to EAW, however, welcome to Louisiana, among the worst states in the United States in employee rights. For example, employers' promises in employee handbooks regarding non-wage issues are legally enforceable elsewhere, but not here.³ Louisiana, too,



Paul Bell

unlike many states, has no public-policy exception to EAW.⁴

The next question for the EAW employee is: "Why did the employer fire you?"

Although an employer can fire an employee for billions of legal reasons under EAW, there are about forty illegal ones. Seven of these are the employee's race (color, birth), age, religion, sex, national origin, genetic information, and

disability. These are protected classes under Title VII and the Americans with Disabilities, Age Discrimination in Employment, and Genetic Information Nondiscrimination acts.⁵

Just as the employer cannot discriminate against an employee because of one of those seven protected classes, the employer cannot retaliate by firing the employee based on those classes because the employee objected to unlawful discrimination or participated in proceedings regarding unlawful discrimination.⁶

Besides employee protections against discrimination, one cannot be fired because of an abortion;⁷ jury duty;⁸ military service/veteran status;⁹ pregnancy;¹⁰ refusal to pay for a medical examination;¹¹ rights under Employee Retirement Income Security Act plans;¹² smoking¹³ (damages limited to \$250 fine); whistleblowing regarding the following: state laws,¹⁴ state environmental laws,¹⁵ state ethics laws,¹⁶ financial fraud (Sarbanes-Oxley Act),¹⁷ Consumer Financial Protection Act,¹⁸ Affordable Care Act,¹⁹ and fraud against the federal government;²⁰ violations of or the refusal to work because of safety concerns in maritime, trucking, railroad, public transportation, pipelines, or aviation;²¹ unemployment or workers' compensation;²² assertion of Fair Labor Standards

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Act²³ or Family and Medical Leave Act²⁴ benefits; misuse of consumer reporting information;²⁵ filed a lawsuit or testified at trial;²⁶ wages garnished;²⁷ speech regarding the right of employees to act together or to form a union;²⁸ and sickle-cell trait.²⁹

Although an employer can fire an employee for failing a drug test done in violation of Louisiana drug-testing law,³⁰ a tort suit against the laboratory that did the bum testing may be successful.

At this preliminary step, look for discrimination claims regardless of whether the employer intended to discriminate or not. Intent is sometimes unnecessary in finding discrimination. Disparate impact claims under Title VII require only that the effects of the employer's treatment were discriminatory.³¹

Some benefits such as FMLA leave or an ADA accommodation are conferred upon an employee, and employer's reason for failing to provide the benefit may be immaterial.

The wrongful termination claim must be filed before administrative deadlines and statutory prescription limits. Some deadlines are quick: 180 days to file complaint to the Occupational Safety and Health Administration³² and 300 days to file Title VII complaint to the Equal Employment Opportunity Commission.

Most other wrongful termination claims must be filed within one year of termination. However, Department of Labor laws (FLSA and FMLA) allow two or three (willful violation) years to file.³³ Race claims under Section 1981 prescribe in four (!) years.³⁴

Title VII, ADA, and GINA apply only to employers with at least fifteen employees.³⁵ ADEA has a twenty-employee minimum.³⁶ If there are fewer employees than the required minimum? Discriminate away, Mr. Employer; except for race (see Section 1981 claims).

Often, after gathering only a small amount of information, it is clear whether the termination was illegal. The employee may have told you that he was fired because of personal issues with the boss (but not dealing with protected classes) or that there is no evidence of firing because of discrimination or retaliation against the protected classes.

Frequently, the employee who was employed for months or years does not know why he was fired. If that employee

doesn't know, I figure it is unlikely that I could find out prior to the lawsuit deadline. Unlike initial consultations in successions or divorce where many seeking help become clients, few seeking help in employment law become clients.

Regardless of the attorney's assessment, many potential clients are convinced the firing was illegal. Although most people describe EAW as more caveman-like (an employer can fire an employee for any or no reason) than it really is, these individuals still think their firing is different, cry of the injustice involved, and insist there was a wrongful termination.

These mistaken understandings of EAW are often due to unfair, but legal, firings:

1. The employer essentially tortures employee but not on the basis of any protected class.
2. Despite the employer and employees adhering to and respecting the employer's rules for years, the employer schemes over several months, violates its rules, and fires the employee.
3. The employer's reason for firing is unfair and makes no sense.
4. Since the Louisiana Workforce Commission found the dismissal without just cause, the client thinks there is wrongful discharge.

Employees understand unemployment compensation law that employs fairness in its analysis. They often cannot understand how EAW from the Paleolithic Period can be legal. As a professor said to the court regarding his employer's use of EAW to win, "I would not have given up six years of my professional career at Tulane if I believed that Tulane was free to deny me tenure for no valid reason."³⁷

EAW is crude and fails at justice, but it does simplify determining whether wrongful termination occurred.

Be cautious in using this advice, investigate more thoroughly, and consult with an experienced employment law attorney for a definitive opinion.

Endnotes

1. *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004).



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CPA/CFF/ABV, CVA, MBA
2637 Edenborn Ave., Ste. 305
Metairie, LA 70002
504.587.1670
RalphL@ralforensics.com
ralforensics.com

2. *Thorne v. Monroe City Sch. Bd.*, 542 So.2d 490, 491 (La.1989); La. C.C. art. 2747.
3. *Henry Fairbanks v Tulane University*, 731 So.2d 983 (La.App.4 Cir. 1999).
4. *Quebedeaux v. Dow Chem. Co.*, 2001-2297 (La. 6/21/02), 820 So.2d 542, 546 citing *Gil v. Metal Service Corp.*, 412 So.2d 706, 708 (La.App. 4 Cir. 1982).
5. Age (29 U.S.C. § 621 - 624); disability (42 U.S.C. § 12100 - 12213); gender/sex (42 U.S.C. § 2000e - 2000e-17; 42 U.S.C. §§ 000e(k)); genetic information (42 U.S.C. § 2000ff); national origin (42 U.S.C. § 2000e-2); race/color (42 U.S.C. § 2000e - 2000e-17; 42 U.S.C. § 1981; 42 U.S.C. § 1983); religion (42 U.S.C. § 2000e - 2000e-17; RFRA 42 U.S.C. § 2000bb - 2000bb-4).
6. 42 U.S.C. § 2000e-3(a).
7. 42 U.S.C. § 2000e(k).
8. 28 U.S.C. § 1875; La. R.S. 23:965.
9. 38 U.S.C. §§ 4301 - 4333; R.S. 29:401, 29:38 - 29:38.3.
10. 42 U.S.C. § 2000e(k).
11. R.S. 23:897.
12. 29 U.S.C. § 1140.
13. R.S. 23:966.
14. R.S. 23:967.
15. R.S. 30:2027.
16. R.S. 42:1169.
17. 18 U.S.C. § 1514A.
18. 12 U.S.C. § 5567.
19. 29 U.S.C. § 218c.
20. 31 U.S.C. § 3730(h).
21. 46 U.S.C. § 2114; 49 U.S.C. § 31105; 49 U.S.C. § 20109; 6 U.S.C. § 1142; 49 U.S.C. § 60129; 49 U.S.C. § 42121.
22. R.S. 23:1361.
23. 29 U.S.C. § 215(a)(3).
24. 29 C.F.R. § 825.220.
25. FCRA 15 U.S.C. § 1681.
26. 42 U.S.C. § 1985.
27. 15 U.S.C. § 1874; R.S. 23:731.
28. 29 U.S.C. § 157; NLRA § 7.
29. R.S. 23:352.
30. *Sanchez v. Georgia Gulf Corp.*, 2002-0904 (La.App. 1 Cir. 11/12/03); 860 So.2d 277, 282-283 writ denied, 2004-0185 (La. 4/2/04); 869 So.2d 877.
31. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 989 (1988).
32. 49 U.S.C. § 31105(b).
33. 29 C.F.R. §§ 825.400, 825.401; 29 U.S.C. § 255.
34. *Jones v. R.R. Donnelley & Sons Company*, 541 U.S. 369, 382 (2004).
35. 42 U.S.C. § 2000e.
36. 29 U.S.C. § 623.
37. *Schwarz v Admin. Tulane Educ. Fund*, 699 So.2d 895, 899 (La. App. 4 Cir. 9/10/1997).

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