
SHERRARD
GERMAN & KELLY, P.C.
ATTORNEYS AT LAW

28th Floor, Two PNC Plaza, Pittsburgh, PA 15222
Phone: 412-355-0200 • Fax: 412-261-6221 • www.sgkpc.com

REPORT FROM COUNSEL

FALL 2004 ISSUE

"YOU'RE FIRED!"

By John P. Edgar, Esquire

As famous as that line may be from last year's television show, there is much misunderstanding about the process and legality of termination from employment. Pennsylvania, like most states is an at-will employment state. That means, as the old adage goes, "you can be fired for a good reason, a bad reason, or no reason at all, just not an illegal reason." One of the earliest statements of this rule came from the Pennsylvania Supreme Court in *Henry v. P.&L.E.R.R.Co* which stated, in 1891 that an employer "may discharge an employee with or without cause at pleasure, unless restrained by some contract . . ." There were no other "illegal" reasons then, but there are now. This article will focus on the last element of that statement -- "just not an illegal reason." It is not intended to be a complete or exhaustive discussion of employment law which usually fills several large books.

Many employees, and not a few employers are under the mistaken belief that there must be legally sufficient "good cause" for a firing. That may be the case where there is a contract, either a collective bargaining agreement, or an individual employment contract which governs the employment relationship. However, the vast bulk of U.S. employees are not covered by any contract. They are, however, covered by various state, federal, and local laws.

The longest standing restriction on at-will employment is the National Labor Relations Act which prohibits termination, or other employment decisions based upon employees' right to engage in "concerted activity." This is not limited to signing up union members, seeking an election, filing an unfair labor practice charge or other formal union activity. Retaliation for mere concerted activity where multiple employees join together to seek some result or action from an employer can be an actionable unfair labor practice.

Title VII of the Civil Rights Act prohibits termination or other adverse action motivated by discrimination because of an employee's race, color, religion, sex or national origin.

The 1967 Age Discrimination Employment Act prohibits termination on the basis of age, and protects individuals over the age of 40. Recently the U.S. Supreme Court reversed the Sixth Circuit Court of Appeals which had held that a collectively bargained provision that provided enhanced benefits for workers age 50 or older on a given date was actionable discrimination against those workers between ages 40 and 50.

The 1990 Americans With Disabilities Act prohibits discrimination, including termination, on the basis of disability or perceived disability. The definition of disability has been the subject of much litigation and generally means needing assistance to engage in one of life's basic activities. An employer is required to make "reasonable accommodation" to an employee's disabilities, and of course that phrase has likewise been the subject to much litigation, and varies from job to job.

The Pennsylvania Human Relations Act prohibits termination or other discrimination based on race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability and use of guide animals. The Act also prevents discrimination against an employee based on distinguishing between a GED and a high school diploma.

The 1993 Federal Family and Medical Leave Act (FMLA) prohibits termination for taking a protected unpaid leave of absence.

The Employee Retirement Income Security Act of 1974 (ERISA) prohibits discharge based on exercising any right under an employee benefit plan or interfering with securing any such right. This could include, for example, terminating an employee shortly before pension vesting in order to avoid that vesting.

The Pennsylvania Criminal History Records Information Act only allows consideration of felony and misdemeanor convictions if they relate to the employee's suitability for the particular employment. This is somewhat at odds with the various statutes requiring pre-employment criminal background checks and prohibiting employment in various fields, such as nursing home employees who have any record of a large enumeration of convictions.

The Uniformed Services Employment and Reemployment Rights Act prohibits termination for fulfilling military obligations.

The Pennsylvania Whistle Blower Law prohibits termination of *public employees* for reporting fraud and illegal acts. However, the definition of public has been expanding.

The Employee Polygraph Protection Act prohibits firing for refusing to take a polygraph or "lie detector" test.

The Jury System Improvement Act of 1978 and similar state legislation prevents firing for serving on jury duty.

Although there is no Pennsylvania or federal law making sexual orientation a protected category, there is such a law in several states and in the City of Pittsburgh.

The Sarbanes-Oxley Act of 2004 is a federal statute prohibiting retaliation against whistle blowers for reporting a number of types of alleged misdeeds by the employer or other employees.

The foregoing are statutory bars or limitations on the employment-at-will doctrine. As stated earlier, there are of course explicit contracts which limit the doctrine where they apply, but there are also contracts which courts have implied. While a promise of "permanent employment" after a probationary period has been held to be too broad to be enforced if there is nothing further, it might be wise to avoid the term "probationary" during initial employment because it has spawned ample litigation. However, a written statement of the duration of an assignment has been held to be a contract for a specific time.

A fruitful field for litigation has been employee handbooks. While an employer may have every intention of following certain procedures, such as "progressive discipline" or "appeal" of initial first level supervisor actions, it should avoid obligating itself to do so. Many cases have addressed this issue, and most lawyers suggest that any employee handbook contain a disclaimer prominently displayed at the beginning. For example, the following disclaimer has been suggested by Kurt Decker in a 1984 article in the Journal of Law and Commerce:

"This is not a contract of employment. 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 rights 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."

Courts have also held that where an employee supplies what has been referred to as "additional consideration" there is an implied, if ambiguous, term of employment. The most often successful additional benefit is where the employee moved to take on a new job, particularly if solicited by the new employer. In a 1991 case, Mr. Cashdollar left a secure high paying position in Virginia, based on promises of future opportunity at Mercy Hospital. He sold his house and relocated with his pregnant wife and two year old son to

be the vice president of human resources. He was fired sixteen days later. The trial court, upheld by the Superior Court, held there was sufficient evidence to establish an implied contract of employment. Although many cases have been filed based on a "specific intent to harm" or an "implied covenant of good faith and fair dealing," Pennsylvania courts have held that that is not a basis to sustain a "wrongful discharge" suit.

In 1974, the Pennsylvania Supreme Court held that an employee did not have a case for wrongful discharge by US Steel. The employee claimed he was fired for reporting improper sales practices. The court stated that there could be violations of public policy that would provide an exception to the at-will doctrine. Over the last thirty years these have been slowly established and include filing a workmen's compensation claim, filing an unemployment compensation claim or attending to jury duty. However, in 2000 the Pennsylvania Supreme Court held that reporting an OSHA violation was *not* such a violation of public policy as to establish a wrongful discharge case. However, in 1993 the Federal Court in Philadelphia held that firing an employee for reporting to OSHA was such a violation of public policy. I believe that the 2000 Pennsylvania Supreme Court decision is controlling, but employers are advised to tread carefully in this area. Courts have also held that reporting a violation of the wage payment and collection law is such a violation of public policy, as is firing an employee for refusing to engage in illegal activity or testifying against an employer that is alleged to have done so. In a 1983 case, the Third Circuit Court of Appeals held that termination for refusal to engage in the employer's lobbying activities and expressing opposition to the company's political position was a violation of First Amendment free speech rights and stated a claim for wrongful discharge.

This article is not intended to be anything approaching an exhaustive list of "do's and don't's" in employment termination rights. Employers are advised to act carefully, remembering that they have in most cases they have the employment-at-will doctrine to make necessary employment determinations, but knowing that we live in a litigious society. It is not sufficient to "stay out of trouble" that an employer's motives are not any of the illegal motives discussed above. It is sufficient to get into a lengthy and expensive lawsuit based upon the *appearance* of violations of any of the foregoing. For example, supervisors should be carefully instructed that they should not make jokes or comments about protected status. There are many news stories about off color and sexual jokes at work constituting "sexual harassment," and thus prohibited sex discrimination (a source of an entire lengthy discussion in itself) and race related jokes, but supervisors should not make comments or jokes that can be viewed as disparaging *any* protected category while in the workplace. A thorough policy and practice of observing and disciplining employees for such matters, and inclusion of such prohibitions in employee handbooks can help.

Most "wrongful discharge" suits are won by employers before the case gets to a jury, but when it does, instructions about burdens of proof and other legal requirements often seem to be ignored in favor of "was the employee treated fairly." That is just one reason most employers are advised to do their best to *be fair* and to *appear to be fair*. It makes for a better work force and also reduces the likelihood of distracting and expensive litigation.

The best lawsuits are not the ones you win, but the ones you can avoid. For further specific advice, of course, you can contact us.

About the Author

John P. Edgar is a shareholder and director of the firm. Mr. Edgar practices in the areas of commercial litigation, corporate law, creditor bankruptcy, and employment law. Mr. Edgar is a 1969 graduate of Swarthmore College, and he received his law degree from the University of Pennsylvania in 1974. He is a co-author of West's Pennsylvania Forms and Commentary--Civil Procedure (1992).

FIRM NEWS

Rob German Heads JDRF Board

Robert D. German, Co-Managing Partner of the firm, recently began serving a two-year term as Chairman of the Board of the Juvenile Diabetes Research Foundation International (JDRF), an organization that is committed to finding a cure for diabetes and its complications through the support of research and government advocacy. JDRF is headquartered in New York City and has over 90 chapters in the U.S. and six international affiliates.

Rob and his wife, Anne, have been active volunteers with JDRF since 1988, when their son, Christopher, was diagnosed with diabetes at the age of six. He served as president of the Western Pennsylvania Chapter for two years and is credited with organizing the chapter's golf tournament in 1991, now one of the most successful charity golf events in Pittsburgh, and with leading the development of the Major Donor Committee, through which he secured gifts totaling over \$1 million.

Rob has served on the JDRF International Board of Directors since 1998, chairing the Audit and Government Relations committees. He currently chairs the Executive committee.

"Rob's commitment to finding a cure for juvenile diabetes highlights his ability to maintain and build on JDRF's position as the leader in funding the world's best Type 1 diabetes research," said outgoing International Board chairman Gordon D. Barker. "His professional and volunteer experience, combined with his personal commitment, make him an excellent choice as Chairman."

Since its founding in 1970, JDRF has provided more than \$800 million to diabetes research worldwide.

Sam Pasquarelli Elected to Hospital Foundation Board

Samuel J. Pasquarelli, Co-Managing Partner of the firm, was recently elected to the Board of Directors of the Ohio Valley General Hospital Foundation, the charitable foundation established by the hospital located in Kennedy Township near Pittsburgh. He also serves as one of two trustees of the Kathryn J. Dinardo Fund, a charitable foundation that makes about \$500,000 in charitable gifts to Western Pennsylvania charities annually.

Cybersquatting Case Victory

James R. Hankle and Danielle R. Fahr of the firm's Litigation Group were recently successful in an action under the Federal Cybersquatting Act. A preliminary injunction was obtained in the United States District Court for the Western District of Pennsylvania against a corporate client's competitor who was immediately enjoined from continuing to operate its website using a confusingly similar domain name. The Federal Cybersquatting Act was implemented in the 1990's to prevent piracy of Internet domain names and is also an effective tool for the prevention of trademark infringement and unfair competition.

Fifth Year for HEARTH Sponsorship

For the fifth consecutive year, SGK again was a significant sponsor for HEARTH and its recent Ninth Annual Golf Outing. HEARTH is a non-profit entity that runs Benedictine Place in the North Hills, a transitional housing program for homeless women and children providing a continuum of care that empowers participants to become independent and economically self-sufficient. The focus of Benedictine Place is to provide the necessary support for families to enable mothers to complete educational or training programs, all while parenting their children and maintaining jobs.

SGK attorney Eric Springer has been on the HEARTH board for the past six years and has served in numerous positions including serving on its Finance, Executive, Community Housing Development, Board Development and Golf Committees. He recently agreed to chair the Golf Committee for the Tenth Annual Golf Outing scheduled for June 2005.

Turnaround Management Association Event Sponsorship

The firm recently sponsored an event held by the Turnaround Management Association (TMA) on bankruptcy preferences and developments. Featured speakers for the June 15 forum included Mark Gleason of Gleason & Associates and Dick Shirra of Copperweld Credit. SGK attorneys Paul Burke and Eric Springer have been involved with the national TMA organization and its Pittsburgh chapter for several years.

Financial Industries Network Event Sponsorship

SGK was a Gold Sponsor of the Financial Industries Network Golf Outing held on July 12th. The Financial Industries Network is a non-profit organization of executives from banking and finance-related industries, chief executive officers, chief financial officers and other senior-level managers from a variety of regional companies as well as accountants, investment advisors, securities brokers, tax consultants, business consultants, attorneys and other professionals. The group meets quarterly to network and discuss issues involving corporate and personal finance. The firm has been involved with the Financial Industries Network and its predecessor, the Bankers Exchange Bureau, for many years. SGK attorney Eric Springer currently serves as a Board Member.

Matt Jarrell Elected to Childcare Center Board

SGK attorney Matt Jarrell was recently elected to the Board of Directors of Riverview Children's Center (RCC), a nonprofit childcare center and private school in Verona. RCC provides a unique interweaving of education and childcare in the context of safe, nurturing, and child-oriented environment. The facility adheres to standards far above those mandated by state licensing agencies and boasts low staff-child ratios, high staff qualifications, staff longevity and careful attention to curriculum planning and program innovation.

Serving as Counsel for Emerging Payment Solutions Company

Bob Bashaw has represented I4 Commerce Inc. for the past four years since its spin-out from a major telecommunications company and is currently serving as its General Counsel. I4 Commerce develops and operates technology and processes related to the Bill Me Later Payment System, an innovative new payment system designed for the rapidly growing market of web and catalog based sales. Mr. Bashaw has provided legal counsel with respect to a broad range of issues that confront technology and emerging companies, including contract negotiation with merchants, vendors and strategic partners and various incentive compensation, employment, intellectual property and corporate governance issues. He also has represented the Company in connection with four rounds of venture capital financing totaling over \$48 million.

NEW ATTORNEYS

Holly S. McCann

The firm is pleased to announce that Holly S. McCann has joined the firm as a member of the Corporate Services Group. Her practice focuses on the area of corporate, partnership and individual business and tax law, especially relating to small and medium-sized businesses. In addition, Ms. McCann's practice concentrates on issues relating to the taxation and regulation of nonprofit corporations. She also has experience dealing with

the tax and related issues surrounding the formation of captive insurance companies. Ms. McCann received her undergraduate degree in 1986 from Edinboro University of Pennsylvania and her law degree from Duquesne University in 1994.

Nicole L. Mangino

The firm is pleased to announce that Nicole L. Mangino has joined the firm as an associate in the Litigation Services Group. She comes to the firm from a Pittsburgh litigation firm specializing in insurance coverage, bad faith, extra-contractual insurance disputes, and fidelity and surety law. Ms. Mangino received her undergraduate degree in 1999 from the University of Pennsylvania and earned her law degree from the University of Pittsburgh School of Law in 2002 while completing course and practicum work towards a Master's Degree in Bioethics. Her practice is concentrated in the areas of commercial litigation, employment and civil rights litigation, insurance coverage and bad faith insurance practices, professional/director and officer liability, fidelity and surety and family law.

EDWARD G. RICE REJOINS SHERRARD, GERMAN & KELLY, P.C.

Attorney Edward G. Rice has rejoined the Pittsburgh law firm of Sherrard, German & Kelly, P.C., as a Director. He was with the firm from 1990 to 1998 and for the last six years had been Associate General Counsel for Buffalo, N.Y.-based M&T Bank.

As a member of SGK's Financial Services Group, Mr. Rice's practice focuses on banking, real estate, contracts and general business law.

He holds a B.S. degree in industrial engineering from the Pennsylvania State University and a J.D. degree from the Duquesne University Law School. Mr. Rice is admitted to the Bar in Pennsylvania and New York and is a member of the Allegheny County, American, and Erie County (N.Y.) bar associations.