

FIRE AT-WILL:
EMPLOYEE TERMINATIONS IN PENNSYLVANIA

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I. AT-WILL BASICS

The employment at-will doctrine, in its most basic form, provides that an employer may terminate an employee at its will, and an employee may terminate his or her employment at its will with no legal recourse for the non-terminating party. Absent contractual or statutory restriction, either the employer or the employee may terminate the employment relationship for good reason, bad reason, or no reason at all. *See Yetter v. Ward Trucking Corp.*, 585 A.2d 1022, 1025 (Pa. Super.), *allocatur denied*, 600 A.2d 539 (Pa. 1991); *see also Weaver v. Harpster*, 601 Pa. 488, 975 A.2d 555, 562 (2009) (“In Pennsylvania, absent a statutory or contractual provision to the contrary, either party may terminate an employment relationship for any or no reason. . . . [A]s a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship.”)

As a general rule, an at-will employee has no claim against an employer for termination of employment or “wrongful termination.” *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” *Clay*, 559 A.2d at 918. Since then, the Pennsylvania Supreme Court has held fast and stated, “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. 2000).

Practice Tip: The odds favor the employer defending a wrongful termination claim.

One of the earliest pronouncements of the employment at-will doctrine in Pennsylvania comes from *Henry v. Pittsburgh & Lake Erie R.R. Co.*, 21 A. 157 (Pa. 1891) stating that, “[an employer] may discharge an employe [sic] with or without cause at pleasure, unless restrained by some contract” *Id.* at 157. This statement is true today, although there are exceptions to termination beyond an express contract. Well over a century after *Henry*, employers are cautious before discharging employees and must keep in mind the common law exceptions to the employment at-will doctrine and the myriad statutory exceptions restricting an employer from unencumbered termination of its employees.

Although most every case involving at-will employment assumes there is an employee -- as distinguished from an independent contractor -- there are indications that the body of law applicable to at-will employment is just as relevant to independent contractors. In *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003), Fraser was an independent contractor for Nationwide authorized to sell insurance on an exclusive basis under an agent’s agreement. *Id.* at 109. Fraser claimed he was terminated for filing complaints with the Pennsylvania Attorney General’s office regarding alleged illegal conduct of Nationwide. *Id.* Nationwide countered that Fraser was terminated because he was disloyal by offering Nationwide’s customers to competitors. *Id.* Fraser claimed wrongful termination. Nationwide succeeded on summary judgment, and the Third Circuit affirmed the dismissal of the wrongful discharge claim stating Fraser’s termination did not fall within any recognized public policy exception to the at-will

employment doctrine. *Id.* at 113. In doing so, the Third Circuit rejected Nationwide’s argument that public policy exceptions did not apply because he was an independent contractor, not an employee. Instead, the appeals court made a significant and unexplained assumption that independent contractors subject to termination at-will would be considered the same as at-will employees. The Third Circuit stated, “Because no Pennsylvania case addresses whether there are limitations on a company’s ability to terminate an independent contractor (as opposed to an employee), the District Court assumed *arguendo* that the public policy cases apply equally to independent contractors. We too proceed by so assuming without deciding the question.” *Id.* at 111. Under *Fraser*, therefore, an independent contractor will enjoy the same protections and rights as an at-will employee. *See also Spyridakis v. Riesling Group, Inc.*, 398 Fed. Appx. 793 (3d Cir. Oct. 10, 2010) (Third Circuit assumes that an independent contractor can sustain a claim for wrongful discharge without deciding the question).

Practice Tip: Employers should not assume that an independent contractor cannot sustain an action for wrongful termination. Independent contractors should not assume there is no cause of action against its contracting employer.

Also, it has been held that employment at-will is not a “property interest” protected by the 14th Amendment to the United States Constitution. *See Keefer v. Durkos*, 371 F. Supp. 2d 686, 692-93 (W.D. Pa. 2005).

For general discussions on at-will employment, see the following:

Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118 (1976)

Spierling v. First Am. Home Health Servs., Inc., 737 A.2d 1250 (Pa. Super. 1999) (Schiller, J., dissenting), *appeal denied*, 786 A.2d 989 (Pa. 2001)

Kurt H. Decker, *Pennsylvania’s Whistleblower Law’s Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 Duq. L. Rev. 723 (Spring 2000)

Amy M. Carlson, *States Are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 Duq. L. Rev. 511 (Spring 2004)

James A. Sonne, *Fired Thoreau: Conscience and At-Will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235 (2007)

Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees Who Blog?*, 9 U. Pa. J. Lab. & Emp. L. 355 (2007)

There are three primary areas of exception to the employment at-will doctrine: (1)

statutory; (2) contractual; and (3) public policy.

II. STATUTORY “EXCEPTIONS”

There are a variety of statutory “exceptions.” These are not true exceptions to the general rule of at-will employment, but legislative restrictions that prevent an employer from terminating an employee. Most provide a remedy to an employee if terminated in violation of the statute. Although not exhaustive, the following list illustrates the variety of statutory exemptions.

A. Title VII, 42 U.S.C.A. §§ 2000e-2000e-17 (West 2017): prevents adverse job action as a result of discrimination with respect to an individual’s race, color, religion, sex or national origin, or in retaliation for making such claims.

B. The Age Discrimination Employment Act of 1967, 29 U.S.C.A. §§ 621-638 (West 2017) (“**ADEA**”): prevents adverse job action on the basis of age -- individuals age 40 and older.

C. The Americans With Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-22213 (West 2017) (“**ADA**”): prevents adverse job action on the basis of disability, as defined, or one who is perceived as having a disability.

D. The Pennsylvania Human Relations Act, 43 Pa. Cons. Stat. Ann. §§ 951-963 (West 2017) (“**PHRA**”): prevents adverse job action for discrimination based upon race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability and use of guide animals, or in retaliation for making a claim. The PHRA further prevents discrimination against an employee or prospective employee based on passing a general educational development (“GED”) test as opposed to a high school diploma.

E. The Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601-2654 (West 2017) (“**FMLA**”): prevents adverse job action for taking defined leave.

F. The Employee Polygraph Protection Act, 29 U.S.C.A. §§ 2001-2010 (West 2017): prevents adverse job action for refusing a polygraph examination.

G. Genetic Information Nondiscrimination Act of 2008, 42 U.S.C.A. § 2000ff (West 2017) (“**GINA**”): effective for health insurance plans May 22, 2010 through May 21, 2010; employment provisions November 21, 2010; prevents discrimination based on genetic and certain medical information.

H. The Pennsylvania Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 2017): prevents adverse job action for *public employees only* and entities receiving public funds for reporting fraud and illegal acts. *But see* Section VI(B) below regarding broadening of definition of “employer.”

I. The Jury System Improvement Act of 1978, 28 U.S.C.A. § 1875 (West 2017); Protection of Employment of Petit and Grand Jurors, 42 Pa. Cons. Stat. Ann. § 4563 (West 2017): prevents adverse job action for serving jury duty. Employee may be reinstated, recover wages and benefits lost and attorneys' fees. The statute does not apply to "any employer in any retail or service industry employing fewer than 15 persons or any employer in any manufacturing industry employing fewer than 40 persons."

J. The Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C.A. §§ 4301-4333 (West 2017) ("**USERRA**"): prevents adverse job action of military personnel for fulfilling military duties.

K. The Criminal History Records Information Act, 18 Pa. Cons. Stat. Ann. §§ 9101-9183 (West 2017): Section 9125 governs the use of criminal records and states that felony and misdemeanor convictions may be considered by the employer only to the extent they relate to the applicant's suitability for employment in the position for which he has applied.

L. Protection of Employment of Crime Victims, Family Members of Victims and Witnesses, 18 Pa. Cons. Stat. Ann. § 4957 (West 2017) (related to the Crime Victims Act): prevents adverse job action if the employee attends court as "a victim of, or witness to, a crime or a member of such victim's family." Employee may be reinstated, recover wages and benefits lost and attorneys' fees.

M. Commercial Drivers, 75 Pa. Cons. Stat. Ann. § 1619 (West 2017): prevents adverse job action because an employee (a) refuses to operate a commercial vehicle in accordance with state safety laws, (b) has filed a complaint or instituted a proceeding relating to a violation of the state safety laws, or (c) has a "reasonable apprehension of serious injury to himself or the public due to the unsafe condition" of the vehicle or equipment. Employee may be reinstated, recover wages and benefits lost, compensatory damages and attorneys' fees.

N. The Medical Care Availability and Reduction of Error Act, 40 Pa. Cons. Stat. Ann. § 1303.308(c) (West 2017): prevents a health care worker who reports the occurrence of a serious event or incident regarding patient safety from being retaliated against for reporting the event or incident and provides the health care worker with all the protections and remedies of the Pennsylvania Whistleblower Law.

O. National Labor Relations Act, 29 U.S.C. § 151 (West 2017) ("**NLRA**"): prevents adverse job action against employees (including non-union employees) for various job related acts, such as sharing compensation information and the use of social media criticizing employer.

Practice Tip: A close examination of each statute must be made as each has its own definitions and prerequisites that will determine its applicability in any given situation.

III. CONTRACT EXCEPTIONS

A. Express Contracts

By definition, an employee at-will is not contractually bound to the employer. It follows, that if an employee has an express employment agreement for a certain term, the employee is no longer at-will and may only be discharged pursuant to the terms of the contract. *See also Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003) (public policy exception to at-will employment applies to independent contractors who may be terminated at-will as well as at-will employees).

Employment is presumptively at-will unless an employee can provide clear proof that an express contract exists for a specific term or duration of employment, or that the contract provides for discharge only for just cause or other specified reasons. *Holewinski v. Children's Hosp. of Pittsburgh*, 649 A.2d 712 (Pa. Super. 1994), *allocatur denied*, 659 A.2d 560 (Pa. 1995); *Rinehimer v. Luzerne Cty. Cmty. College*, 539 A.2d 1298 (Pa. Super.), *allocatur denied*, 555 A.2d 116 (Pa. 1988); *Schoch v. First Fid. Bancorporation*, 912 F.2d 654 (3d Cir. 1990) (employer's admitted custom of discharging employees only for "cause or overriding business considerations" did not override the presumption of at-will employment); *Edwards v. Geisinger Clinic*, 459 Fed. Appx. 125, 130 (3d Cir. 2012) (employer's recruitment statements to physician for employment for "four to six years" were too vague to establish an express contract for a definite term of four years). Although certain contract terms may be implied, the existence of the employment contract itself cannot be implied, and must be proven with evidence of a specific term of employment or cause for termination. *Rodgers v. Prudential Ins. Co. of America*, 803 F. Supp. 1024 (M.D. Pa. 1992), *aff'd*, 998 F.2d 1004 (3d Cir. 1993).

In *Scully v. US WATS, Inc.*, 238 F.3d 497 (3d Cir. 2001), an employee who had been terminated from his position as the company's president and chief operating officer before the end of his two-year employment contract and before he could exercise his stock option sued the company and three of its former officers and directors for breach of contract, conspiracy, fraudulent and negligent misrepresentation and violations of the Pennsylvania Wage Payment and Collection Law. With respect to the at-will presumption, the Third Circuit Court of Appeals stated,

Pennsylvania presumes all employment to be at-will. *See, e.g., Geary v. United States Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974); *Scullion v. EMECO Indus., Inc.*, 580 A.2d 1356, 1358 (Pa. Super. 1990). This presumption is necessary to prevent baseless assertions of oral employment contracts for a definite term. *See Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1198 (Pa. Super. 1987), *allocatur denied*, 536 A.2d 1331 (Pa. 1987). However, it is merely a presumption, and courts must be careful in protecting a litigant's right to prove that the parties intended a specific employment period. *See id.* The party attempting to overcome the presumption must show clear and precise evidence of an oral employment contract for a definite term. *See Gorwara v. AEL Indus., Inc.*, 784

F. Supp. 239, 242 (E.D. Pa. 1992); *Adams v. Budd Co.*, 583 F. Supp. 711, 713 (E.D. Pa. 1984); *Oliver Realty*, 526 A.2d at 1202. Evidence of a subjective expectation of a guaranteed employment period, based on employer practices or vague employer superlatives, is insufficient. *See Adams*, 583 F. Supp. at 713-14; *Ross v. Montour R. Co.*, 516 A.2d 29, 32 (Pa. Super. 1986), *allocatur denied*, 529 A.2d 1082 (Pa. 1987).

Scully, 238 F.3d at 505. The *Scully* court found that plaintiff proved he and his employer orally agreed to a two-year contract and, as such, employee successfully defeated the presumption of at-will employment.

In the unreported case of *Sant v Branding Brand, Inc.*, 672 WDA 2015, 2016 WL 5377939 (Pa. Super. Aug. 16, 2016), the Superior Court reversed the trial court's dismissal of plaintiff's wrongful termination claim. After working for Brinding for 14 months, most recently as the company's CFO, plaintiff confronted the company's vice president about the CEO allegedly misrepresenting the company's earnings at a Board of Director's meeting. That same day plaintiff was terminated without explanation. Although plaintiff made a breach of contract claim and argued he was not an at-will employee, the Superior Court noted there was a written contract that expressly stated the employment relationship was at-will, therefore, it was.

The *Sant* court stated, "Courts have consistently held that, under Pennsylvania law, the existence of a disclaimer expressly disavowing any intent to contract are sufficient to retain the at-will presumption." *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 943 (Pa. Super. 2011) (quoting *McGough v. Broadwing Comm., Inc.*, 177 F. Supp.2d 289 (D.N.J. 2001))." *Sant*, at *3.

Disputes also arise, especially with public employees, over whether an employee is actually subject to a contract if a probationary period is instituted by the employer. *Upper Makefield Twp. v. Pennsylvania Labor Relations Bd.*, 753 A.2d 803 (Pa. 2000) (unless the terms of police officer's probationary period specifically grant him avenues of redress, the relationship is strictly at-will and terminable by either side for the duration of the probationary period). *See also Pennsylvania State Police v. Pennsylvania Labor Relations Bd.*, 764 A.2d 92 (Pa. Commw. 2000), *aff'd*, 810 A.2d 1240 (Pa. 2002) (no unfair labor practice to unilaterally cease providing contractually required pretermination hearings for probationary troopers facing dismissal); *but cf. Gehring v. Pennsylvania Labor Relations Bd.*, 591 Pa. 574, 581 (2007).

Pennsylvania 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). Similarly, a guarantee of employment for life is seldom enforceable. *Halpin v. LaSalle Univ.*, 639 A.2d 37 (Pa. Super. 1994), *allocatur denied*, 668 A.2d 1133 (Pa. 1995); *see also Preobrazhenskaya v. Mercy Hall Infirmary*, No. CIV.A.02-3190, 2003 WL 21877711, at *3 (3d Cir. July 30, 2003), *cert. denied*, 540 U.S. 1150 (2004) (an oral promise from an employer that employee could remain working "as long as her performance was satisfactory" was too vague to create employment for a term); *Engstrom v. John Nuveen & Co., Inc.*, 668 F. Supp. 953 (E.D. Pa. 1987) (statement by employer that employment would continue until employee's "voluntary retirement" too vague and conclusory to overcome at-will presumption); *Veno v. Meredith*, 515 A.2d 571, 592 (Pa. Super. 1986), *allocatur denied*,

616 A.2d 986 (Pa. 1992) (oral representation that employer expected to retire with employee and raise their children together insufficient to prove existence of contract).

Often, an employee will argue that because their salary is computed to a specific time period, a term of employment is created. This is not the case. *See Booth v. McDonnell Douglas Truck Servs., Inc.*, 585 A.2d 24 (Pa. Super.), *allocatur denied*, 597 A.2d 1150 (Pa. 1991). Moreover, an employee is not guaranteed a term of employment as a result of a promise to maintain employment if performance is good. *See McWilliams v. AT&T Info. Sys., Inc.*, 728 F. Supp. 1186 (W.D. Pa. 1990) (intention to offer specific term of employment may not be inferred from employer's statement that employee would not be terminated as long as she performed work in a satisfactory manner). *But see Steinberg v. 7-Up Bottling Co. of Philadelphia*, 636 A.2d 677 (Pa. Super. 1994) (where employer and employee agreed that employee would be hired on a trial basis, that meant a "reasonable" trial basis, and discharge after one and one-half days was not reasonable time for employee to prove he could do the job).

A written statement by an employer with respect to the length of an assignment has been held to have created an agreement for a definite duration that overcame the presumption in favor of at-will employment. *See Janis v. AMP, Inc.*, 856 A.2d 140 (Pa. Super. 2004). In *Janis*, the Dauphin County Court of Common Pleas, determined AMP, Inc.'s "summary of the policy provisions" provided to Janis during his employment was an agreement for a definite duration. The "summary of the policy provisions" stated in pertinent part,

The assignment is expected to last three years but no more than five years. Based on business needs, the employee may be returned to the United States prior to July 1995 and the company may entertain a personal request to return sooner.

Id. at 144.

After trial on the issue, the jury found in favor of plaintiff and awarded \$117,384, finding that the employee overcame the presumption of at-will employment. Defendant appealed. The Superior Court held the provision was sufficiently clear to establish that Janis' assignment was contemplated by both parties to be between three and five years and thus affirmed the jury verdict. *Id.* at 146-47.

Practice Tip: Employers are advised not to make any statements orally or in writing that can be construed as a guarantee of employment for any length of time. Such statements could be contractually binding and give an employee rights to be employed beyond what was expected or intended.

B. Employee Handbooks

To overcome the at-will presumption, "there must be either an express contract between the parties, or an implied-in-fact contract plus consideration passing from the employee to the employer from which the court can infer the parties intended to overcome the at-will presumption." *Sharp v. BW/IP Int'l, Inc.*, 991 F. Supp. 451, 459 (E.D. Pa. 1998) (citing *Anderson v. Haverford College*, 851 F. Supp. 179, 181 (E.D. Pa. 1994)).

The burden is on the employee to prove the parties intended to overcome the at-will presumption and that the parties intended to create an employment relationship different than employment at-will. See *DiBonaventura v. Consolidated Rail Corp.*, 539 A.2d 865, 867 (Pa. Super. 1988). The burden is “very great” and requires a showing of a “clear statement of an intent[] to so modify.” *Id.* at 868.

It is for the court to interpret a handbook, utilizing a reasonable person standard, to discern whether it contains evidence of the employer’s intention to be legally bound. *Anderson*, 851 F. Supp. at 181 (citing *Ruzicki v. Catholic Cemeteries, Inc.*, 610 A.2d 495, 497 (Pa. Super. 1992) (“Under the reasonable person standard, a handbook is only enforceable as a contract if a reasonable person in the same position as the employee would interpret its provisions as evidencing an intent by the employer to overcome the at-will presumption.”)); *Schoch v. First Fid. Bancorporation*, 912 F.2d 654, 660 (3d Cir. 1990) (court has duty to determine if evidence is sufficient to defeat at-will presumption).

In *Luteran v. Loral Fairchild Corp.*, 688 A.2d 211 (Pa. Super.), *allocatur denied*, 701 A.2d 578 (Pa. 1997), Luteran challenged a Court of Common Pleas determination that he was an at-will employee who was properly discharged. Luteran contended the employee handbook contained clear and unequivocal language which established he could only be fired for just cause. The handbook set forth details regarding the employer’s numerous policies and included the following provision:

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.

Id. at 213.

The *Luteran* court rejected the employee’s assertion that the provision evidenced an intent by the employer to create an implied contract whereby he could only be discharged for objective cause only. The court determined “the list of actions set forth in the handbook which call for discharge are nothing more than common sense enumerations of actions that any reasonable at-will employee would understand to call generally for discharge.” *Id.* at 215. The court stated the list was nothing more than an “aspirational statement by the employer listing actions that generally will not be tolerated” and that the list served merely an “information function.” *Id.* The court held, therefore, the provision did not create the contractual relationship so asserted by the employee.

In *Preobrazhenskaya v. Mercy Hall Infirmary*, No. CIV.A.02-3190, 2003 WL 21877711, at *3 (3d Cir. July 30, 2003), *cert. denied*, 540 U.S. 1150 (2004), the Third Circuit rejected an employee’s argument that the provisions of an employee manual stating that “permanent” employment begins after a 90-day probationary period and which provided a list of reasons why an employee may be dismissed from employment constituted a contract for employment. The Third Circuit adopted the Magistrate Judge’s finding that “in order for an employee handbook to

constitute a contract, it must contain a clear indication that the employer intends to overcome the at-will presumption” and refused to overturn the Magistrate Judge’s finding that the employee manual served an informational, rather than a contractual, purpose. *Id.*

Pennsylvania courts agree that an appropriate disclaimer is sufficient to overcome an employee’s argument that the handbook creates a contract for employment. Thus, an employer may issue statements in an employee handbook that are not contractually binding, so long as such statements are accompanied with an “appropriate, conspicuous disclaimer.” *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830, 840 (Pa. Super. 1986), *allocatur denied*, 523 A.2d 1132 (Pa. 1987); *see Scott v. Extracorporeal, Inc.*, 545 A.2d 334, 338 (Pa. Super. 1988) (“great clarity is necessary to contract away the at-will presumption”); *see also Anderson*, 851 F. Supp. at 182 (“Courts have held that provisions in employee handbooks which contain disclaimers or state there is no intent to create an employment contract are sufficient to retain the at-will presumption”); *Lynady v. Community Med. Ctr.*, 49 Pa. D.&C.4th 391 (Pa. Com. Pl. 2000) (letter notifying plaintiff of his termination along with the defendant’s human resources policy and procedure manual, from which the letter was based, did not create an implied employment contract sufficient to negate the at-will presumption). In *Ruzicki*, the court found where the handbook disclaimer stated its purpose is “not intended to give rise to any contractual obligations or to establish an exception to the employment at-will doctrine,” there was no contract sufficient to defeat the at-will presumption. *Ruzicki*, 610 A.2d at 496.

One commentator has suggested the following language as examples of handbook disclaimers sufficient to disclaim a contractual relationship between the employer and the employee and to preserve the at-will employment relationship. Such language should appear prominently in the front of the handbook:

This is not a contract of employment. Any individual may voluntarily leave employment upon proper notice, and may be terminated by the employer at any time for any reason. Any oral or written statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee. The contents of this handbook are subject to change at any time at the discretion of the employer.

-or-

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 employer 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.

Kurt H. Decker, *Handbooks and Employment Policies as Express or Implied Guarantees of Employment -- Employer Beware!*, 5 J.L. & Com. 207, 223-24 (1984); see also *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).¹

Even in the absence of an explicit statement as in *Ruzicki* or the above examples, the at-will presumption is not easily defeated. In *Rutherford v. Presbyterian Univ.*, 612 A.2d 500 (Pa. Super. 1992), the court determined a disclaimer in an employee manual was sufficient to overcome an employee's assertions that a contract for employment had been created by the employee manual. The employee manual stated the guidelines found therein were "a summary of the [Hospital Manual] and group benefits policies with insurance companies, and are not intended to be a legal contract." *Id.* The *Rutherford* court held that this disclaimer clearly indicated the employer's intent not to confer any rights upon its employees. *Id.* at 504.

The foregoing, however, does *not* stand for the proposition that an employer cannot create a legally binding contract with its employees via an employee handbook. See *Martin*, 511 A.2d at 841. The *Martin* court stated:

It is for the court to interpret the handbook to discern whether it contains evidence of the employer's intention to be legally bound and to convert an at-will employee into an employee who cannot be fired without objective just cause. A reasonable employee may be presumed to regard such handbooks as having legally binding contractual significance when the handbook, or oral representations about the handbook, in some way clearly state that it is to have such effect.

Id. at 841-42. In fact, there have been several times when courts have strayed from the narrow interpretation of the handbook language.²

In *Bauer v. Pottsville Area Emergency Med. Servs., Inc.*, 758 A.2d 1265 (Pa. Super. 2000), the Superior Court interpreted a provision in an employee handbook that stated "[a]ny employee

¹ These are two excellent sources generally for a wide variety of employment law topics.

² Be wary of the somewhat anomalous case of *Niehaus v. Delaware Valley Med. Ctr.*, 631 A.2d 1314 (Pa. Super. 1993) in which the Superior Court determined an employer, by approving an at-will employee's leave of absence in accordance with the guarantee contained in the employee handbook, impliedly agreed to rehire the employee at the end of her leave of absence for at least a reasonable period of time unless she was then unable to satisfactorily perform the duties of her employment. The following year, this holding was reversed without opinion by the Supreme Court of Pennsylvania. See *Delaware Valley Med. Ctr. v. Niehaus*, 649 A.2d 433 (Pa. 1994).

scheduled for at least 36 hours per week for a period of 90 consecutive days will be treated as a full time employee.” In addition, the handbook enumerated several benefits provided to full-time employees.

Bauer worked the requisite hours for the requisite number of days and, therefore, believed he was entitled to full-time wages, health insurance and other benefits provided to full-time employees as set forth in the handbook. The employer, however, argued that its employee handbook specifically states it is an “employer at will” and that it reserves the right to terminate employment at any time, thus the employee handbook did not create a binding contract.

The court found for Bauer and reversed the lower court determination. The court held a reasonable person in Bauer’s position “would understand that his continued performance would bear fruits of his employer’s policies.” *Id.* at 1269. The court, however, narrowed the implications of its holding by emphasizing the public policy concerning emergency medical service personnel that made this case unique. “To the extent the service provided is not fully funded by government or is created as a specific arm of a mandated public service, subject to contract or even union-negotiated agreements, there exists wide flexibility in the operative arrangement of the employment relationship.” *Id.* at 1270.

In light of *Martin* and *Bauer*, there is real a question whether an employer should be able to selectively enforce certain provisions in a handbook. For example, can an employer enforce an arbitration provision (as if it were contractually binding on both parties) but then hide behind the disclaimers and not conform to the provisions in its disciplinary policy requiring the employer to provide written warnings prior to termination or disciplinary action? What about the sexual harassment and discrimination policy that promises “a prompt and thorough investigation” when that may not, in reality, occur?

Practice Tip: Employers are advised to have qualifying language in all handbooks and statements of policy. To determine whether a contract for employment has been established by an employee handbook, a court will undertake an examination of the handbook’s language, utilizing a reasonable person standard, to determine whether the employer’s policies supplant the at-will presumption.

C. Additional Consideration Supplied by Employee

The presumption of at-will employment may be overcome by showing that the employee provided 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), *overruled on other grounds by*, *Clay v. Advanced Comp. Applications, Inc.*, 559 A.2d 917 (Pa. 1989) (a plaintiff may be able to overcome the at-will presumption when an employee affords his employer a substantial benefit other than the services for which the employee was hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform).

It is important to note, however, 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 is to be ascertained from the document itself. *Walden v. Saint Gobain Corp.*, 323 F. Supp. 2d 637, 646-47 (E.D. Pa. 2004). Therefore, even if an employee could establish that he or she provided an employer with substantial additional consideration, the unambiguous terms of a writing completely preclude an employee from establishing that the employee's or employer's conduct or statements evidence an intent to modify the at-will presumption. *Id.*

The *Darlington* court articulated the law regarding an employee providing substantial additional consideration as a means to alter the at-will presumption as follows:

The term "consideration" is not used here as it is in the usual contractual context to signify a validation device. The term is used, rather, more as an interpretation device. When "sufficient additional consideration" is present, courts infer that the parties intended the contract will not be terminable at-will. This inference may be nothing more than a legal fiction because it is possible that in a given case, the parties never truly contemplated how long the employment would last even though additional consideration is present. Even so, the at-will presumption would be overcome. On the other hand, if the parties specifically agreed that the employment would be at-will, even though additional consideration were present, we would expect a court to construe the contract according to the parties' stated intention and hold it to be at-will. Thus, we start with the usual at-will presumption which, let us say, has not been overcome by evidence of a contract for a term or for a reasonable length of time. Then, if sufficient additional consideration is present, the law presumes this to be sufficient to rebut the at-will presumption. Such a contract could not be rightfully terminated at-will but would continue for a reasonable length of time. . . . However, the presumption created by the additional consideration could itself be rebutted by evidence that the parties specifically contracted for employment at-will.

Id. at 314-15.

The additional consideration given to the employer must be substantial. "The at-will presumption is not overcome every time a worker sacrifices theoretical rights and privileges." *Scott v. Extracorporeal, Inc.*, 545 A.2d at 339; see *Luteran v. Loral Fairchild Corp.*, 688 A.2d 211, 217 (Pa. Super.), *allocatur denied*, 701 A.2d 578 (Pa. 1997) (an employee who agreed to a confidentiality clause, a non-competition clause and a clause giving the employer the right to any inventions employee made or conceived was "so minimal" that in no sense could it be said that the agreement rose to the level of additional consideration); *Scullion v. Emeco Indus., Inc.*, 580 A.2d 1356, 1358 (Pa. Super. 1990), *allocatur denied*, 592 A.2d 45 (Pa. 1991) (a party must provide additional consideration apart from the detriments "commensurate with those incurred by all manner of professionals" in order to rebut the at-will presumption). *But see Bravman v.*

Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir. 1977) (appellate court held that jury could have found additional consideration given by a furniture manufacturer's representative who gave up representing all other manufacturers and turned down other opportunities to represent other manufacturers, hired an associate at his own expense, guaranteed the creditworthiness of many of his accounts and prior to his employment had been able to offer his customers a full line of furniture, but had to forego that luxury when he went to work for present employer).

Ordinarily, the determination of whether factors constitute sufficient consideration to overcome the at-will presumption is a jury question. *See Permenter*, 38 F. Supp. 2d at 379; *Scullion* at 298, 580 A.2d 1358 ("It is a question of fact whether, in a given case, an employee is given additional consideration sufficient to rebut the at-will presumption"). However, a court may rule on the issue when the "evidence is so clear that no reasonable person would determine the issue before the court in any way but one." *Permenter*, 38 F. Supp. 2d at 379.

If sufficient additional consideration is found to exist to create an implied contract, the employee may not be fired for the term of the agreement absent just cause. Or, if the agreement contains no specific term of employment, the fact finder may impose a reasonable time period during which the employee may not be fired absent just cause. *Curran v. Children's Serv. Ctr. of Wyoming Cty, Inc.*, 578 A.2d 8, 11 (Pa. Super.), *allocatur denied*, 585 A.2d 468 (Pa. 1990); *Marsh v. Boyle*, 530 A.2d 491, 493 (Pa. Super. 1987) (when the exact period for which the parties intended to contract is unable to be determined, an agreement for a reasonable time will be inferred). Moreover, the "reasonable period" in an implied contract situation should be commensurate with the hardship incurred or the benefit conferred by the employee. *Id.*

In *Curran v. Children's Serv. Ctr. of Wyoming Cty, Inc.*, Curran asserted an implied contract of employment was created because he had given additional consideration to his employer by remaining in his position without a pay raise for two years and by obtaining state certification as a licensed psychologist. 585 A.2d at 11. The court, however, disagreed. The court found no additional consideration that would prevent Curran from being subject to termination at-will where "it was appellant's decision to continue working in a temporary status without an increase in salary . . . [s]imilarly, appellant was aware that licensing by the Commonwealth of Pennsylvania was a condition of employment." *Id.* at 12.

In *Cashdollar v. Mercy Hosp. of Pittsburgh*, 595 A.2d 70 (Pa. Super. 1991), the court upheld a jury verdict in favor of the plaintiff on a claim of breach of implied contract. After much persuasion by Mercy Hospital of Pittsburgh, Cashdollar left his job as vice-president of human resources at a hospital in Fairfax, Virginia where he had worked for over four years, for a similar position at Mercy Hospital in Pittsburgh, Pennsylvania. Mercy Hospital induced Cashdollar to leave his job with promises of future opportunity. Sixteen days after he began his employment, however, Cashdollar was fired. The jury found an implied contract was created and held that the hospital breached its contractual obligations. The jury also found additional consideration existed in this instance because the employee conferred a substantial benefit on the employer other than what the position would normally require. Resigning from a secure, high-paying job, selling his house and relocating to Pittsburgh with his pregnant wife and two year old son were determined to be sufficient evidence that an implied contract for employment existed between Cashdollar and Mercy Hospital. *See id.* at 73-74.

Similarly in *News Printing Co., Inc. v. Roundy*, 597 A.2d 662, 665 (Pa. Super. 1991), the Superior Court held that by quitting his prior job, rejecting another job offer, selling his Massachusetts house and purchasing a home in Pennsylvania the plaintiff had provided additional consideration sufficient to rebut the at-will presumption and create an implied contract for a reasonable period of time.

In *Wakeley v. M.J. Brunner*, No. 392 WDA 2015, 2016 WL 157997 (Pa. Super. April 19, 2016) plaintiff was made an offer of employment at a Pittsburgh company, that was rescinded less than a week later. That same company then offered plaintiff another position that she accepted. She relocated her family from Dallas and started work, only to be terminated a short time later. The Superior Court held that plaintiff had sufficiently pled “additional consideration” so as to defeat the at-will presumption, although she lost the case because she had executed a confirmation of employment that specifically noted her employment’s at-will status.

In *Jones v. Flaster Greenberg*, No. Civ.A. 13-2771, 2013 WL 6846916 (E.D. Pa. Dec. 30, 2013) a former associate attorney sued the law firm after she was terminated for, *inter alia*, breach of implied contract. The District Court denied Defendant’s motion to dismiss the complaint on the grounds that plaintiff had, in fact, demonstrated she had provided additional consideration. In so holding, the court found that in order to accept Flaster’s job offer, Jones closed her successful law practice and moved 765 miles across the country to Philadelphia, where she had no friends or family and was not admitted to the bar.

In *Walsh v. Alarm Security Group*, 230 F. Supp. 2d 623 (E.D. Pa. 2002), *vacated in part*, 2004 WL 605427 (3d Cir. Mar. 24, 2004), the Eastern District of Pennsylvania determined evidence existed on the record sufficient for a jury to find that Walsh provided additional consideration to Alarm Security Group and Alarm Security Group knew that Walsh would suffer great hardship and loss by its failure to employ him. The record indicated that Walsh gave up a year-end bonus worth approximately \$20,000, moved his wife and two youngest children from California to Philadelphia and was forced to cash out certain stock options at a time which was less than advantageous, all for a promise of employment which never came to fruition. The court held a jury could “conceivably find this to be sufficient additional consideration to support an implied-in-fact employment contract.” *Id.* at 629.

In *Zysk v. FFE Minerals USA, Inc.*, 225 F. Supp. 2d 482 (E.D. Pa. 2001), plaintiff alleged a breach of an implied employment contract in violation of Pennsylvania common law based upon his discharge. Although plaintiff did not dispute he was an at-will employee of defendant, plaintiff claimed he had provided additional consideration, which created an implied contract for employment for a reasonable period of years, by relocating himself and his family across the country after he was induced to leave another job. The Eastern District of Pennsylvania determined as a matter of law, however, even assuming this case was one of the “rare instances” in which an implied-in-fact contract for a reasonable period of time was created, plaintiff’s two-plus years of employment with defendant more than fulfilled the “reasonable period.” *Id.* at 502.

Pennsylvania courts will not recognize an implied contract of employment for an unlimited period of time. Rather, the implied contract will be recognized for a reasonable period of time. In *Veno v. Meredith*, 515 A.2d 571, 580 n. 4 (Pa. Super. 1986), the court held, “The length of time during which it would be unreasonable to terminate, without just cause, an

employee who has given additional consideration should be commensurate with the hardship the employee has endured or the benefit he has bestowed.” *Veno*, 515 A.2d at 580. In *Veno*, the plaintiff argued he had given his employer sufficient additional consideration to create an implied contract of employment. He also stated he could never be fired except for “just cause,” because he gave up another job and moved from New Jersey to Pennsylvania to accept a job with the defendant and refused other jobs over the years. *Id.* at 579-80. The Superior Court disagreed, and determined that, since the Plaintiff had been employed for eight years, “the ‘reasonable length of time’ . . . has surely passed based on the consideration given.” *Id.* at 580 n. 4.

The Eastern District of Pennsylvania rejected a former employee’s argument that signing a restrictive covenant at the outset of the employment relationship provided additional consideration and thus altered the employment at-will relationship to one for employment for a reasonable time. *Shriver v. Cichelli*, No. CIV.A.92-0094, 1992 WL 350226, at *1 (E.D. Pa. Nov. 19, 1992). The court stated, “as long as the restrictive covenant is an auxiliary part of the taking of employment and not a later attempt to impose additional restrictions on an unsuspecting employee, a contract of employment containing such a covenant is supported by valid consideration and is therefore enforceable.” *Id.* at *4. Thus, based upon the well-settled law of this Commonwealth that “no additional consideration or change in status is required to validate a restrictive covenant contained in an initial employment agreement,” the court rejected the former employee’s argument and granted the employer’s motion for summary judgment. *Id.*

In *Preobrazhenskaya v. Mercy Hall Infirmary*, No. CIV.A.02-3190, 2003 WL 21877711, at *3 (3d Cir. July 30, 2003), the Third Circuit rejected an employee’s argument that she had provided sufficient additional consideration to overcome the at-will presumption when she left her previous employment to accept a new position. The Third Circuit stated, “[l]eaving one job to take another has been held to be simply a reasoned choice of a new career goal rather than additional consideration implying an employment contract.” *Id.* at *4 (citing *Darlington*, 504 A.2d at 315).

Practice Tip: Plaintiffs’ attorneys need to think twice before employing an “additional consideration” strategy. Unadvised, it is natural for potential plaintiffs to believe they have provided value to the employer over and above what was expected.

D. Specific Intent to Harm

Pennsylvania state and federal courts have indicated there is no viable claim for wrongful discharge using a “specific intent to harm” exception, which implies that the employer discharged the employee in bad faith and with the intent to harm him. *See Donahue v. Federal Express Corp.*, 753 A.2d 238 (Pa. Super. 2000); *Brosso v. Devices for Vascular Intervention, Inc.*, 879 F. Supp. 473 (E.D. Pa.), *aff’d*, 74 F.3d 1225 (3d Cir. 1995); *Asko v. Bartle*, 762 F. Supp. 1229 (E.D. Pa. 1991); *Jacques v. AKZO Int’l Salt, Inc.*, 619 A.2d 748, 753 (Pa. Super. 1993), *abrogated on other grounds as recognized in Kroptavich v. Pennsylvania Power and Light Co.*, 795 A.2d 1048, 1055 (Pa. Super. 2002); *Yetter v. Ward Trucking Corp.*, 585 A.2d 1022 (Pa. Super.), *allocatur denied*, 600 A.2d 539 (Pa. 1991); *Clay*, 559 A.2d at 918. Despite occasional dicta that such an exception may exist, *Tourville v. Inter-Ocean Ins. Co.*, 508 A.2d 1263 (Pa. Super. 1984), *allocatur denied*, 521 A.2d 933 (Pa. 1986), such challenges have since

been rejected. *Whitney v. Xerox Corp.*, No. 94-CV-3852, 1994 WL 613630, at *4 (E.D. Pa. Oct. 31, 1994) (“Previously, the courts applying Pennsylvania law had assumed the existence of a specific intent to harm exception to the employment at will doctrine . . . [h]owever, since Clay and Paul, there is serious doubt about whether any such exception exists.”) (internal citations omitted); see also *Booth v. McDonnell Douglas Truck Servs., Inc.*, 585 A.2d 24 (Pa. Super.), *allocatur denied*, 597 A.2d 1150 (Pa. 1991) (suggested in dicta that a specific intent to harm might make out a violation of the public policy tort, although the court found no such cause of action); *Castro v. Air-Shields, Inc.*, Bucks Cty. Ct. Com. Pl., No. 96-05488-16-2 (Aug. 17, 2004) (unpublished) (no cause of action for wrongful termination based on specific intent to harm).

E. Implied Covenant of Good Faith and Fair Dealing

Pennsylvania appellate courts have consistently held there is no implied duty of good faith and fair dealing that applies to termination of a pure at-will employment relationship. See *Donahue v. Federal Express Corp.*, 753 A.2d 238 (Pa. Super. 2000). Indeed, the Supreme Court held “an at-will employee has no cause of action against his employer for termination of the at-will relationship except where that termination threatens clear mandates of public policy.” *Pipkin v. Pennsylvania State Police*, 693 A.2d 190, 191 (Pa. 1997); see also *Werner v. Zazyczny*, 681 A.2d 1331, 1335 (Pa. 1996); *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990). In fact, a significant number of federal cases have squarely held that “Pennsylvania recognizes no action for wrongful discharge based upon breach of the duty of good faith and fair dealing in an at-will employment contract.” *McDaniel v. American Red Cross*, 58 F. Supp. 2d 628, 633-34 (W.D. Pa. 1999) (citing *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910, 913 (3d Cir. 1982)); see also *Fucci v. Graduate Hosp.*, 969 F. Supp. 310, 320 (E.D. Pa. 1997); *Green v. Bryant*, 887 F. Supp. 798, 803 (E.D. Pa. 1995); *Cox v. Vogel*, No. CIV.A.97-3906, 1998 WL 438492, at *8 (E.D. Pa. July 29, 1998); *Buckwalter v. ICI Explosives USA, Inc.*, No. CIV.A.95-4795, 1998 WL 54355, at *16 (E.D. Pa. Jan. 8, 1998), *aff’d*, 175 F.3d 1010 (3d Cir. 1999); *Radicke v. Fenton*, No. CIV.A.00-2346, 2001 WL 229936 (E.D. Pa. Mar. 8, 2001) (no duty of good faith and fair dealing exists in an at-will employment contract).

The *McDaniel* court further held that “although the duty of good faith and fair dealing exists in an at-will employment contract, there is no bad faith when an employer discharges an at-will employee for good reason, bad reason, or no reason at all, as long as no statute or public policy is implicated.” *McDaniel*, 58 F. Supp. 2d at 634 (citations omitted).

F. Tortious Interference with At-Will Employment

Quite often, in practice, there is a cause of action alleging tortious interference with an employee’s at-will relationship with his or her current or former employer. Commonly this is a claim brought when an employee has left his employer and moved to a competitor, and when there is no apparent employment contract containing a non-competition, non-solicitation or confidentiality provision, allowing a tortious interference with contract claim. It is important, therefore, to determine the nature of the relationship between the employee and employer, that is, whether the employment relationship is contractual or at-will, as this determination will subject an employee to different claims and affect an employer’s defenses.

Although many courts and practitioners believe there can be no tortious interference with

an employee's at-will employment relationship, this is not entirely accurate. It is true the claims are difficult, as a practical matter, to prove, but legally, the claim exists. First, however, we examine the cases that hold against the cause the action.

In *Hennessey v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998), the Superior Court held that under Pennsylvania law, “an action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship whether at-will or not, not a presently existing at-will employment relationship.” *Id.* at 1279; *see also ZA Consulting, LLC v. Wittman*, No. CIV.A.01-3941, 2002 WL 31898369, at *1 (Pa. Com. Pl. Dec. 11, 2002) (as a matter of law, no cause of action exists for tortious interference with existing contractual relations with respect to an existing at-will employment relationship); *Reading Radio, Inc., t/d/b/a WAGO Radio v. Fink*, 833 A.2d 199 (Pa. Super. 2003), *appeal denied*, 847 A.2d 1287 (Pa. 2004) (at-will employment status will not bar former employer from bringing tort claim of interference with a covenant not to compete against former employee and new employer).

In *Buckwalter v. Parker*, No. CIV.A.96-4795, 1998 WL 195701, at *4 (E.D. Pa. March 25, 1998), *aff'd*, 175 F.3d 1010 (3d Cir. 1999), this Court, in light of *Hennessey*, reconsidered a previous opinion it had rendered denying defendant's motion for summary judgment in which defendant had asserted that he could not be liable for interfering with plaintiff's employment relationship because plaintiff was an at-will employee. In reconsidering its prior opinion this Court stated:

We believe that Hennessey accurately predicts how the Pennsylvania Supreme Court would rule on this matter. As the Third Circuit has explained, “[i]n adjudicating a case under state law, we are not free to impose our own view of what state law should be; rather, we are to apply state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before us. In the absence of guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule. . . . Thus, considering the absence of any appellate case-law stating otherwise, we predict that the rule set out in Hennessey would be adopted by the Pennsylvania Supreme Court.

Id. (emphasis added). Thus, this Court concluded, as a matter of law, plaintiff could not sue defendant for intentionally interfering with his employment because plaintiff's employment was an existing at-will employment relationship. *Id.*

The distinction made by *Hennessey* and its progeny is “prospective” employment -- when there can be interference -- versus “existing” employment, when there cannot.

The *Hennessey* line of cases is contradicted in part, however, by at least one Pennsylvania Supreme Court case (note *Hennessey* was a Superior Court opinion) that allowed the claim of

tortious interference with an existing at-will employee.

In *Morgan's Home Equip. Corp. v. Martucci*, 136 A.2d 838 (Pa. 1957), an employer brought suit in equity against former employees to enforce a restrictive covenant in the former employees' employment contracts. Suit was also brought against the former employees' new employer for wrongfully inducing the former employees to terminate their at-will employment. The Supreme Court affirmed the chancellor's determination that the new employer engaged in the systematic enticement of the employees for the purpose of disrupting the former employer's business and to obtain the former employer's confidential information. *Id.* at 848.

The Supreme Court held two circumstances exist for a viable cause of action for tortious interference with an existing at-will employment relationship and stated:

The systematic inducing of employees to leave their present employment and take work with another is unlawful *when the purpose of such enticement is to cripple and destroy an integral part of a competitive business organization rather than to obtain the services of particularly gifted or skilled employees.* So also, *when the inducement is made for the purpose of having the employees commit wrongs, such as disclosing their former employer's trade secrets or enticing away his customers,* the injured employer is entitled to protection.

Id. at 847 (emphasis added).

Also, in *Keefer v. Durkos*, 371 F. Supp. 2d 686 (W.D. Pa. 2005), ruling on a motion to dismiss, the District Court determined plaintiff sufficiently pled tortious interference against the Defendants (the school directors in their individual capacities) with her existing at-will employment relationship. The *Keefer* Court stated that the Pennsylvania Supreme Court "adopted" the Restatement (Second) of Torts § 766 in its opinion, *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *Keefer* at 698. The *Keefer* Court then reasoned, "Relying upon the guidance provided by Comment (g) [to the Restatement (Second) of Torts § 766], it is clear that § 766 contemplates that at-will contracts can be the subject of the tort of tortious interference with a contractual relationship." *Id.* at 699.

Practice Tip: Tortious interference claims depend upon (1) at-will status; (2) prospective or existing employment; and (3) whether there was a legitimate purpose to the interference or the intent was to cripple and destroy the competitor's business, or the inducement was made for the purpose of having the employees commit wrongs, such as disclosing their former employer's trade secrets or enticing away his customers.

IV. PUBLIC POLICY EXCEPTIONS

The public policy exception is currently the most controversial issue of the at-will

employment doctrine. Pennsylvania courts espouse extreme reluctance to expand the list of public policy exceptions, yet, in the last decade, the list of exceptions has continued to grow, sometimes in surprising ways.

As a general rule, an at-will employee has no claim against an employer for termination of employment or “wrongful termination.” *Paul v. Lankenau Hosp.*, 569 A.2d 346, 348 (Pa. 1990); *Clay v. Advanced Computer Applications, Inc.*, 559 A.2d 917, 918 (Pa. 1989); *Geary v. United States Steel Corp.*, 319 A.2d 174 (Pa. 1974). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” *Clay*, 559 A.2d at 918. In *Cisco v. United Parcel Serv., Inc.*, 476 A.2d 1340, 1343 (Pa. Super. 1984), the Pennsylvania Superior Court noted:

The sources of public policy [which may limit the employer’s right of discharge] include legislation; administrative rules, regulation, or decision; and judicial decision. In certain instances, a professional code of ethics may contain an expression of public policy. . . . Absent legislation the judiciary must define the cause of action in case-by-case determinations.

Id. at 1343, *abrogation recognized in Krajsa v. Key punch, Inc.*, 622 A.2d 355, 359 (Pa. Super. 1993) (“[O]ur Supreme Court’s decisions in *Clay* and *Paul*, preclude us from undertaking the task of creating and forming public policy with respect to wrongful discharge on our own initiative. Instead, in order to find a cause of action for wrongful discharge in at-will employment relationships, the discharge must threaten or violate a clear mandate of public policy.”).

In *McLaughlin v. GastroIntestinal Specialists*, 750 A.2d 283 (Pa. 2000) the Pennsylvania Supreme Court held that for the public policy exception to apply, the alleged violation of public policy must be of Pennsylvania public policy, not solely an alleged violation of federal law (OSHA). “A plaintiff must do more than show a possible violation of a federal statute . . . [and] must allege that some *public* policy of *this* Commonwealth is implicated, undermined, or violated.” *Id.* at 288. “[W]e declare the public policy of this Commonwealth by examining the precedent within Pennsylvania, looking to our own Constitution, court decisions and statutes promulgated by our legislature.” *Id.*; *see also Kelly v. Retirement Pension Plan For Certain Home Office*, No. CIV.A.02-3185, 2003 WL 22070527 (3d Cir. Sept. 5, 2003) (citing *McLaughlin*; no violation of public policy when employee terminated after objecting to marketing methods arguably in violation of federal Securities and Exchange Act of 1984); *Castro v. Air-Shield, Inc.*, 78 Bucks Co. L. Rep. 94, 101 (Aug. 20, 2004) (court found no violation of Pennsylvania public policy when former employee cited FDA regulations, stating instead, Pennsylvania public policy is determined by examining Pennsylvania’s Constitution, court decisions and statutes).

In *Wetherhold v. Radioshack Corp.*, 339 F. Supp. 2d 670 (E.D. Pa. 2004), plaintiff, an at-will employee, alleged that he was terminated in retaliation for reporting black mold exposure to OSHA. Defendant filed a motion to dismiss arguing there was no Pennsylvania public policy implicated, therefore, the termination was proper. The Court denied the motion to dismiss finding that, although plaintiff cited to federal OSHA regulations (that prohibited termination for

making a complaint) and that could not be used to discern a violation of Pennsylvania public policy, plaintiff also cited to a section of the Pennsylvania Worker and Community Right-to-Know Act, 35 Pa. Cons. Stat. Ann. § 7301 (West 2017) (“PWCRA”). Pursuant to the PWCRA, it is “to be read in conjunction with” OSHA, therefore determined the court, plaintiff had set forth a viable cause of action for retaliation.

Practice Tip: Employees alleging wrongful termination must be certain to identify Pennsylvania public policy, not a violation of federal law or policy.

A claim for wrongful discharge in violation of public policy is not allowed when there is a statutory remedy available. For example, the Pennsylvania Human Relations Act prohibits race discrimination, among other types of discrimination. An employee, therefore, may not bring a wrongful termination action based upon the PHRA, because a statutory remedy exists. *See Cruz v. Pennridge Reg’l Police Dept.*, No. CIV.A.02-4372, 2003 WL 21742015 (E.D. Pa. July 29, 2003). The Third Circuit has interpreted Pennsylvania law to hold that a common law wrongful discharge claim must fail where there is a statutory remedy available. *See Wolk v. Saks Fifth Ave. Inc.*, 728 F.2d 221, 223 (3d Cir.1984) (citing *Becker v. Interstate Props.*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978), *abrogated on other grounds by, Robinson v. Jiffy Executive Limousine Co.*, 4 F.3d 237 (3d Cir. 1993)); *Raykhman v. Digital Elevator Co.*, No. CIV.A.93-1347, 1993 WL 370988, at *7 (E.D. Pa. Aug. 30, 1993) (holding no common law wrongful termination claim where specific statutory remedies are available under Wage Payment and Collection Law and Minimum Wage Act). This is not always adhered to, however. *See, e.g., Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978) (termination for serving jury duty public policy violation, but statute itself has prohibition against termination); *Kroen v. Bedway Sec. Agency, Inc.*, 633 A.2d 628 (Pa. Super. 1993) (termination for refusal to take polygraph test public policy violation, but statute has prohibition against termination); *Nazar v. Clark Distrib. Sys, Inc.*, 46 Pa. D. & C.4th 28 (Pa. Com. Pl. 2000) (termination for complaining under PHRA public policy violation, but statute itself has anti-retaliation protection). *But cf. Weaver v. Harpster*, 975 A.2d 555 (Pa. 2009), *infra* at Section V.

Using *Geary*, *Clay*, *Paul*, and *Cisco* as a foundation, the courts have established a body of cases that illustrate when a public policy exception will be found.

A. Workers’ Compensation Act: In *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998), the Pennsylvania Supreme Court held that discharging an employee in retaliation for filing a workers’ compensation claim was a violation of public policy. *But see Shafinsky v. Bell Atlantic, Inc.*, No. CIV.A.01-3044, 2002 WL 31513551, at *1 (E.D. Pa. Nov. 5, 2002) (plaintiff’s claim of termination in retaliation for filing a workers’ compensation claim barred because such a cause of action is limited to at-will employees and plaintiff was employed under a collective bargaining agreement); *McNichols v. Commonwealth, Dept. of Transp.*, 804 A.2d 1264 (Pa. Commw. 2002) (claim of wrongful discharge in retaliation for filing a workers’ compensation claim barred by doctrine of sovereign immunity).

Guided by *Shick*, the Supreme Court has expanded the public policy exception to the at-will doctrine in the context of wrongful discharge in retaliation for filing workers’ compensation claims. In *Rothrock v. Rothrock Motor Sales, Inc.*, 883 A.2d 511 (Pa. 2005), the Supreme Court expanded upon *Shick* and held a supervisory employee terminated for failing to dissuade a

subordinate employee from seeking workers' compensation benefits had a cognizable cause of action for wrongful discharge against his employer.

B. Unemployment Compensation Act: The Superior Court held in *Highhouse v. Avery Transp.*, 660 A.2d 1374 (Pa. Super. 1995) and *Raykovitz v. K Mart Corp.*, 665 A.2d 833 (Pa. Super. 1995) that discharging an employee in retaliation for filing an unemployment compensation claim was a violation of public policy.

C. Occupational Safety and Health Act ("OSHA"): In *McLaughlin v. GastroIntestinal Specialists*, 750 A.2d 283 (Pa. 2000) the Pennsylvania Supreme Court held that discharging an employee in retaliation for reporting a safety violation of OSHA was *not* a violation of public policy. *See also Holmes v. Schneider Power Corp.*, 628 F. Supp. 937 (W.D. Pa.), *aff'd*, 806 F.2d 252 (3d Cir. 1986). *But see Sorge v. Wright's Knitwear Corp.*, 832 F. Supp. 118 (E.D. Pa. 1993) (discharging employee in retaliation for reporting to OSHA was a violation of public policy); *Wetherhold v. Radioshack Corp.*, 339 F. Supp. 2d 670 (E.D. Pa. 2004) (employee survived motion to dismiss complaint alleging termination in retaliation for reporting safety hazard to OSHA and Pennsylvania Worker and Community Right-to-Know Act).

D. Sarbanes-Oxley Act: In *Paraxel Int'l Corp. v. Feliciano*, No. 04-CV-3798, 2008 U.S. Dist. LEXIS 98195, at *1 (E.D. Pa. Dec. 3, 2008), the United States District Court for the Eastern District of Pennsylvania held an employer's retaliation against its employee in violation of the Sarbanes Oxley Act of 2002, 18 U.S.C. 1514A (West 2017), for termination of the employee for his refusal to engage in illegal conduct and reporting of his supervisor's allegedly illegal conduct was a violation of Pennsylvania public policy.

E. Jury Duty: In *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. 1978) the Pennsylvania Superior Court held that discharging an employee for attending jury duty was a violation of public policy. There is also a statutory prohibition preventing the termination of an employee based upon the employee's attendance or scheduled attendance for jury duty. Protection of Employment of Petit and Grand Jurors, 42 Pa. Cons. Stat. Ann. § 4563 (West 2017); *see also* 28 U.S.C.A. § 1875(a) (West 2017).

In *Sheeran v. Kubert, Himmelstein & Associates, P.C. et al.*, Nov. Term 2001, No. 003169 (Pa. Com. Pl. Oct. 27, 2003), an unpublished opinion in the Philadelphia Court of Common Pleas, the Honorable Barry F. Feudal, specially presiding, denied defendants' motion for summary judgment seeking to dismiss plaintiff's claim for wrongful termination arising from plaintiff's termination for jury service.

According to defendants, amendments to the Pennsylvania statute governing juries and jurors, 42 Pa. Cons. Stat. Ann. §§ 4501-4584 (West 2017), made by the legislature in 1992 were intended to and did in fact exclude employers in the service industry with fewer than fifteen employees from the prohibition against termination or other adverse action against employees for jury service. *See* 42 Pa. Cons. Stat. Ann. § 4563(d) (West 2017). Moreover, defendants' argued that plaintiff had a statutory remedy found in section 4563(e), which permits any such employee to be excused from jury service upon request. According to defendants, despite being encouraged to do so by defendants, plaintiff failed to avail herself of her statutory remedy to be

excused from jury service and therefore was unable to then claim such a remedy was inadequate and that she is instead protected by a public policy that excluded those in her class.

Judge Feudal, however, disagreed and determined the “mischief” created by such an interpretation is discriminatory, contrary to the other provisions of the statute and would present an “administrative nightmare” for judges and jury administrators. Judge Feudal, instead, determined the legislature’s intent was to exclude employers in defendant’s class from the criminal summary offense and civil penalties set forth in the statute and not to eliminate an employee’s right to bring a claim for wrongful discharge when terminated for serving on a jury. Judge Feudal therefore determined that the statutory provisions upon which defendant had relied were not the exclusive remedy to an employee terminated for serving on a jury and accordingly denied defendants’ motion for summary judgment. *See Wolk v. Saks Fifth Ave. Inc.*, 728 F.2d 221, 223 (3d Cir. 1984) (a claim for wrongful discharge in violation of public policy is not allowed when there is a statutory remedy available).

F. Criminal Background History: In *Hunter v. Port Auth. of Allegheny Cty.*, 419 A.2d 631 (Pa. Super. 1980), the Pennsylvania Superior Court held that denying employment based upon prior criminal conviction not related to the position was a violation of public policy. There is also a statutory prohibition, the Criminal History Record Information Act, that permits an employer to consider felony and misdemeanor convictions only to the extent to which they relate to the applicant’s suitability for employment in the position for which he has applied. 18 Pa. Cons. Stat. Ann. §§ 9125(b) (West 2017).

G. Polygraph Test: In *Kroen v. Bedway Sec. Agency, Inc.*, 633 A.2d 628 (Pa. Super. 1993), the Pennsylvania Superior Court held that discharging an employee for refusal to take a polygraph test was a violation of public policy. There is also a statutory prohibition that prevents an employer from discharging, disciplining or discriminating in any manner against an employee or prospective employee who refuses, declines, or fails to take or submit to a lie detector test. 29 U.S.C.A. §§ 2002(3) (West 2017).

H. Pennsylvania Human Relations Act (“PHRA”): In *Nazar v. Clark Distrib. Sys. Inc.*, 46 Pa. D. & C.4th 28 (Pa. Com. Pl. 2000), the Lackawanna Court of Common Pleas held that discharging an employee for making a PHRA complaint was a violation of public policy. There is also a statutory prohibition preventing retaliation for filing a charge of discrimination pursuant to the Pennsylvania Human Relations Act. 43 Pa. Cons. Stat. Ann. § 955(b)(5)(d) (West 2017):

I. Wage Payment and Collection Law (“WPCL”): In *Fialla-Bertani v. Pennysaver Publications of Pa. Inc.*, 45 Pa. D. & C.4th 122, 2000 WL 1060662 (Pa. Com. Pl. Mar. 15, 2000), the Allegheny Court of Common Pleas held that discharging an employee for making a complaint under the WPCL was a violation of public policy.

J. Uniform Commercial Driver’s License Act (“UCDLA”): In *Cartright v. SCA Packaging North America*, No. 10187, 2007 Pa. Dist. & Cty. Dec. LEXIS 87, at *1 (Pa. Com. Pl. 2007), the Beaver County Court of Common Pleas held that the UCDLA, which prohibits discharging or discriminating against any employee who refuses to operate a commercial vehicle

not in compliance with existing safety laws, provides a public policy exception to the at-will employment doctrine.

K. Illegal/Improper Activity: There are a number of cases determining it is a violation of public policy to discharge or take job action against an employee for refusing to engage in illegal activity or to testify against the employer who engaged in illegal activity. *See Perry v. Tioga Cty.*, 694 A.2d 1176 (Pa. Commw. 1997) (employee discharged for refusal to perform illegal activity); *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) (employee discharged for refusing to bill paralegal time as attorney's time); *Paralegal v. Lawyer*, 783 F. Supp. 230 (E.D. Pa. 1992) (employee paralegal discharged for testifying against lawyer); *Hanson v. Gichner Sys. Group, Inc.*, 831 F. Supp. 403 (M.D. Pa. 1993) (employee discharged for refusal to lie to federal investigators); *Freeman v. Mckellar*, 795 F. Supp. 733 (E.D. Pa. 1992) (criminal statutes prohibiting perjury and intimidation of witnesses provides basis for public policy exception).

There are a number of cases determining it is not a violation of public policy to discharge or take job action against an employee for refusing to engage in illegal activity or to testify against the employer who engaged in illegal activity. *See Kelly v. Retirement Pension Plan For Certain Home Office*, No. CIV.A.02-3185, 2003 WL 22070527 (3d Cir. Sept. 5, 2003) (no violation of public policy when employee terminated after objecting to marketing methods arguably in violation of federal Securities and Exchange Act of 1984); *McGonagle v. Union Fid. Corp.*, 556 A.2d 878 (Pa. Super. 1989), *allocatur denied*, 575 A.2d 115 (Pa. 1990) (not a violation of public policy to discharge general counsel for his refusal to approve mailings he believed violated the law); *Hineline v. Stroudsburg Elec. Supply Co.*, 559 A.2d 566 (Pa. Super.), *allocatur denied*, 574 A.2d 70 (Pa. 1989) (not a violation of public policy to discharge employee for disabling allegedly illegal electronic surveillance system). *But see Haddle v. Garrison*, 525 U.S. 121 (1998) (retaliation for testifying against employer at Medicare fraud trial found to be a violation of employee's civil rights under 42 U.S.C. § 1985).

L. Work Related Incidents: In an apparent effort to avoid creating an implied "good cause" standard attached to at-will termination, courts have found that most day-to-day work related incidents, that is, disputes that arise over terms and conditions of employment (work rules, company policy, etc.) do not provide a basis for a public policy exception. Two cases stray from this general rule. In *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699 (3d Cir. 1988), the Third Circuit found it a violation of public policy to discharge a waitress for refusing to serve a visibly intoxicated patron. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) the court found a violation of public policy after an employee was discharged for refusing to support company's lobbying efforts contrary to his personal beliefs.

In the following cases, the court found *no* violation of public policy. *See Mikhail v. Pennsylvania Org. for Women in Early Recovery*, 63 A.3d 313 (Pa. Super. 2013) (J. Bender dissenting) (employee discharged for insubordination for refusing to place female sex offender in therapy group with other women who were victims of sex offenders); *Davenport v. Reed*, 785 A.2d 1058 (Pa. Commw. 2001) (employee discharged for insubordination, using profane language and providing false information to his supervisor, as well as off-duty conduct including arrest for assault and disorderly conduct); *Pilkington v. CGU Ins. Co.*, No. CIV.A.00-2495, 2000 WL 33159253 (E.D. Pa. Feb. 9, 2001) (employee discharged based upon allegedly false sexual

harassment allegation); *Welch v. Maritrans Inc.*, No. CIV.A.00-2606, 2001 WL 73112 (E.D. Pa. Jan. 25, 2001) (employee alleged discharge was a result of employer allowing working conditions to become so intolerable as to force termination); *Clark v. Modern Group Ltd.*, 9 F.3d 321 (3d Cir. 1993) (employee discharged for refusal to comply with employer directive not to report reimbursed auto expenses as income); *Green v. Bryant*, 887 F. Supp. 798 (E.D. Pa. 1995) (discharged employee was a victim of spousal abuse); *Frankel v. Warwick Hotel*, 881 F. Supp. 183 (E.D. Pa. 1995) (employee discharged by this father for refusing to divorce his wife); *Brosso v. Devices for Vascular Intervention*, 879 F. Supp. 473 (E.D. Pa. 1995) (termination in retaliation for employee's failure to relinquish to employer ownership in medical device he created during the course of his employment); *Redick v. Kraft, Inc.*, 745 F. Supp. 296 (E.D. Pa. 1990) (employee immediately discharged after giving two weeks notice); *Mann v. J.E. Baker Co.*, 733 F. Supp. 885 (M.D. Pa. 1990) (employee discharged for poor performance allowed to continue after an allegedly negligent performance evaluation); *Durham v. Fleming Cos., Inc.*, 727 F. Supp. 179 (E.D. Pa. 1989), *aff'd*, 897 F.2d 521 (3d Cir. 1990) (employee discharged for communicating to warehouseman that striking workers were potentially violent); *Whelan v. CareerCom Corp.*, 711 F. Supp. 198 (M.D. Pa. 1989) (employee allegedly discharged to avoid paying him stock options and salary increase); *Reese v. Tom Hesser Chevrolet-BMW*, 604 A.2d 1072 (Pa. Super. 1992) (no violation of public policy for employer to demand that employees be financially responsible for losses on sales of vehicles due to their errors); *Beach v. Burns Int'l Security Servs.*, 593 A.2d 1285 (Pa. Super. 1991) (failure to hire employee who refused to sign an employment agreement allowing a bench trial rather than a jury trial in the event of a dispute); *Hershberger v. Jersey Shore Steel Co.*, 575 A.2d 944 (Pa. Super. 1990), *allocatur denied*, 589 A.2d 691 (Pa. 1991) (employee discharged for failing a drug test); *Scott v. Extracorporeal, Inc.*, 545 A.2d 334 (Pa. Super. 1988) (employee discharged for fighting even though employee acted in self-defense); *Martin v. Capital Cities Media, Inc.*, 511 A.2d 830 (Pa. Super. 1986), *allocatur denied*, 523 A.2d 1132 (Pa. 1987) (employee discharged for placing an advertisement in a competing newspaper); *McCartney v. Meadowview Manor, Inc.*, 508 A.2d 1254 (Pa. 1986) (employee discharged for applying for job with competitor); *Turner v. Letterkenny Fed. Credit Union*, 505 A.2d 259 (Pa. Super. 1985) (employee discharged for poor relations with employees he supervised); *Rossi v. Pennsylvania State Univ.*, 489 A.2d 828 (Pa. Super. 1985).

M. Privacy: Issues of personal privacy are among the exceptions Pennsylvania courts have yet to clearly define. See *Borse v. Pierce Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) (violation of public policy when employee discharged for refusal to consent to urinalysis and property search that constituted invasion of privacy); *Smyth v. Pillsbury*, 914 F. Supp. 97 (E.D. Pa. 1996) (no violation of public policy when employee discharged for inappropriate e-mail despite employee's reasonable expectation of privacy).

N. Free Speech: An emerging exception to the at-will doctrine is in the area of free speech, that is, whether an employer may terminate an at-will employee based upon the employee's exercise of his or her free speech rights in the workplace. In *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983), the Third Circuit held an at-will employee who was allegedly discharged for his refusal to participate in his former employer's lobbying effort and the employee's privately stated opposition to the company's political position had stated a claim for wrongful discharge under Pennsylvania law. The Third Circuit agreed and concluded "a cognizable expression of public policy may be derived in this case from either the First

Amendment of the United States Constitution or Article I, Section 7 of the Pennsylvania Constitution.” *Id.* at 899.

In *Fraser v. Nationwide Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001), *aff’d in pertinent part*, 352 F.3d 107 (3d Cir. 2003). Fraser, an insurance agent under an exclusive, terminable-at-will contract with Nationwide Insurance Company sued the company alleging he was terminated, *inter alia*, in retaliation for his First Amendment activities. Fraser alleged Nationwide had retaliated against him for his reports to Pennsylvania authorities regarding Nationwide’s alleged unlawful practices, his leadership role in the Pennsylvania chapter of the Nationwide Insurance Independent Contractors Association (“NIICA”), and his role in drafting a letter to Nationwide’s competitors regarding the potential acquisition of policyholders of the NIICA members in Pennsylvania. Relying exclusively upon *Novosel*, Fraser claimed his termination fell within a public policy exception to at-will employment based Nationwide’s violation of his free speech rights. The Eastern District of Pennsylvania, however, disagreed. The court concluded opinions by Pennsylvania courts subsequent to *Novosel* had narrowly limited *Novosel* to its facts and, therefore, determined even if Nationwide had terminated Fraser solely for these particular First Amendment activities, the court would not second guess Nationwide’s decision to exercise its right under the at-will doctrine to terminate its relationship with Fraser. *Id.* at 643.

In *Khazzaka v. University of Scranton*, No. CIV.A.01-211, 2001 WL 1262320, at *1 (M.D. Pa. Oct. 22, 2001), Khazzaka, an associate professor with the University of Scranton, claimed his termination violated public policy because it was in retaliation for his backing and approving a colleague’s discrimination complaint filed with the Pennsylvania Human Relations Commission based upon her sex and national origin. Khazzaka contended his dismissal was contrary to public policy as it violated his constitutional right to free speech. The Middle District of Pennsylvania determined, however, there was no state action alleged and therefore dismissed Khazzaka’s claim. The court did not express an opinion whether the result would have differed had the defendant been a public university or other state actor.

N. Sovereign Immunity: A public employer protected by sovereign immunity pursuant to 42 Pa. Cons. Stat. Ann. § 8522 (West 2017) cannot be held liable for a claim of wrongful discharge because the claim is not a statutorily recognized exception to sovereign immunity. *See, e.g., DeSimone v. Coatesville Area Sch. Dist.*, 248 F. Supp. 2d 387 (E.D. Pa. 2003) (citing *Demuro v. Philadelphia Housing Auth.*, No. CIV.A.98-3137, 1998 WL 962103, at *4 (E.D. Pa. Dec. 22, 1998).

Similarly, the Pennsylvania sovereign immunity statute, 1 Pa. Cons. Stat. Ann. § 2310 (West 2017), protects employees of the Commonwealth of Pennsylvania from claims for wrongful discharge. *See, e.g., Grigsby v. Kane*, 250 F. Supp. 2d 453, 457 (M.D. Pa. 2003). In *Grigsby*, former attorneys for the State of Pennsylvania’s Bureau of Professional Licensing and Occupational Affairs brought suit against bureau officials which included, *inter alia*, a state law claim for wrongful discharge. The Middle District of Pennsylvania, however, held that the wrongful discharge claim was barred by the doctrine of sovereign immunity. The court stated,

[T]he Pennsylvania sovereign immunity statute states that “the Commonwealth, and its officials acting within the scope of their duties, shall continue to enjoy sovereign and official immunity . . .

.” While it is true that Pennsylvania has waived its right to sovereign immunity with respect to certain types of claims, it has not waived its immunity with respect to claims for wrongful discharge.

Moreover, [Plaintiff] has not alleged that the defendants acted outside the scope of their employment. Indeed, his allegations describe the defendants as performing job-related functions. Thus, due to the absence of a colorable allegation that the Commonwealth defendants were acting outside of their employment, the court concludes that [plaintiff’s] wrongful discharge claim is barred by the doctrine of sovereign immunity.

Id.

In *Hillegass v. The Borough of Emmaus*, No. CIV.A.01-5853, 2003 WL 21464578, at *1 (E.D. Pa. June 23, 2003), the Borough of Emmaus’ former Borough Manager argued the Borough’s Personnel Policy, which sets forth procedures that the Borough council must follow when terminating Borough employees, constituted an implied contract for employment with the Borough and provided her with property interest in her position sufficient to guarantee her due process and the benefits outlined in the Borough’s Personnel Policy. The District Court rejected this contention holding that municipalities, such as the Borough, are not permitted to enter into employment contracts absent authorizing legislation. *Id.* at *7. The court stated, “[w]ithout specific statutory authority granting a municipality the right to alter the at-will status of a public employee, any contract created by a municipality, whether express or otherwise, is invalid and unenforceable and consequently, does not create a property interest in employment. *Id.* (citations omitted).

O. Legislative Immunity: Legislative immunity, an absolute immunity, can be invoked when officials’ actions are legislative in nature. *Gallas v. Supreme Court*, 211 F.3d 760, 773 (3d Cir. 2000). Individuals who are not legislators but whose acts have a substantial legislative nexus are imbued with this absolute legislative immunity. *Id.*

In *Brominski v. County of Luzerne*, 289 F. Supp. 2d 591 (M.D. Pa. 2003), a former chief clerk in the county tax assessor’s office sued the county and individual members of the County Commission and County Board, claiming wrongful discharge. The individual defendants were either County Commissioners, responsible for preparing and adopting the County’s budget, or Board members responsible for overseeing the Tax Assessor’s office. The County Commissioners voted on a proposed budget that included recommendations of the Board members in which plaintiff’s position was eliminated from the County’s budget. The Middle District of Pennsylvania, relying on a Supreme Court determination that the elimination of a public employment position constitutes a legislative act, granted the individual defendant’s motion for summary judgment on the basis that the individual defendants were entitled to absolute legislative immunity from suit. *Id.* at 594 (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)).

P. Pennsylvania Worker and Community Right-to-Know Act (“PWCRA”): Section 7313 of the PWCRA prohibits employers from terminating employees who file a complaint or assist the Department of Labor and Industry with an investigation into violations of the Act (relating to hazardous materials). *See Wetherhold v. Radioshack Corp.*, 339 F. Supp. 2d 670 (E.D. Pa. 2004) (employee survived motion to dismiss complaint alleging termination in retaliation for reporting safety hazard to OSHA and PWCRA).

Q. Victims of Medical Malpractice: Public policy favors allowing the victims of medical malpractice to seek adequate compensation for themselves, and asserting legal claims on behalf of their children.” *See Haun v. Community Health Sys., Inc.*, 14 A.3d 120 (Pa. Super. 2011).

R. The Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C.A. §§ 4301-4333 (West 2017): Pennsylvania common law precludes employee from bringing a public policy claim when USERRA offers its own remedy. *See McAlee v. Independence Blue Cross*, 798 F. Supp. 2d 601 (E.D. Pa. 2011).

S. Firearms – The Right To Bear Arms: Terminating an employee for possessing a handgun in the glove compartment of a personal vehicle on company property in violation of company policy, even with a proper license to carry and even though the Pennsylvania Constitution provides for the right to bear arms, is not a public policy violation. *See Stewart v. Fedex Express and Federal Express Corp.*, 114 A.3d 424 (Pa. Super. 2015) (Superior Court affirmed a trial court ruling granting a demurrer and dismissing the case on the grounds that plaintiff did not make out a claim for wrongful termination in violation of public policy).

V. PUBLIC POLICY EXCEPTION FOR CLAIMS OF SEXUAL HARASSMENT IN THE WORKPLACE

In 2010, the Supreme Court of Pennsylvania issued a significant decision in *Weaver v. Harpster*, 975 A.2d 555 (Pa. 2010) in which the Court reversed the Superior Court’s holding that a public policy exception to the employment at-will doctrine existed for claims of sexual harassment in the workplace. The Superior Court had held that, although the Pennsylvania Human Relations Act (“PHRA”) defines an “employer” as one who employs “four or more persons in the Commonwealth,” (*see* 43 Pa. Cons. Stat. Ann. § 953(b) (West 2017)), the trial court erred when it sustained employer’s preliminary objections to former employee’s claims of sexual harassment, discrimination and harassment in violation of the PHRA, constructive discharge in violation of the PHRA and wrongful discharge because employer had less than four employees.

The Superior Court had agreed with the former employee and held “where an employee is prevented from bringing a sexual discrimination suit under the PHRA only because his or her employer has less than four employees, we find a public policy exception to the at-will employment doctrine.” *Weaver v. Harpster*, 885 A.2d 1073, 1078 (Pa. Super. 2005). The Supreme Court, however, rejected the Superior Court’s analysis and held that the PHRA does not

provide a public policy exception to the at-will doctrine for sex discrimination by an employer not covered by the PHRA. *Weaver*, 975 A.2d at 569-70.

The Supreme Court stated, “our precedent adhering to the at-will employment presumption indicates that we can only declare the public policy of this Commonwealth where it is ‘so obviously for or against public health, safety, morals, or welfare that there is virtually unanimity of opinion in regard to it’” *Id.* at 569 (citation omitted). The Court relied upon the fact that the legislature had previously lowered the employee threshold for the PHRA from twelve to six to four, but not to one, which the Court stated demonstrated the lack of a unanimous opinion that every employee in the Commonwealth of Pennsylvania should be protected from sex discrimination. *Id.*

The Court thus concluded that it was bound by the terms of the PHRA and Pennsylvania’s adherence to the doctrine of at-will employment and held that Pennsylvania does not recognize a common law cause of action for discriminatory termination of at-will employment in cases where the employee is precluded from pursuing a remedy under the PHRA. *Id.* at 569-70.

VI. WHISTLEBLOWING

A. The Whistleblower Law Does Not Create A Public Policy Exception.

Pennsylvania law does not recognize the right of action of a private employee for whistleblowing activities. The statutory language of the Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 2017) (hereinafter “the Whistleblower Law”) is clear -- it applies, without exception, only to public employees. Stated differently, for private employers, whistleblowing activities do not constitute a well-articulated public policy so as to provide an exception to the at-will employee doctrine.

Practice Tip: Private employers are not subject to Pennsylvania’s Whistleblower Law, but first make certain the employer does not receive public funds as stated below in Section B.

In *Clark v. Modern Group Ltd.*, 9 F.3d 321 (3d Cir. 1993) the Third Circuit held that the whistleblower law is not an indicator of public policy in private discharge cases. Additionally, there is no general public policy of protecting whistleblowers who are not employed in the public sector. *Id.* at 332; *see also Krajsa v. Key Punch, Inc.*, 622 A.2d 355 (Pa. Super. 1993) (scope of whistleblower law is limited to employees discharged from governmental entities or other entities created or funded by government); *Perry v. Tioga Cty.*, 649 A.2d 186 (Pa. Commw. 1994), *allocatur denied*, 655 A.2d 995 (Pa. 1995) (“there is no general public policy protecting whistleblowers in private sector”); *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) (Pennsylvania’s whistleblower 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).

In *Holewinski v. Children's Hosp. of Pittsburgh*, 649 A.2d 712 (Pa. Super. 1994), *allocatur denied*, 659 A.2d 560 (Pa. 1995), a nurse reported concerns that an incompetent doctor was to be hired as Chief of Pediatric Neurosurgery. *Id.* at 714. Despite the protests, the doctor was hired and informed plaintiff that her job would be upgraded. *Id.* Shortly thereafter, she was terminated although she was arguably qualified for the upgraded position. *Id.* Plaintiff filed a claim for wrongful discharge on the basis that the hospital violated public policy. *Id.* at 715.

The *Holewinski* court, held that whistleblowing is not an established public policy:

In the instant case, the public policy at issue is the need to protect whistleblowers. Although there is a whistleblower law in Pennsylvania, 43 Pa. Stat. Ann. § 1421 (1986), it only applies to employees discharged from governmental entities, and therefore does not protect appellant. Furthermore, as we have already explained in *Krajsa*, 622 A.2d at 358, we are precluded from creating or forming public policy with respect to wrongful discharge. Therefore, as appellant's claim is not based on an established public policy exception, this claim is meritless.

Id.

In *Hunger v. Grand Cent. Sanitation*, 670 A.2d 173 (Pa. Super. 1995), *appeal denied*, 681 A.2d 178 (Pa. 1996), this Court held that, "firing which results solely due to an employee's decision to report his employer's illegal activities is not actionable unless the firing is specifically prohibited by statute." *See also McLaughlin v. GastroIntestinal Specialists*, 750 A.2d 283, 290 (Pa. 2000) (at-will employee could not state a claim for wrongful discharge under the public policy exception based solely upon alleged retaliatory termination of her employment in violation of the federal statute, OSHA); *but see Nixon v. The ARC of Montgomery, Berks & Chester Cty.*, 149 M.C.L. R. (Feb. 2, 2012, Mont. Cty. Ct. Common Pleas) (denying preliminary objections to claim for wrongful discharge based on retaliation for allegedly reporting misuse of funds by nonprofit agency).

B. The Broadening Definition of "Employer."

The Pennsylvania Whistleblower Law defines "employer" as "[a] person supervising one or more employees, including the employee in question; a superior of that supervisor; or an agent of a public body." A "public body" is defined, in part, as any body created by the Commonwealth or "which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body." 43 Pa. Cons. Stat. Ann. § 1422 (West 2017).

In 1998, the Pennsylvania Superior Court decided *Riggio v. Burns*, 711 A.2d 497 (Pa. Super. 1998) which held that a private medical institution receiving funds from the state was a "public body" within the meaning of the Whistleblower Law.

In *Riggio*, the plaintiff was terminated as an instructor from the Medical College of Philadelphia for failure to follow departmental leave procedure. The plaintiff claimed she was terminated because she expressed her opposition to another physician's failure to directly supervise a surgical procedure that resulted in the death of one patient and left a second patient in a coma. The plaintiff claimed she was compelled by various Pennsylvania medical licensing statutes to prevent surgery by unsupervised residents.

The *Riggio* court found the statutes relied upon by plaintiff were too general and vague to present a cognizable claim under the Whistleblower Law. In doing so, however, the court determined that the Medical College of Philadelphia was a public body because it received public funds. The Court stated:

[A]n attempt to divine the intent of the legislature by reference to the common understanding of "public body" is not only unnecessary, it also begs the question. Notwithstanding the everyday meaning of "public body," this term was expressly defined by our legislature for purposes of the Whistleblower Law. "Where a statute provides internal definitions, we are bound to construe the statute according to those definitions."

Riggio, 711 A.2d at 500 (citing *Hodges v. Rodriguez*, 645 A.2d 1340, 1348 (Pa. Super. 1994) (citing 1 Pa. Cons. Stat. Ann. § 1903(a))).

If there was any doubt about the interpretation of "employer" in *Riggio*, it was erased with the Superior Court's decision in *Denton v. Silver Stream Nursing and Rehabilitation Center*, 739 A.2d 571 (Pa. Super. 1999). In *Denton*, plaintiff was a nursing home director and alleged she was wrongfully terminated after being accused of theft and negligence. The court considered the question of whether a privately owned, for-profit business that receives public monies, in this case Medicaid funding, is a "public body." Citing *Riggio* and the plain language of the Whistleblower Law, the *Denton* court concluded that the nursing home was a public body for the purposes of the Whistleblower Law. Although the defendants argued that only monies specifically intended for a business should constitute funding, the court stated:

We do not find that legislatively appropriated funds are the only monies that will create "public body" status under the Whistleblower Law. The statutory language differentiates between appropriated and "pass-through" funds and extends the law to cover both types: "[a]ny other body which is . . . funded in any amount by or through Commonwealth. . . ." (citations omitted). The Law clearly indicates that it is intended to be applied to bodies that receive not only money appropriated by the Commonwealth, but also public money that passes through the Commonwealth.

Denton, at 576; *but see Tanay v. Encore Healthcare, LLC*, 810 F. Supp.2d 734, 745 (E.D. Pa. 2011) (specifically rejecting the *Denton* analysis); *see also Cohen v. Salick Health Care, Inc.*, 772 F. Supp. 1521 (E.D. Pa. 1991) (predicting the Pennsylvania Supreme Court would find the receipt of Medicaid reimbursements is not sufficient to make an entity a "public body" under the Whistleblower Law).

Denton significantly broadened the scope of the Whistleblower Law and subjects an entire group of businesses to a statute against which they thought they were immune. Query whether the Pennsylvania courts will further define this definition. For example, the statute states that a public body is that which receives funding in *any* amount. Will the court interpret that literally? Is there a de minimis amount an employer can receive that would not subject it to the Whistleblower Law? Will the courts care about how the public funds make their way to the employer? If a charitable or non-profit organization receives state funds and then makes a donation to a business, has that business received public funds? Do the funds have to be in dollars or can “funds” mean, for example, tax forgiveness? Of course, a central question is whether the Pennsylvania legislature will simply amend the Whistleblower Law to include private employers.

For further discussion, see Kurt H. Decker, *Pennsylvania’s Whistleblower Law’s Extension to Private Sector Employees: Has the Time Finally Come to Broaden Statutory Protection for All At-Will Employees?*, 38 Duq. L. Rev. 723 (Spring 2000).

C. The Fine Line Between Voluntary Action and Obligation.

The courts have continued to draw a distinction between voluntary action and required action by an employee. Decisions have not generally favored employees who engage in whistleblowing activities unless they were clearly and statutorily obligated to act.

In *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170 (Pa. Super. 1989), an employee was discharged because he reported violations involving nuclear materials. The court found a public policy violation because this reporting was a statutorily imposed duty, in other words, the plaintiff would have suffered a penalty if he failed to notify the Nuclear Regulatory Commission of a violation. As an example of such a provision, the statute states,

Penalty for failure to notify. Any person who knowingly and consciously fails to provide the notice required by subsection (a) of this section [noncompliance with the Act] shall be subject to a civil penalty in an amount equal to the amount provided by section 234 of the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5846(b) (2003).

In *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) the federal district court made clear there is a distinction between “gratuitous disclosure of improper employer conduct and disclosures by persons responsible for reporting such conduct or for protecting the public interest in the pertinent area.” *Id.* at 647 (citing *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1345 (3d Cir. 1990), *cert. denied*, 499 U.S. 966 (1991) (discharged chemical company employee not responsible for reporting improper emissions or spills)); *see also Gaiardo v. Ethyl Corp.*, 697 F. Supp. 1377 (M.D. Pa. 1986), *aff’d*, 835 F.2d 479 (3d Cir. 1987) (plaintiff was neither employed in a supervisory capacity nor responsible for quality control).

In *Hennessey v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998), a doctor's employee reported a rape of a resident of the facility to the local District Attorney. The reporting employee was terminated. The Superior Court held the employer had *not* violated public policy because there existed no duty in the law, regulations or code of professional ethics for the employee to make such a report. *See also Hays v. Beverly Enters., Inc.*, 766 F. Supp. 350 (W.D. Pa.), *aff'd*, 952 F.2d 1392 (3d Cir. 1991) (not a violation of public policy to discharge a nurse who communicated with a family member about the medical condition of a resident when nurse had no legal duty to make such communication).

In *Spierling v. First Am. Home Health Servs., Inc.*, 737 A.2d 1250 (Pa. Super. 1998), *appeal denied*, 786 A.2d 989 (Pa. 2001), the Pennsylvania Superior Court made it clear it did not intend to expand the holding of *Hennessey*. In *Spierling*, the plaintiff searched through "old and discarded" files and discovered what she thought to be evidence of past Medicare fraud. Plaintiff was terminated after reporting this evidence to her supervisor, who in turn, contacted the company's "Fraud Hotline."

After her termination, plaintiff sued alleging wrongful discharge. The case was dismissed after argument of defendant's preliminary objections, and plaintiff appealed.

On appeal, plaintiff cited many statutes that arguably made it a crime or made a person liable for withholding information or taking action to deceive defraud a governmental agency. Of the various statutes cited by Spierling, however, not one imposed an affirmative duty to report such fraud. These included: Crimes and Criminal Procedure, 18 U.S.C.S. § 1001 (Law. Co-op. 1996) (relating to failure to disclose material information); Crimes and Criminal Procedure, 18 U.S.C.S. § 287 (Law. Co-op. 1993) (relating to a party making false claims); Social Security Act, 42 U.S.C.S. §§ 1320a-7a, 7b (Law. Co-op. 1998) (relating to civil money and criminal penalties for improperly filed claims for medical services); and the False Claims Act, 31 U.S.C.S. § 3730(h) (Law. Co-op. 1996) (relating to false claims for payment). In no statute cited by Spierling did there exist a requirement to investigate or report fraud. Furthermore, the prohibitions of The False Claims Act, 31 U.S.C. § 3729 may apply to those who committed the fraud, but, again, does not obligate the plaintiff to report fraud.

In a 2-1 decision, the *Spierling* court affirmed the trial court's dismissal of the case holding there was no violation of public policy because plaintiff was not *obligated* to report Medicare fraud under any law or regulation. The court stated:

Since Spierling was under no statutorily imposed duty to report the suspected past Medicare fraud, Defendant-Appellees did not request that Spierling commit a crime and there was no specific statutory prohibition against Spierling's discharge, we find that Defendant-Appellees were within their rights to discharge her as an at-will employee.

Spierling, 737 A.2d at 1254; *see also Donahue v. Federal Express Corp.*, 753 A.2d 238, 244 (Pa. Super. 2000) (citing *Spierling*); *compare Ballinger v. Delaware River Port Auth.*, 800 A.2d 97 (N.J. 2002) (interpreting Pennsylvania law, the New Jersey Supreme Court found plaintiff's

termination for whistleblowing unlawful because plaintiff, as a DRPA police officer, had a statutory obligation to report criminal behavior of fellow officers).

Judge Berle Schiller wrote a scathing yet scholarly dissent which traced the history of at-will employment and concluded that the narrow public policy exception must be expanded. The Pennsylvania Supreme Court denied allocatur.

The Pennsylvania state and federal courts' reluctance to expand the public policy exceptions to the at-will doctrine was highlighted by the Eastern District of Pennsylvania in *McGovern v. Jack D's, Inc.*, No. CIV.A.03-5447, 2004 WL 228667 (E.D. Pa. Feb. 3, 2004). In *McGovern*, from the outset of plaintiff's employment as a waitress at a bar, she was subjected to sexual comments, innuendos and groping by two male co-workers. Plaintiff repeatedly complained to the owners of the bar to no avail. Ultimately, plaintiff was the victim of a rape that took place in a dark part of the bar by one of plaintiff's male co-workers. Plaintiff brought suit against the bar and its owners alleging, *inter alia*, a claim for wrongful termination after she was terminated for reporting the rape to police. Defendants filed a motion to dismiss plaintiff's wrongful termination claim on the grounds that plaintiff failed to state a claim upon which relief could be granted. The court agreed with defendants and, relying upon *Hennessey v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998), concluded that since there was no statutory requirement that plaintiff report the alleged rape, defendants had not violated any public policy by terminating plaintiff. *Id.*

In a Court of Common Pleas case, *Castro v. Air-Shield, Inc.*, 78 Bucks Co. L. Rep. 94 (Aug. 20, 2004), the plaintiff alleged wrongful discharge in violation of Pennsylvania's public policy. Employee alleged he was fired in retaliation for threatening to report to the Food and Drug Administration safety concerns with a hand ventilator used primarily for infants. Mr. Castro, a licensed engineer, cited FDA regulations to support his argument that his termination was in violation of Pennsylvania public policy. The court, however, found that FDA regulations, which were of course promulgated as federal law, did not reflect Pennsylvania's public policy, which instead was determined by examining Pennsylvania's Constitution, court decisions and statutes. The employee also cited Pennsylvania law that set forth ethical standards for engineers:

63 Pa. Cons. Stat. Ann. § 151. General Powers of board

(g) For the purposes of this subsection, the code of ethics is as follows: It shall be considered unprofessional and inconsistent with honorable and dignified bearing for any professional engineer []:

. . .

(10) To aid or abet any person in the practice of engineering . . . not in accordance with the provision of this act or prior laws.

The Court found that the statute set forth

broad-based, generalized rules of conduct that have little, if any, bearing on facts of this case. By their express terms, they do not prohibit or compel conduct, but set forth standards of professionalism and a dignified practice. Clearly, these guidelines do not relate to the commission of a crime, create a duty to report matters to governmental authorities, or prohibit firing an employee for any reason. Thus, they do not fall within the narrow public policy exceptions outline in *Hennessy*.”

Castro, 78 Bucks Co. L. Rep. at 101.

In the unreported case of *Sant v Branding Brand, Inc.*, 672 WDA 2015, 2016 WL 5377939 (Pa. Super. Aug. 16, 2016), the Superior Court reversed the trial court’s dismissal of plaintiff’s wrongful termination claim. After working for Branding for 14 months, most recently as the company’s CFO, plaintiff confronted the company’s vice president about the CEO allegedly misrepresenting the company’s earnings at a Board of Director’s meeting. That same day plaintiff was terminated without explanation. Although plaintiff made a breach of contract claim and argued he was not an at-will employee, the Superior Court noted there was a written contract that expressly stated the employment relationship was at-will, therefore, it was.

Plaintiff Sant also claimed wrongful termination because the employer (if his allegations were true) discharged him for refusing to expose himself to criminal liability. The Superior Court found this was sufficient to sustain the cause of action. *Sant*, at *3-4.

Practice Tip: *McGovern* and *Castro* demonstrate how hesitant the courts are to expand the public policy exceptions. An employee’s action must be required, not voluntary, to have a reasonable chance of success arguing wrongful termination based on a whistleblowing incident.

It seems arbitrary and somewhat harsh to draw a bright line at a “statutory obligation” to report. For example, even though the various statutes do not require an individual to act, why can’t these same statutes simply act as a basis for a recognized public policy? There are many statutes that don’t *require* an employee to report violations yet act as a basis for a recognized public policy, for example, the line of cases that found it a violation of public policy to retaliate against an employee for reporting claims under the WPCL, OSHA, Unemployment Compensation Act, Worker’s Compensation Act, etc. *See supra* Section V “Public Policy Exceptions.” These statutes do not compel employee action, yet have been used as clear pronouncements of public policy in this Commonwealth.

D. Is it Whistleblowing or Retaliation?

Employees of a non-public employers that accept no public funds are seemingly defenseless if they blow the whistle on some improper employer practice. Or are they?

Whether or not an employee has any legal protection may very well turn on the exact type of complaint made or information provided about the employer, when the employer knew about

the complaint, and what action was taken as a result. In short, whether there was employer retaliation.

An employee may have no protection under the Whistleblower Law for contacting the Pennsylvania Human Relations Commission to report that the employer has failed to post the proper employment-related notices under the PHRA. However, if the employee complains to her supervisor, then contact the PHRC, her claim is now retaliation for making the complaint. Retaliation has long been prohibited by state and federal law, and re-defined and explained in the important case *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *see also Crawford v. Metropolitan Gov't of Nashville*, 555 U.S. 271 (2009) (witness in internal investigation protected by Title VII anti-retaliation provisions as “opposing discrimination”).

Pennsylvania has other codified anti-retaliation provisions, for example, the law that protects commercial truck drivers. *See* 75 Pa. Cons. Stat. Ann. § 1619 (West 2017) (prevents adverse job action because an employee (a) refuses to operate a commercial vehicle in accordance with state safety laws, (b) has filed a complaint or instituted a proceeding relating to a violation of the state safety laws, or (c) has a “reasonable apprehension of serious injury to himself or the public due to the unsafe condition” of the vehicle or equipment).

VII. LIFESTYLE DISCRIMINATION: “WHERE THERE’S SMOKE, YOU’RE FIRED!”

The latest erosion of the employer’s rights to terminate an employee for “good reason, bad reason, or no reason at all” comes from legislation to protect employees from acts of so-called “lifestyle discrimination.” The most common discrimination is against employees who smoke off-duty, but other employee activities include free speech, drinking, overeating, unhealthy eating, and any other activity the employer deems to be contrary to its image or management’s personal beliefs. What about discrimination against people because of personal appearance (non-attractive people)?

Legislation or work rules that protect employees who engage in these activities, effectively create additional protected classes that restrict an employer’s ability to discipline or terminate its employees. This is a debate that transcends the employer-employee relationship and quickly spills into thoughts and beliefs about politics, religion, assumptions about certain classes of people, and our culture in general.

For an excellent review of this topic, although somewhat skewed towards the rights of employees, see an article by the National Workrights Institute titled “*Lifestyle Discrimination: Employer control of legal off duty employee activities*” and published at www.workrights.org.

VIII. PRACTICAL TIPS WHEN CONSIDERING A WRONGFUL DISCHARGE CLAIM

A wrongful termination claim is made if an at-will employee is discharged or claims constructive discharge. “An action for the tort of wrongful discharge is available only when the employment relationship is at-will.” *Phillips v. Babcock & Wilcox*, 355, 503 A.2d 36, 38 (Pa. Super. 1986), *allocatur denied*, 521 A.2d 933 (Pa. 1987); *Ferrell v. Harvard Indus.*, No. CIV.A.00-2707, 2001 WL 1301461, at *1 (E.D. Pa. Oct. 23, 2001) (an action for the tort of wrongful discharge is only available when the employment relationship is at-will, i.e., without a collective bargaining agreement).

When trying to determine whether or not to file a claim for wrongful termination, Plaintiff’s counsel should consider, and Defendant’s counsel can glean defenses from, the following basic questions:

A. General Analysis of Public Policy Claim

- Ü Does the employee have a contract for a specified term? If so, employee is not at-will. (An independent contractor who can be terminated at-will may be treated the same as an at-will employee)
- Ü Is the employee a member of a union which operates under a collective bargaining agreement? If so, employee is not at-will, however, even non-union employees still have certain protections under the National Labor Relations Act.
- Ü Did the employer distribute a handbook? If so, check for qualifying language that will defeat claims that its provisions create contractual rights in the employee. In rare instances, a handbook will not contain such language. Generally, the handbook will not create such contractual rights and employee will have no claim for a “violation” or failure of the employer to follow the policies set for in its handbook.³
- Ü Did the employer make any express promises to the employee about the length of time the employee would be employed? If so, the employee may have an argument that a contract exists.
- Ü Did the employee provide extraordinary consideration to the employer? If so, employee may have an argument that a contract exists. Be careful, though, virtually every employee feels he or she provided extraordinary consideration to the employer.
- Ü Was the employee discharged in retaliation for filing a claim under any law or regulation? If so, review caselaw to determine whether there is precedent for a wrongful discharge claim. If not, this type of claim will be making new law and will almost assuredly be decided on appeal.
- Ü Was employee discharged for whistleblowing? If so, is employer a *public* employer? Does employer receive public funds? If no to both, the Pennsylvania

³ If an employer applies handbook policies differently to an employee than his or her co-workers, however, that may be an indication of discrimination under state or federal law.

Whistleblower Law does not apply, and a whistleblower claim will likely be defeated unless employee can prove he or she was statutorily obligated to report the violation.

- Ü Was employee discharged for out of work conduct?
- Ü Is employee complaining about disparate treatment which, in your opinion, is discrimination? If so, your claim is a violation of the statute that prohibits discrimination. If the employee is complaining about poor treatment that does not rise to the level of discrimination (e.g., discharge due to difficult supervisor, poor performance reviews, others being treated differently, dispute over attendance), don't waste your time with a lawsuit. Pennsylvania courts, seemingly, have no interest in expanding the public policy exception to create a "termination for cause" standard.
- Ü Make sure your wrongful termination claim is not otherwise pre-empted or controlled by statutory remedies.
- Ü If you do prepare a complaint containing a wrongful discharge claim based on the public policy exception, be sure to state specifically the grounds upon which you believe the exception should apply, that is, list the statutes, regulations, or other authority you believe provides a basis for the court to find a recognized public policy of the Commonwealth. If not, you run the risk of having the complaint being dismissed on preliminary objections or, in federal court, a motion under Fed. R. Civ. P. 12(b).

B. Litigation Avoidance: The Amicable Separation

- 1. Employer's reasons to negotiate a separation package**
 - a. Threat of litigation against the company or its agents.
 - b. Employer doesn't want to register a claim under Employment Practices Liability Insurance ("EPLI").
 - c. "Legal" or "illegal" extortion against company or its agents.
 - d. Threat of adverse publicity.
 - e. Employee will take or divert clients.
 - f. Employee will solicit company's employees.
 - g. Employee will divulge confidential information, trade secrets, etc.
 - h. Company's desire for smooth transition of employee's position, department.
 - i. History of negotiation with employees.

- j. Company is obligated under written severance policy, so it will pay more to get a release.
- k. Company's general policy of treating employees fairly and with genuine appreciation.
- l. Insurance company pressures resolution.

2. Employer's reasons not to negotiate a separation package

- a. Lack of funds.
- b. Employer opinion that employee is gouging or misrepresenting situation.
- c. Employer has Employment Practices Liability Insurance ("EPLI") and feels it is only responsible for the deductible/retainage.
- d. Employer has made previous payments to employee.
- e. Retaliation for employee's negligence, bad acts.
- f. Company believes severance should be offset against actual or perceived employee cost.
- g. General policy of not negotiating severance packages.
- h. General policy of not exceeding written severance policy.
- i. No reason to negotiate, i.e., no litigation threat, no concern for smooth transition, etc.
- j. Employee does not ask.
- k. Employee has "fired his bullets" and already contacted the press, made claims with administrative agencies, etc.
- l. Insurance company opposes resolution.

3. Employee's reasons for seeking a separation package

- a. Money.
- b. Promise made by Company.
- c. Perception of value and loyalty to Company.
- d. Perception of what is "fair" or "traditional."
- e. Stated desire to "fix the system."

- f. Needs continued health benefits and is concerned about pre-existing conditions.
- g. Misunderstands company obligation for severance and/or severance policy.
- h. Revenge.

4. Employee's reasons not to negotiate

- a. Not enough money.
- b. Too angry or upset.
- c. Related issues that would not be resolved with simple separation package (i.e., restrictive covenant issues, other litigation).
- d. Belief that employer will not negotiate fairly.
- e. Employer does not negotiate fairly.
- f. Strategy that more can be gained from filing suit, grievance or arbitration.
- g. Revenge.

C. Employee Separation Checklist

EMPLOYEE SEPARATION CHECKLIST

Date: _____

Name: _____ Referred by: _____

Address: _____

Telephone No: _____ Fax No. _____ E-mail: _____

Employer: _____ Conflict check? _____

Employer address: _____

Age: _____ Sex: _____ Race: _____ Disability: _____ Religion: _____

National origin _____ Veteran status _____ GED: _____

Married: __ Children/ages: _____ Employee or Independent Contractor? _____

Start Date with Employer: _____ End Date: _____

Compensation structure: Base? _____ Commission? _____ Bonus? _____

Previous complaints made (retaliation risk)? _____

Stated Reason for Termination: _____

Direct Reports: _____ Direct Supervisor: _____

Name of, and Number in Group: _____

Others in Group Same or Different?:

Number of employees at your location?

All locations?

Employment Contract?:

Non-Compete?

Non-Solicitation?

Confidentiality?

EPLI? _____ Amount of retainage/deductible \$ _____

Other restrictive covenants?

If so, when executed? Consideration given?

What State law applies?

Violation of statute?

Public Policy violation?

Statute of Limitations?

Currently working? with a competitor?

Take clients when you left?

Take employees when you left?

Take inventions when you left?

Take property? Materials?

Violate confidentiality?

FMLA issues?

ADA issues?

EPA issues?

WPCL issues?

CEPA issues (NJ)?

Receive 1099? W-2?
Paid in cash?
I.R.C. 409(A) implicated?

401(k)?: _____ Stock Options? Vested?: _____ Other?: _____

Unemployment?: _____ Letter of Reference?: _____

Outplacement offered?: _____

Payment of:

- (1) All Wages?
- (2) Bonuses?
- (3) Reimbursement for Expenses?
- (4) Commissions?
- (5) Unpaid vacation, PTO
- (6) Any money withheld?

Ever sue the company?

Ever act as a witness for or against the company?

Ever complain to anyone about the treatment of another employee?

Your treatment?

Was an investigation conducted involving you?

Company have in-house counsel? Outside counsel?

Failure to hire because of criminal background?

REVIEW OF SEPARATION AGREEMENT

Any reason to refuse General Release? _____

Termination Letter?:

Separation Package?:

**Due Date for Return:

Signed any document (Release?): _____

Do ADEA/OWBPA requirements apply? _____

Does Release go beyond terms of employment? _____

Does Release exempt 401(k)/pension plan claims? _____

Arbitration provision? _____

Any WARN Act considerations? _____

Negotiation Points:

DOCUMENTS

_____ Employment Contract (current and previous)

_____ Restrictive Covenant/Non-compete/Non-solicitation

_____ Termination Letter

_____ Separation Agreement and Notices

_____ Warning Letters/Performance Evaluations

_____ Commission Agreement/Policy

_____ Bonus Agreement/Policy

_____ Stock Plan (options, warrants, etc.)

_____ Shareholder's Agreement

_____ Loan documents/Personal Guarantees

_____ Employee Handbook/Policies

_____ Documents prepared by client: timeline, diary, chronology