

KDLA February 2011 Trustee Tip of the Month **What is At-Will Employment?**

Quick Tips

- ◆ Employees without a written employment contract generally can be fired for good cause, bad cause, or no cause at all.
- ◆ Judicial exceptions to the rule protect employees from wrongful termination.
- ◆ In Kentucky, two major exceptions are recognized: public policy exception and implied contract exception.
- ◆ Most employers operate in an “employment at-will with exceptions” which prevents termination in cases where public policy or implied contract exceptions apply.

Employment At-Will:

It is often heard that Kentucky is an “at-will” state concerning employment arrangements. This is an employment relationship in which either party can break the employment relationship with no liability, provided there was no express contract with terms that would be violated by the separation and the employee does not belong to a collective bargaining group or union. In a strict “at-will environment, the employer may terminate the employee “for good cause, or bad cause, or no cause at all,” and the employee is equally free to quit, strike, or otherwise cease work at any time, and at the same standard. In addition, employers generally may change the terms or conditions of employment at any time and for any reason; such as, changing an at-will employee’s job description, work location, shift, and salary or hourly pay.

However, it is doubtful that an absolute at-will employment situation exists in the United States today due to legal restrictions on termination. The actual situation is called “*Employment at-will with exceptions.*”

Employment at-will with exceptions:

In Kentucky libraries, the vast majority of employees labor in an “employment at-will *with exceptions*” situation. In this, many of the same conditions exist as do in the at-will situation, but there are protections for the employee based upon law and public policy. Disallowed exceptions to at-will employment termination generally are:

- ◆ Termination if there is an “implied-in-law” contract between the employer and employee. This is not an actual contract but an obligation that is imposed by law to protect the employee
- ◆ Termination for an act supporting public policy: “whistle blowing,” reporting illegal activity by the employer, or for performing a public duty, for instance. [*Brockmeyer v. Dun & Bradstreet*, 113 Wis.2d 561, 335 N.W.2d 834 (1983)]



Serving Kentucky's Need to Know

- ◆ Firing an employee in violation of the employer's own discharge policy
- ◆ Terminating an employee under the guise of a false statement of fact
- ◆ Discharge of an employee in breach of contract of employment or an employer-union collective bargaining agreement
- ◆ Termination as an act of retaliation against an employee for reasonable exercise of employee rights under relevant employment and labor laws, or for an employee for filing a worker's compensation claim
- ◆ Terminating an employee for bringing or threatening to bring legal action against the employer
- ◆ Terminating an employee on discriminatory grounds, such as:
 - Refusing the sexual advances of a superior
 - Based on race, age, gender, religion, sexual orientation, pregnancy and disability. [*KRS 344.040, Americans with Disabilities Act, Family Medical Leave Act, Equal Employment Opportunity Act and the Fair Labor Standards Act.*]

Terminating an employee for any of these reasons would be grounds for legal action on the behalf of the employee, and would place the library in a precarious legal position.

Just Cause termination:

Even though Kentucky is an employment at-will state, there are occasions where an event occurs which makes it in the library's best interest to terminate an employee for a given reason. This is known as a "just cause" termination.

In employment law a "just cause" termination is defined as: termination due to misconduct of an employee, or some other event relevant to the employee, which justifies the immediate termination of the employment contract. This is most evident when an employee seriously jeopardizes fellow employees or the library by their actions. This would include such actions as stealing from the library, threatening another employee, taking bribes, fighting, vandalism, and lying. This is generally a situation of gross misconduct and, after a suitable investigation, termination is justified.

Employment law is constantly evolving with courts carving out exceptions to the employment at-will doctrine. If you have a questionable situation in dealing with an employee issue, it is best to consult a Labor Law attorney for advice and counsel.

All *Trustee Tips of the Month* are available at: <http://kdla.ky.gov/libsupport/trustee.htm>.

This is not legal advice and I am not an attorney. If you feel you need legal advice you should consult an attorney.

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What is At-Will Employment? Addendum:

Steps to Avoid the “Implied Contract” Exception

One way that an employee may gain legal recourse for being fired without cause is through policy statements made in an employee handbook. These statements may be read by the courts as a contract between the employer and the employee.

Without a clear and prominent disclaimer, statements in an employee handbook that imply that an employee will only be fired for “good cause” are enforceable against an employer. If the handbook does not state that an employee could be dismissed without cause, an explanation of other reasons that are cause for termination may imply a promise of job security as long as the employee does not infract those particular causes.

A handbook that says that library policy is to retain employees who perform their duties efficiently and effectively may also imply a promise of job security. Often provisions in employee handbooks are interpreted as contractual situations and as an implied promise of job security.

The use of ambiguous statements in an employee handbook will not be seen by courts as a long-term employment contract IF the employee has been required to sign a disclaimer that clearly states that the employee agrees that the employment is “at-will” and that policy statements in the employee handbook do not alter the at-will employment relationship.

Statements to avoid in the handbook:

- A list of causes for termination, such as: layoffs, performance, disciplinary reasons, retirement, resignation, etc.
- Language that implies that an employee can only be disciplined or discharged for “just cause.”
- An employee will be retained as long as duties are performed efficiently and effectively.
- Use of a probationary period - it implies job security after that time period.
- Use of a performance appraisal system - it implies job security if the employee fulfills the duties and goals for his/her position.

Spoken promises may be also serve to imply job security. Some statements to avoid making:

- “You’ll be employed here providing that your job performance meets our expectations for this position.”
- “We only fire employees who are unable to meet our performance standards, even after coaching and training.”
- “We will tell you what you need to do to keep your job through the performance appraisal process.”

To ensure protection against ambiguous statements in a handbook, you should have a disclaimer prominently displayed in the handbook advising the employee that nothing in the handbook overrides their at-will employment status.

Sample disclaimers for the employee handbook:

THIS HANDBOOK IS NOT A CONTRACT OF EMPLOYMENT.

No employee of the _____ County Public Library has the authority to enter into a written or oral contract with any employee. Nothing included in this handbook is intended to alter this fact. Only written contracts of employment executed by the Board of Trustees of the _____ County Public Library will be recognized by this Board and Library.

In addition, some employers include the disclaimer on their application, the opening pages of the employee handbook, on the *Acknowledgement of Receipt* signature page, in the rules of conduct, the performance appraisal, and the termination sections of the handbook. Here are some additional sample disclaimers:

The _____ County Public Library is an “at-will” employer. What this means is that you or the Library are free to end the employment relationship at any time, with or without notice, with or without cause and that your employment is for no specified period of time.

I agree to obey the rules and regulations of the _____ County Public Library, and that my employment and compensation can be terminated with or without cause, and with or without notice by either myself or the Library, at any time.

It is always best to have an attorney who specializes in labor law to review your handbook to ensure that it complies with the at-will employment requirements for Kentucky.

Steps to Avoid the “Public Policy” Exception:

This simply means that you must follow state and federal Constitutions and laws and not ask or require an employee to violate any of these laws.

Do not base termination in violation of discrimination laws [[KRS 344.040](#)]:

- Age
- Color
- Disability
- Gender
- National Origin
- Race
- Religion
- Smoking

Termination may not be in retaliation as a result of an employee:

- Filing a worker’s compensation claim
- Filing a safety complaint with OSHA
- Whistle-blowing on wrongdoing in the workplace
- Serving on a jury
- Military service requirements
- Taking FMLA leave
- Refusing the sexual advances of a superior
- Filing a law suit against the employer.

Tips for Legal Termination:

When terminating an employee, follow these tips to avoid a wrongful dismissal charge:

- For **gross misconduct**: stealing, lying, fighting, vandalism, taking bribes, etc.
 - Conduct a fair investigation before terminating the employee.
- For **poor performance**: shoddy work, negligence, incompetence, forgetting duties, etc.
 - Document the poor performance and give the employee the opportunity to improve.
- For **minor misconduct**: spreading rumors, tardiness, bad attitude, insubordination, breaking library policies, etc.
 - Issue warnings and document the misconduct and give the employee a last chance before terminating them.

Additional Reading:

Employee Handbooks and 'At Will' Employment - Lawyers.com. (n.d.). *Labor & Employment Law Attorney, Lawyer, Attorneys, Lawyers and Legal Research Information - Lawyers.com*. Retrieved January 26, 2011, from <http://labor-employment-law.lawyers.com/human-resources-law/Employee-Handbooks-and-At-Will-Employment.html>

Just Cause vs. Employment-At-Will. (n.d.). *Business ideas for small business and home business. Advice, start-up, marketing and management information and resources from Business Know-How*. Retrieved January 26, 2011, from <http://www.businessknowhow.com/manage/justcausevsfreewill.htm>

Muhl, C. (2001). The Employment At-Will Doctrine: Three Major Exceptions . *Monthly Labor Review*, 124(1), 3-11. Retrieved January 26, 2011, from <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>