# Hiring and Firing Employees in an At-Will Employment World

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In today's economy, businesses often find it necessary to adjust the labor force within a relatively short period of time to remain competitive. In most situations in Michigan, this can be accomplished because the law presumes that all employment relationships are at-will, meaning both the employer and employee are free to terminate the employment relationship at any given time, with or without cause. The at-will doctrine generally protects employers from lawsuits filed by employees for wrongful discharge. There are four exceptions, however, that may permit employees to proceed with litigation even if the employer intended to hire them on an at-will basis.

## MICHIGAN'S PUBLIC POLICY EXCEPTION

An exception to at-will employment occurs when an employee has been terminated in violation of Michigan's public policy. An at-will employee's discharge violates public policy if the employee is discharged:

1. in violation of a law specifically prohibiting adverse action against employees who engage in conduct protected by the law;
2. for failing or refusing to violate a law in the court of employment; or
3. for the exercise of a right conferred by a well-established legislative enactment.

The prohibition on terminating an employee in violation of, or for engaging in conduct protected by, established law is not difficult to understand. However, the protection on public policy grounds against terminating an employee who has failed or refused to violate the law has been the result of recent litigation to determine the scope of the protection. In a recent case, the Sixth Circuit affirmed the district court's decision holding that the plaintiff, a medical sales representative, was terminated in retaliation of her refusal to violate the law. In this case, the plaintiff, who sold pain control products to hospitals, claimed that her employer expected her to promote "off-label" uses of the pain medicine, which involves using or prescribing a medical product for indications or in dosages other than those approved by the Food and Drug Administration. The plaintiff also

said she resisted instructions to use marketing and billing strategies that she believed violated the federal anti-kickback laws. The court held that, by demonstrating that she refused to violate the law upon her employer's request, the employee presented sufficient evidence to establish her claim.

As a result of the Sixth Circuit's decision, in order to establish that a termination occurred in violation of public policy, employees are not required to establish that the employer directed them to violate the law, only that the employer made such a request and the employee refused.

**AN EMPLOYER'S CLEAR AND UNEQUIVOCAL ORAL PROMISE FOR JUST-CAUSE**

Another exception to at-will employment occurs when an employer makes a clear and unequivocal promise for a just cause employment relationship. Where an employee can demonstrate an indication of actual negotiations or a specific intent to contract for permanent or just cause employment, a just cause relationship may be found. However, a simple expression of optimistic hope for a long and satisfying employment relationship is insufficient to convert at-will employment to one of just cause. For example, in a Michigan Court of Appeals decision, the plaintiff argued that her employer told her on several occasions that she was "there for life." The employee, however, could not establish a clear and unequivocal promise for a just cause employment relationship because she was unable to demonstrate that there was a discussion between the parties "regarding grounds for termination, nor was there an indication of an intent to contract for just-cause employment." Accordingly, the court found that she remained employed on an at-will basis, despite the comments made by the employer. Thus, her claim for wrongful discharge was dismissed.

**THE LEGITIMATE EXPECTATIONS EXCEPTION**

Michigan law also provides an exception to at-will employment where there is evidence of a legitimate expectation of just-cause employment. Under this theory, an employee must rely on an employer's promises to the workforce in general, rather than promises to an individual employee. Specifically, the court engages in a two-step analysis. First, it must determine what, if anything, the employer has expressly or impliedly promised. And second, the court must determine whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees. Only policies and procedures reasonably related to employee termination may serve as the basis for any such purported legitimate expectation.

For example, in a case issued by the Eastern District Federal Court in Michigan, the court found that a statement allegedly made at a staff meeting after another employee had been fired that "[w]e don't fire you, you fire yourself" could be reasonably understood as a promise of just-cause employment. In addition, the court was also persuaded by the employer's office manual which provided, among other things, that after a probationary period during which employees could be dismissed without cause, employees were considered regular employees. As a result, the court determined that the issue of whether these statements created just cause employment must be decided by a jury.

**EMPLOYMENT CONTRACT PROVISION FOR DEFINITE TERM**

One exception to at-will employment occurs when an individual is hired for a definite period of time. When this occurs, the law implies the employment relationship to be one in which the employer must have just cause to terminate the employee before the expiration of the agreed-upon term. This presumption may be overcome, however, if the employer includes a specific statement in a written employment agreement or document provided to the employee, clearing stating that employment is on an at-will basis and may be terminated at any time prior to completion of the anticipated period of employment.

**CONCLUSION**

In conclusion, while most employment relationships will fall into the at-will employment category, it is important to understand the exceptions to the rule and how the exceptions can be applied to your situation. Employers should frequently consult with their counsel to discuss each of Michigan’s exceptions to at-will employment in order to best protect themselves against claims for wrongful termination or wrongful discharge.