

## FREQUENTLY ASKED QUESTIONS (F.A.Q.)

Regarding

### Employment Law

#### *Introduction*

The term, "employment law" covers a broad category of laws and judicial decisions that generally serve to protect the rights of employees to work in an environment free of discrimination and unfair treatment based on factors that are irrelevant to their responsibilities. Employment law also regards agreements between employees and employers. Any work-related dispute between an employee and employer will invariably raise employment law questions. Just as the employee may have rights to certain employment conditions, the employer usually has rights which the employee must respect. Such is the case with non-compete agreements and confidentiality agreements. The following frequently asked questions touch on some of the more common questions asked in the field of employment law.

#### *1. Can I be fired just because my employer "says so"?*

Washington has long adhered to the "terminable-at-will" doctrine, which means that an employer can terminate an employee without having a reason. Some employment contracts expressly state that the employment is at-will. If no written employment agreement exists, the employee will be said to be working pursuant to a "unilateral contract", or a contract where performance constitutes acceptance of the employment offer. The default rule for unilateral employment contracts is that, unless the employer expressly states otherwise, the term of employment lasts only so long as the employer wills it. There are four important exceptions to the terminable-at-will doctrine, and they are as follows:

- An employment contract says otherwise. Employment contracts are governed by the same rules as other contracts. An employer and employee can agree to condition the duration of the employment on any event(s) or under any condition(s) that are defined in the contract. Once the employee is hired, the employer's mere oral reassurances of continued employment will not alter the terms of a terminable-at-will agreement. In *Lawson v. Boeing Co.* (1990), the court rejected the employee's claim that he had a contract for continued employment even though the employer made repeated oral promises that the employee would retain his job if the employee met certain performance levels.
- An employment manual provides for job security. Sometimes, during the hiring process, employers give their employees a manual that describes the ins and outs of the company and also usually sets forth various conditions of employment. If wording contained in the manual leads the employee to expect to be employed for a certain period and the employee relies on that expectation, the employment manual will be read in favor of the

employee, and the employee will be able to keep his or her job based on his or her expectation (which of course must be reasonable). However, if the employee manual merely describes progressive discipline measures under certain conditions, such measures alone will not be deemed sufficient to give rise to an employee's expectation of employment for a definite period, and will not alter what was previously an at-will employment relationship.

- The employee relies to his or her detriment on the employer's promises of job security. If the employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and the employee relies on the promises, the employer will be "estopped" or legally prevented from inducing the employee's reliance when promises were really just hot air. *Gaglidari v. Denny's Restaurants, Inc.* (1991).
- Public policy forbids it. The public policy exception provides the employee with a tort cause of action against its employer for wrongful discharge if the discharge contravenes a "clear mandate of public policy." A clear mandate of public policy is usually based in a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may be helpful in fleshing out examples of what constitutes a clearly mandated public policy. One Washington case that recognized the public policy exception described the meaning of "clearly mandated public policy" as concerning "what is right and just and what affects the citizens of the state collectively ... Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other states involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Burnside v. Simpson Paper Co.* (1992). Whistleblowers cannot be discharged out of retaliation under the public policy exception. Similarly, employees cannot be discharged for refusing to commit an illegal act, or be discharged due to race, religion, age, sexual preference, or disability.

## ***2. What remedies are available in the event of a wrongfully discharge?***

The general purpose of a damage award in almost all cases is to make the injured party whole. The same applies in wrongful discharge cases. A damage award should place the employee as close as possible to where he or she would have been if the wrongful conduct had not been committed. In most cases, once the wrongful discharge is established, the inquiry essentially turns to determining the period of time that the employee was out of work, and multiplying that period by the rate of pay that would have been expected.

An employee who is wrongfully discharged cannot just sit around waiting for trial and expect to be compensated during the entire interim period. The doctrine of mitigation of damages prevents recovery for those damages that the injured party could have avoided by reasonable efforts taken after the wrong was committed. The employee's effort to gain alternative employment to mitigate damages has to be reasonable. The income generated by the alternative job will serve to offset the award at trial. If the court finds that the employee did not make reasonable efforts to gain alternative employment, the employee's damage award will still be offset by an amount roughly equal to what the employee could have earned had he or she attempted to gain the alternative employment. The burden of proving a failure to mitigate damages is always on the employer. An

employee is not required to go into another line of work, accept a demotion, or take a demeaning position to mitigate his damages.

Attorneys fees under RCW 49.48.030 are recoverable in any successful action for lost wages for breach of an employment contract. No doubt, the legislature enacted that statute with the purpose of providing an incentive to employees to assert their claims, and on the flip side, a major incentive to employers to adhere to their employment obligations. Attorney fees are recoverable under RCW 49.48.030 even if there exists a bona fide dispute between the employer and employee. *Schoonover v. Carpet World, Inc.* (1978).

In addition, RCW 49.52.050(2) makes it a misdemeanor for an employer who "[w]ilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract." As a civil penalty for such a violation, RCW 49.52.070 makes the employer liable for "twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees. However, carelessness or a simple payment error on the part of the employer will not entitle the employee to recover double damages under RCW 49.52.070.

***FAQ 3. What are some of the impermissible grounds for termination? And what laws forbid termination on such grounds?***

Employers wrongfully discriminate in a variety of ways and contexts. An employee who is improperly discriminated against must identify and invoke the appropriate body of law, whether it be federal or state law (or both), in order to pursue a legal claim against his or her employer. The following Federal and state legislative acts are some of the more commonly invoked bodies of law that work to provide relief to employees who are members of protected classes and are unfairly treated.

1. Federal Law:

1.1 Americans with Disabilities Act:

The Americans with Disabilities Act ("ADA"), as the name suggests, protects employees who suffer from mental or physical challenges or disabilities from being treated unfairly as a result of his or her disability. Under the equal employment provisions of the ADA (Title I), it is unlawful for an employer to discriminate against a qualified individual with a disability. Like most discrimination statutes, the prohibition applies to conduct involving applicants and employees in the terms, privileges and conditions of employment. It is also unlawful to discriminate against a non-disabled individual because of that person's association with a disabled individual.

An employer must reasonably accommodate a disabled employee's functional limitations unless doing so would impose an undue hardship on the employer. Whether and when an employer must accommodate an employee is fact specific question. When the obligation to accommodate arises, the employer must engage the employee in an interactive process to determine whether and what accommodation is reasonable. In order to properly invoke the ADA, the claimant must

establish that its employer employs more than fifteen (15) employees for each working day in each of twenty or more calendar weeks per year. The successful claimant under the ADA is entitled to several remedies and damages that include back pay, compensatory damages, attorney's fees, punitive damages, front pay, and injunctive relief.

### 1.2 Age Discrimination In Employment Act:

The Age Discrimination In Employment Act ("ADEA") is the main federal statute that protects employees from being discriminated against by their employers based on their age. Older employees are sometimes unfairly treated in terms of privileges and conditions of employment, and this is specifically prohibited by the ADEA. The ADEA governs employment agencies and labor organizations as well as private employers who employ more than twenty (20) employees for each working day in each of twenty or more calendar weeks in a year. To be covered by the ADEA, an individual must be at least 40 years old.

Recognizing that an employee's age may truly affect an employee's ability to carry out a particular task or responsibility, the ADEA provides several exceptions to its general ban on age discrimination. Where an employee's age is a true factor that is reasonably relevant to the performance of the employee's position, employers are permitted to use age as a factor for treating some employees differently than others. The ADEA recognizes that "no precise and unequivocal determination can be made as to the scope of the phrase 'differentiation based on reasonable factors other than age.' Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation."

The ADEA borrows the remedies and damages provisions from the Family and Medical Leave Act (see below), which include back pay, liquidated damages, front pay, injunctive relief, and attorneys fees.

### 1.3 Title VII of the Civil Rights Act of 1964:

Title VII of the Civil Rights Act of 1964, 42 USC 2000e, ("Title VII") makes it unlawful for an employer to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, sex or national origin. This covers hiring, firing, promotions and all workplace conduct.

Like the other federal discrimination laws, Title VII only applies to employers or companies who employ fifteen (15) or more employees for each working day in each of twenty or more calendar weeks. That is because the federal government may only make laws that affect the nation and interstate commerce. Smaller businesses are deemed to have less of an effect on interstate commerce and are therefore not subject to federal jurisdiction, including federal laws that aim to regulate employment discrimination.

The successful claimant under Title VII may be entitled to back pay, compensatory damages, attorneys fees, punitive damages (where the discrimination is intentional and done so with malice or reckless indifference), front pay, and injunctive relief. As is the case with the other federal

discrimination laws, certain filing requirements and time limitations exist.

#### 1.4 Family & Medical Leave Act:

Under the Family & Medical Leave Act ("FMLA"), employees covered by the act are entitled to up to 12 weeks of job protected, unpaid leave during the course of a year for any of the following reasons:

- Birth of a child;
- Care for an immediate family member who has a serious health condition;
- Employee's own serious health condition.

The FMLA applies to all government employers and to all private sector employers who employ 50 or more employees each working day during at least 20 calendar weeks or more in the current or preceding year. An employer must maintain group health benefits that an employee was receiving at the time leave began during periods of FMLA leave at the same level and in the same manner as if the employee had continued to work. Under most circumstances, an employee may elect or the employer may require the use of any accrued paid leave (vacation, sick, personal, etc.) for periods of unpaid FMLA leave.

When the employee returns from FMLA leave, the employee is entitled to be restored to the same or an equivalent job. An equivalent job is one with equivalent pay, benefits, responsibilities, etc. The employee is not entitled to accrue benefits during periods of unpaid FMLA leave, but must be returned to employment with the same benefits at the same levels as existed when leave commenced.

An aggrieved employee is entitled to back pay, monetary losses which were sustained by the employee as a result of the violation, liquidated damages, attorney's fees, and injunctive relief (reinstatement in their old position).

#### 2. Washington State Law:

Chapter 49.60 of the Revised Code of Washington sets forth the laws in Washington that regulate discrimination in the work place. This body of law is commonly known as the Washington State Law Against Discrimination ("WSLAD"). One important Section of the Chapter that is especially relevant to employees and employers is found under RCW 49.60.180, "Unfair Practices of Employers." The purpose of Section 180 is to protect individuals who have sensory, mental, or physical challenges from being denied employment, unfairly treated in terms of work or benefits, or terminated where the employer does not have a bona fide justification as to why the employee's condition interferes with the employee's occupational performance. The employee's medical condition(s) must be determined to be medically cognizable or diagnosable in order to serve as the basis for a discrimination claim under the WSLAD.

Section 030 of the WSLAD broadly prohibits discrimination on the basis of race, creed, color, national origin, sex, or the presence of any sensory, mental or physical disability in the workplace, in addition to beyond the workplace. The WSLAD applies to all state employees, and

also to private employers who have eight or more employees. A recent ruling from the Washington Supreme Court (*Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901. (2000)) has given employees of small employers that were exempt from the WSLAD a right to sue for discrimination based on protected classifications.

The Washington State Human Rights Commission is a public agency that is charged with the duty to enforce the provisions of the WSLAD. However, civil actions can also be filed by aggrieved parties under the WSLAD. The successful claimant is entitled to actual damages in addition to attorney fees and other remedies that may be deemed appropriate under the circumstances.