Termination: Exceptions to Employment At Will

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Table: Sources of Law - Exceptions to Employment At Will

Federal Statute	None. State or local common law controls.
Federal Regulations	None.
D.C. Statute	None. State or local common law controls.
D.C. Regulations	None.
Federal Employees	Most federal employees are not at-will employees. *See* 5 U.S.C. § 1201-1222 for ways to protest termination of federal employees.
D.C. Employees	Most D.C. government employees are not at-will employees. *See* D.C. Code § 1-606.01 to 1-606.11 for ways to protest termination of D.C. employees.

D.C. Law

Employment-At-Will Doctrine

"Employment-at-will" is a common law doctrine which states that either party in an employment contract can walk away at any time for any reason. Employees in D.C. are presumed to be employees-at-will unless they have signed a contract for a definite period of time. In accordance with this doctrine, "**an employer may discharge an at-will employee at any time and for any reason, or for no reason at all**." *See Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). There are, however, exceptions to the employment-at-will doctrine, which are discussed below.

Practice Tip: The employment-at-will rule has one advantage for workers: they can walk away at any time without damages. There is no law requiring two weeks' notice before quitting, and an employer would have no cause of action against a worker who failed to give two weeks' notice. Of course, the employer can give a bad reference for failure to follow this convention.

Exceptions to Employment-At-Will Doctrine

Expressed Contracts - Breach of Employment Contract for Specific Term

If a worker has an oral or written contract for a specific term, and the worker is terminated before the end of the contract term, s/he may be able to sue the employer for breach of contract to collect money damages. The terms of any written contract should be reviewed carefully. An employment contract usually contains mutual obligations, e.g., the employer may not be able to terminate the worker under the contract, but the worker may not be allowed to quit either, without giving rise to a breach of contract action against the worker.

The general statute of limitations for contract actions in D.C. is **three years**. *See* D.C. Code § 12-301(7).

Note: As a matter of practice, low-wage workers rarely are employed via contracts for a specific term.

Oral Contracts & Statute of Frauds

Oral employment contracts are generally enforceable and do not violate the statute of frauds requirement that certain contracts be in writing because they *can be* performed within one year. *See* D.C. Code § 28-3502; *See also Hodge v. Evans Fin. Corp.,* 823 F.2d 559 (D.C. Cir. 1987) (court found oral promise of lifetime employment did not need to be in writing because, for example, employee could have died within first year, and thus fully performed contract within one year); *Stone v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 865 F.2d 1330 (D.C. Cir. Dec 30, 1988) (finding alleged oral contract of employment "until you retire" need not be in writing).

Oral Promise of Employment for Specific Term Beyond Two Years Violates Statute of Frauds

In other cases when the employment contract was for a fixed duration, such as "until the age of 65" or for a fixed term longer than a year (e.g., two years), the statute of frauds applies. *See e.g., Gebhard v. GAF Corp.,* 59 F.R.D. 504 (D.D.C. 1973); *Prouty v. National R.R. Passenger Corp.*, 572 F. Supp. 200 (D.D.C. 1983). In both *Prouty* and *Gebhard*, the courts noted in dicta that because of the statute of frauds the contracts needed to be in writing.

Collective Bargaining Agreements - Union Contracts

Most union collective bargaining agreements (CBAs) are for a fixed duration; therefore, employees covered by such contracts are not at-will employees. In addition, most CBAs state that all terminations must be for just cause and require employers to use progressive discipline (e.g., for most offenses, first a verbal warning, then a written warning, then a suspension, then termination). Finally, most union contracts also describe specific procedures that must be used to terminate an employee or allow an employee to protest a termination, called a grievance procedure.

For more information, please see this manual's *Labor Laws & Union* chapter.

Implied Contracts

Employee Handbooks

Implied contracts most often are created and found in an employer's personnel policy manual (or "employee handbook"). For example, if a manual states preconditions for terminating a worker, then the workers are not at-will employees. The leading cases in D.C. for this issue are *Washington Welfare Ass'n v. Wheeler*, 496 A.2d 613 (D.C. 1985) and *Sisco v. GSA National*

Capitol Federal Credit Union, 689 A.2d 52 (D.C. 1997).

In *Wheeler*, an employee of a non-profit organization was terminated after uncovering and exposing embezzlement of funds by a business manager, who also was fired. When she was hired, Wheeler had received a letter informing her of her salary but no specified period of employment; the appellants therefore argued she was an at-will employee. However, the personnel manual made a distinction between "probationary" and "permanent" employees, and stated that permanent employees could not be fired except for just cause. The D.C. Court of Appeals found that Wheeler was a permanent employee who could be fired only for just cause and upheld the jury verdict in her favor for $26,000 in back pay. *See Wheeler*, 496 A. 2d 613 (D.C. 1985).

Similarly, in *Sisco*, an employee was discharged in contravention of the "Discharge and Discipline" chapter of the "Policy Manual." The plaintiff had been fired for refusing to come in to work on a snowy day and was not subjected to progressive discipline, as required by the personnel manual. *See Sisco*, 689 A 2d 52 (D.C. 1997).

On the other hand, the D.C. Court of Appeals has also held that a personnel manual which makes general references to "permanent employees" and discusses *reasons* management can terminate them (as opposed to *procedures* by which they may be terminated) is too ambiguous to counteract the presumption of at-will employment. *See Perkins v. District Gov't Employees Fed. Credit Union*, 653 A.2d 842, 843 (D.C. 1995).

When reviewing an employee handbook to find language that can be used to create an implied contract, advocates should look for the following:

- Procedural guidelines or instructions as to discipline and discharge of workers, or grievance procedures;
- "Good cause" or "just cause" termination clauses; and,
- Two-week notice requirements for discharged workers.

The statement in the handbook constitutes the "offer" of the contract, and it is, generally, enough to aver that the worker's "retention of his employment" constitutes "acceptance." Continuing to work for the employer is sufficient consideration. *See* Richard Harrison Winters, Employee Handbooks and Employment At-Will Contracts, 1985 Duke L. J. 196 (1985).

The employee handbook also should be reviewed for disclaimers of contracts, expressed or implied, or statements that nothing in the manual is intended to alter the at-will nature of employment. If disclaimers are clearly and carefully written, courts generally uphold them and will dismiss any breach of implied contract claim on that basis.

Other Sources of Implied Contracts

General statements not contained in an employee handbook, if made with sufficient clarity, will be enough to defeat the at-will presumption of employment. *See Rinck v. Association of Reserve City Bankers*, 676 A.2d 12 (D.C. 1996) (Employer's oral statement that employee

would not be terminated as result of merger enough to rebut presumption of at-will employment).[104]

Promissory Estoppel

A worker may be able to challenge a termination on the grounds of promissory estoppel if she can prove (1) the existence of a promise, (2) on which she reasonably relied, (3) to her detriment. *See Bible Way Church of Our Lord Jesus Christ v. Beards*, 680 A.2d 419 (D.C. 1996), citing *Bender v. Design Store Corp*., 404 A.2d 194 (1979).

Public Policy

An employee may sue his or her employer for wrongful discharge when his or her discharge violates a clear mandate of public policy. *See Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). Generally, these cases fall into three categories: (1) the employee is fired for refusing to engage in illegal conduct; (2) the employee is fired for exercising a statutory right; or (3) the employee is fired for reporting the illegal conduct of his or her employer or co-worker. Each of these three categories is discussed below.

Employee's Refusal to Engage in Illegal Conduct

The D.C. Court of Appeals first recognized a narrow public policy exception to the employment-at-will doctrine in *Adams v. George W. Cochran & Co.*, 597 A.2d 28, 30 (1991). In *Adams*, the D.C. Court of Appeals held that an at-will employee, a delivery truck driver discharged solely for refusing to drive a truck without a required inspection sticker, may sue for wrongful discharge because the discharge was for the worker's refusal to violate the law, specifically a statute or municipal regulation. Id. at 34. The worker was awarded back pay and emotional damages. This exception has been broadened somewhat to encompass other public policy concerns, as discussed below.

Employee's Exercise of a Statutory Right

In 1997, the public policy exception was broadened to include termination of a worker for exercising a statutory right. *See Carl v. Children's Hosp.*, 702 A.2d 159 (1997). In *Carl*, the plaintiff, a nurse, was fired because she testified before the D.C. Council and the courts on tort reform and her advocacy position on patients' rights ran counter to her employer's position. *Id*. at 160. Although the plaintiff was not discharged because she refused to violate the law, the court found that her termination contravened public policy embodied in a D.C. statute which protected individuals against harassment for testifying before the D.C. City Council. However, the Court in *Carl* made clear that in order to establish a public policy exception to the at-will doctrine there must be a "close fit between the policy thus declared and the conduct at issue in the allegedly wrongful termination." *Id*. at 164.

[104] An at-will employee cannot bring a claim for breach of an implied covenant of good faith and fair dealing. *See Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 627 (1997).

In *Liberatore v. Melville Corporation, T/A CVS*, 168 F.3d 1326 (1999), a pharmacist who threatened to inform the Food and Drug Administration about drugs being kept at the wrong temperature stated a cause of action under the expanded public policy exception. Additionally, the court held that the worker does not actually have to file a complaint to be protected; rather, a mere threat to file a complaint is enough to warrant protection under the expanded public policy exception.

Note: For this exception to apply, there must be a right embodied in a written law or regulation that the client is exercising.

Termination for Reporting Illegal Conduct of an Employer or a Co-Worker

A worker can bring a wrongful discharge claim under the public policy exception if terminated for reporting an employer's illegal conduct. *See Freas v. Archer Services, Inc.*, 716 A.2d 998 (1998). In *Freas*, the court held that a worker could bring a claim for wrongful discharge when he was terminated in retaliation for initiating a lawsuit against his employer for violating D.C.'s minimum wage and wage payment statutes.

A worker also may bring a wrongful discharge claim for being terminated for reporting a co-worker's illegal conduct. *See Washington v. Guest Services, Inc.*, 718 A.2d 1071 (1998) (reversing summary judgment where plaintiff claimed she was terminated because she attempted to persuade a co-worker not to violate the health code and for protesting the co-worker's alleged health code violation).

Exception cannot go beyond Public Policy of the Statute

The public policy exception cannot be invoked to require the employer to act beyond the public policy concerns contained in the statute. *See Duncan v. Children's Nat. Medical Center*, 702 A.2d 207 (D.C. 1997). Duncan refused to work where she was exposed to radiation, alleging she was terminated in violation of the "public policy of not exposing pregnant women to radiation" as embodied in the 1977 District of Columbia Human Rights Act. *Id.* at 210. Because the Human Rights Act prohibited only discrimination based on pregnancy and did not require special treatment for pregnant women, Duncan's case failed to state a claim for wrongful discharge based on public policy. *Id*.

Termination must be "Substantially" because of the Public Policy

The worker must have been terminated "substantially" for the reason of engaging in conduct protected by the public policy exception. *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 886 (1998) (finding plaintiff failed to show she was terminated "substantially" for threatening to report her employer's illegal behavior where plaintiff alleged that she was terminated for a number of reasons).

Remedies & Statute of Limitations

A wrongful termination action is a tort action, so tort-like remedies are available, including loss of pay, pain and suffering, compensatory and punitive damages. There are few caps on damages in a tort action in D.C.

Wrongful discharge claims are subject to a three-year statute of limitations. D.C. Code §§ 12-301 (7)–(8).

Note: Statutory attorney's fees are *not* available in wrongful termination actions.

Employment Laws as Exceptions to the At-Will Doctrine

Although the at-will rule says an employer can discharge a worker at any time for any reason—good reason, bad reason or no reason at all—there are a number of "reasons" that are illegal. For example, it is illegal to terminate a worker because of his or her race, sex or other protected basis under Title VII of the Civil Rights Act or the D.C. Human Rights Act. *See* Discrimination chapter. It is also illegal to terminate a worker for exercising his or her rights under the 1993 Family and Medical Leave Act. *See* Family and Medical Leave chapter. Additional employment laws that may be invoked as exceptions to the employment-at-will doctrine are discussed below.

Jury Duty

It is illegal to fire a worker because he has jury duty. *See* D.C. Code § 11-1913(a). A worker has nine months to bring a case against his employer for violation of this statute. *Id.* at (c).

Termination by Employer Who Takes Over a Service Contract

Food service, janitorial, hospital and nursing home workers can be terminated only in limited circumstances when their employer changes due to a change in contractors. For example, when a downtown office building changes cleaning companies, some workers retain rights to their jobs. This law applies to any individual or company, including subcontractors, that employ 25 or more people. The following classes of employees are covered:

- food service workers (in a hotel, restaurant, cafeteria, apartment building, hospital, nursing care facility, or similar place);
- janitorial, building maintenance service workers (in an office building, institution, or similar facility); and
- non-professional employees hired to perform health care or related support services (in a hospital, nursing care facility, or similar facility).

The law does not apply to:

- employees who work fewer than 15 hours per week
- executive, administrative, or professional workers, as defined by the 1938 Fair Labor Standards Act; or
- those employees required by law to possess an occupational license (e.g., security guards, nurses not covered).

The "old" contractor must notify the "new" contractor of the names, date of hire, and occupation classification of each employee within a period of 10 days. Then, the new contractor must:

- retain for 90 days workers who have been employed for eight months or longer;
- maintain a preferential hiring list of eligible covered employees not retained;
- not discharge any employee without cause during the 90-day transition; and
- after 90 days, the new contractor must conduct performance evaluations of each employee. If the evaluation is satisfactory, the worker must be offered continued employment.

Further, if a company's contract is not renewed, but a similar one is awarded in the District of Columbia within 30 days, the company must retain 50 percent of the workers "as needed" to perform the contract. *See* D.C. Code 32-101 to 103.

In order to seek recourse under this law, a worker may bring a civil action in Superior Court for back pay, the cost of benefits the employer would have incurred and attorney's fees. There is no administrative enforcement mechanism and the law is not preempted by federal labor law. *See* D.C. Code 32-103. *See also, Washington Serv. Contractors Coalition v. District of Columbia*, 858 F.Supp 1219 (D.C. 1994), *aff'd*, 54 F.3d 811, (D.C. Cir 1995).

Displaced by Participants in Publicly-Funded Jobs Programs

Federal Temporary Assistance for Needy Families and Welfare-to-Work laws contain anti-displacement provisions that protect non-TANF recipients from replacement by "cheaper" TANF workers. Employers may not employ a TANF recipient when any other worker is on layoff from the same or substantially the same job. Nor may the employer terminate a worker to be replaced by the recipient. *See* 42 U.S.C. § 607(f)(2). In addition, an employer may not reduce the hours of non-recipients below full-time to make space for a TANF recipient to take the same or substantially the same job. *Id.* at § 603(a)(5)(J)(i)(III).

The TANF and Welfare-to-Work laws require states to include in their state plans grievance procedures for displacement provisions. *Id.* at § 607(f)(3).

Wage Garnishment

A worker cannot be terminated because his or her wages are being garnished. *See* D.C. Code § 16-584.

Tobacco Use

A worker cannot be terminated because of tobacco use. *See* D.C. Code § 7-1703.03.

Government Employees

Many public employees have constitutional rights that might prevent their termination, including procedural due process rights to notice and a hearing before the deprivation of the employee's property interest in employment, and the protection of free speech rights. As a result, many are protected from termination without just cause. *See e.g., Pickering v. Board of Education*, 391 U.S. 563 (1968) (finding public school teacher illegally discharged for violating constitutional right to free speech). In D.C., however, not all government employment creates a property interest. *See Holland v. Board of Trustees*, 794 F. Supp. 420, 423 (D.D.C. 1992).

Federal Employees

Termination for Misconduct

Prior to terminating a federal employee for misconduct (or taking an adverse action against a federal employee), the agency/employer must first send the employee a "notice of proposed removal/demotion/suspension" containing specific reasons for the action, and provide the worker a chance to review the material relied on by the agency for the removal. [105] The worker will have at least seven days after the receipt of the notice to respond in writing and/or orally.

An adverse action is defined as a termination, demotion, or suspension of more than 15 days.

After the employee presents his/her reply to the notice of proposed adverse action, the agency must issue a written decision explaining whether or not it is going to terminate, suspend, or demote the employee. The agency has the burden to establish by a preponderance of the evidence that the adverse action "promotes the efficiency of the federal service," and it can choose to mitigate the penalty to a lesser one.

In any event, no official agency action can be taken for 30 days. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404. If, after 30 days, the agency decides to move forward with its decision to terminate (or demote or suspend for 15 or more calendar days), **the worker then has 30 days from the effective date of the removal to appeal in writing to the Merit Systems Protection Board or 45 days to file a discrimination complaint with the agency's Equal Employment Opportunity office**.

If the worker is a **union member**, however, s/he must check her union contract because it

[105] These are sometimes referred to as Chapter 75 removals.

will specify the **maximum number of days within which to file an appeal**. THIS TIME PERIOD COULD BE AS SHORT AS FIVE DAYS!

Removal for Poor Performance

An employee whose performance is unacceptable either must be removed, demoted or reassigned.[106] The major difference between this type of removal and a removal for misconduct is the necessity of creating performance improvement plans for the affected worker.

A performance improvement plan (PIP) is designed to spell out in writing what a worker must do to effectively perform his or her job, and it must be approved by the Office of Personnel Management. *See* 5 U.S.C. § 4303; 5 C.F.R. § 432.104. The discharge then must be related to the criteria outlined in the plan, and at least one of the plan components must be "crucial" to the worker's position.

Prior to issuing a PIP, the agency/employer must determine that the employee's performance is unacceptable. Once the PIP is issued, the employee has at least 30 calendar days to improve his or her performance to an acceptable level, but employees typically are given 90 days. If the employee does not demonstrate acceptable performance during the PIP, the agency will either demote or remove the employee.

Prior to demoting or removing the employee, however, the agency must follow the same procedures outlined above for removing an employee for misconduct.

Notice of Proposed Removal

Practice Tip: Some unions are inactive and workers are unaware they are members. Read the Notice of Proposed Removal carefully to see whether it references a union. If it does, immediately request a copy of the collective bargaining agreement from the union AND the agency, and ask the union for assistance with preparing the appeal.

Appeals to the MSPB[107]

Federal employees who are (1) not on probation (e.g., competitive service federal workers who have been employed for more than a year), or (2) excepted service workers who have been employed in the same or similar position for two years, have due process rights which allow them to appeal a termination or other "adverse action" to the Merit Systems Protection Board (MSPB).[108]

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[106] These are sometimes referred to as Chapter 43 removals (a/k/a performance-based removals). They are less common than those under Chapter 75.

[107] Although many federal employees have the right to file an appeal to the MSPB from an adverse action, some do not, due to the nature of their appointment or the agency for whom s/he works. For example, employees of the FBI generally do not have MSPB appeal rights.

[108] Federal workers are hired and employed under one of two categories of service: "competitive service," which requires a preliminary civil service examination and a probationary employment period, are the presumptive

Other "adverse actions" include suspensions of *more than* 15 calendar days, a demotion, a loss in pay, or a reduction-in-force (RIF). A suspension for less than 15 days is not appealable to the MSPB unless the worker claims retaliation and has raised that claim with the Office of Special Counsel.[109]

Workers have **30 calendar days** (or the next business day after the thirtieth day) from the effective date of the adverse action to appeal the action to the MSPB.

The MSPB provides an optional form (a letter is also fine) for filing an appeal, available online at http://www.mspb.gov. The worker should provide two copies of the appeal, filed with the regional office. If the worker was terminated prior to filing an appeal, she no longer will be on payroll. However, if the MSPB orders her re-instated, she will receive back pay and interest for the time of the appeal, so long as she was "ready, willing and able to work." If the worker was suspended, she will remain on payroll pending the appeal; however, she will not receive income for the time she was suspended, unless the MSPB orders otherwise.

Federal employees who are covered by union contracts must choose to use either the union grievance procedures as negotiated in the collective bargaining agreement OR the above outlined procedure.

The MSPB, in the *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), established a number of factors it uses to determine whether a removal was proper. The factors include the following:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and the prominence of the position;
(3) The employee's past disciplinary record;
(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

category, while "excepted service," which requires no examination and has at least a two-year probationary period, must be approved by the Office of Personnel Management. There are further sub-categories, such as temporary, term, career-conditional, and career.

[109] Much of this section is culled from James M. Eisenmann, Esq., *Overview of Rights of Federal Government and District of Columbia Employees* (September 23, 1999) (unpublished paper included in D.C. Bar PSAC Pro Bono Program – Employment Law Training).

(7) Consistency of the penalty with any applicable agency table of penalties;
(8) The notoriety of the offense or its impact upon the reputation of the agency;
(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) Potential for the employee's rehabilitation;
(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

One can use these factors to argue that the adverse action was not proper. To review post-1994 MSPB case law, go to www.mspb.gov.

Federal workers who work in D.C. file MSPB cases with the Washington Regional Office, 1800 Diagonal Road, Suite 205, Alexandria, VA 22314. The telephone number is 703-756-6250.

At the MSPB, the case is assigned to an administrative law judge. It is common practice for the administrative judges to actively try to get the parties to settle the case.

D.C. Government Employees

Relevant Agency

The D.C. Office of Employee Appeals (OEA) is the D.C. agency that functions as the administrative appeals court for District of Columbia public employees in the following types of issues: disciplinary removal from employment (wrongful termination) for alleged misconduct; disciplinary suspensions of more than 10 days in length for misconduct; appeals of workplace reductions-in-force; review of position classifications of District public employees; review of performance issues involving District public employees; other issues. *See* D.C. Code 1-606.03 (a). It is located at 717 14th Street, NW, 3rd Floor, Washington, DC 20005. The telephone number is 202-727-0004, and its website address is http://www.oea.dc.gov.

Note: Like federal government employees, D.C. government workers who are represented by a union may not seek recourse for an adverse employment decision through the union grievance procedure *and* the OEA process; rather, aggrieved employees must choose which course to take to the exclusion of the other.

Note: An employee of a D.C public charter school shall not be considered an employee of the District of Columbia. *See* D.C. Code § 38-1802.7(c)

Filing an Appeal

The employee must file a petition for appeal (one original and two copies) with the OEA within 30 calendar days of the effective date of the action being appealed. *See* DC Official Code 1-606.03. A form petition can be found on the OEA website and at http://wrmanual.dcejc.org/36.

Along with the petition for appeal, the employee also should submit:

- a statement as to whether the employee requests an evidentiary hearing or oral argument;
- a concise statement of the facts giving rise to the appeal;
- an explanation as to why the employee believes the agency's action was unwarranted; and
- a statement of the specific relief the employee is requesting.

Employees should not wait to file because the petition for appeal will be deemed filed on the date it is received by OEA. OEA will then serve a copy of the petition on the agency and request a response. The response may include a motion to dismiss on jurisdictional grounds.

If jurisdiction is proper, the parties typically will proceed to mediation. If mediation fails, the parties are assigned to an administrative judge for a hearing. After a hearing, the administrative judge will issue an initial decision. The rules for proceedings before the administrative judge, including the rules for discovery, any pre-hearing conference, or hearing, can be found on the OEA website.

Prevailing workers in these cases may be entitled to attorney's fees, and either party may appeal the administrative judge's initial decision to the OEA Board or to D.C. Superior Court.

Whistleblower and Anti-Retaliation Protections for Government Employees

Employees of the D.C. Government and D.C. Government Contractors

D.C.'s Whistleblower Law

The District of Columbia's whistleblower law protects workers who complain about fraud and abuse, or about health and safety dangers. *See* D.C. Code § 1-615.51 *et seq*. The law protects former employees, current employees and applicants for employment by the D.C. government, including but not limited to employees of subordinate agencies, independent agencies, the Board of Education, the U.D.C. Board of Trustees, the D.C. Housing Authority and the Metropolitan Police Department. However, the D.C. Council is excluded. *See* D.C. Code § 1-615.52(a)(3).

The law provides that it is illegal to take retaliatory actions against employees who make protected disclosures or against employees who refuse to comply with an illegal order. *See* D.C. Code § 1-615.53. "Protected" disclosures are defined as disclosures not prohibited by law, by an employee to a supervisor or a public body, that the employee believes reasonably evidences:

gross mismanagement; gross misuse or waste of public resources or funds; abuse of authority in connection with a public program or public contract; violation of a law, rule or regulation; violation of a term of a contract between the D.C. government and a government contractor that is not merely of a technical or minimal nature; or a "substantial and specific danger to the public health and safety." D.C. Code § 1-615.52(a)(6).

The law further provides that an employee who was wrongfully retaliated against has a private right of action in D.C. Superior Court, and that the court may award relief and damages, including but not limited to an injunction, reinstatement to the prior position, reinstatement of seniority rights, restoration of lost benefits, back pay and interest on back pay, compensatory damages, and reasonable costs and attorney's fees. *See* D.C. Code § 1-615.54(a). For filing purposes, the action must be filed within **three years** after the violation occurs or within one year after the employee first becomes aware of the violation, whichever "occurs" first (that is, whichever time "runs out" first). Id. at § 1-615.54(a)(2). Further, an aggrieved employee need not comply with the notice requirements of D.C. Code § 12-309,[110] and need not first exhaust administrative or union contract remedies. *See Sharma v. District of Columbia*, 791 F. Supp. 2d 207, 216 (D.D.C. 2011) (interpreting the DCWPA's provision on election of remedies, D.C. Code § 1-615.56, in light of legislative intent); *See* also D.C. Code § 1-615.54(a)(1).

In a court or administrative proceeding, once the employee demonstrates that the prohibited activity was a "contributing factor" in the alleged prohibited personnel action, the burden of proof shifts to the employing agency to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by the act. *See* D.C. Code § 1-615.54(b).

Note: An employee who institutes a civil action under the act is precluded from pursuing administrative remedies in the Office of Employee Appeals or pursuant to a "negotiated grievance and arbitration procedure or an employment contract." *See* D.C. Code § 1-615.56(a).

The law further enumerates related rights and responsibilities of employees:

- Free Speech. Employees have the right "to freely express their opinions on all public issues" subject to reasonable agency rules and regulations. *See* D.C. Code § 1-615.58(1).
- Right to Disclose Certain Information. Employees have the right to "disclose information unlawfully suppressed, information concerning illegal or unethical conduct which threatens or which is likely to threaten public health or safety, or which involves the unlawful appropriation or use of public funds, and information which would tend to impeach the testimony of employees of the District government before committees of the Council or the responses of employees to inquiries from members of the Council concerning the implementation of programs, information which would involve expenditure of public funds, and the protection of the constitutional rights of citizens and

[110] The 2009 Whistleblower Protection Amendment Act extended the statute of limitations from one to three years and eliminated the "pre-suit notice" requirement of DC Code § 12-309.

the rights of government employees under this chapter and under any other laws, rules or regulations for the protection of the rights of employees." *See* D.C. Code § 1-615.58(2).

- Right to Communicate with D.C. Council. Employees have the right to communicate with members of the D.C. Council. *See* D.C. Code § 1-615.58(3).
- Right to Assemble. Employees have the right to assemble in public places "for the free discussion of matters of interest to themselves and the public and the right to notify, on their own time, fellow employees and the public of these meetings." *See* D.C. Code § 1-615.58(4).
- Right to Humane Employment. Employees have the right "to humane, dignified, and reasonable conditions of employment, which allow for personal growth and self-fulfillment, and for the unhindered discharge of job responsibilities." *See* D.C. Code § 1-615.58(5).
- Obligation to Make "Protected Disclosures." Employees are required to make "protected disclosures" concerning violations of law and misuse of government resources as soon as the employee becomes aware of the violation or misuse of resources. *See* D.C. Code § 1-615.58(7).
- Right to Personnel File. An employee has the right to access his or her personnel file, medical file, or any other file or document concerning his or her status of performance within the agency. *See* D.C. Code § 1-615.58 (6).

D.C.'s False Claims Law

D.C.'s false claims law applies to workers at companies or organizations that contract with the D.C. government. It is unlawful to "discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against" a worker because of lawful acts of the worker in disclosing information to a government or law enforcement agency in a false claims[111] action by the D.C. government. *See* D. C. Code §2-308.16(b). Further, a worker who assists, supports or testifies on behalf of another worker who filed a whistleblower claim, is protected. *Id*. In addition, if a worker participated in conduct that either directly or indirectly led to the filing of a claim, she is protected by the law. § 2-308.16(d).

Claims under D.C.'s false claims law are enforced by filing a civil action in D.C. Superior Court. Remedies for retaliation include reinstatement, back pay (plus double back pay, for a total of treble damages), and punitive damages. § 2-308.16(c). Attorney's fees may be awarded to successful plaintiffs. Additionally, workers, like other individuals, may file a *qui tam* suit in the D.C. Superior Court to claim damages on behalf of the District. Violators of D.C.'s false claims law are liable to the District for three times the amount of damages the District sustains as a result of the violator's act, plus costs and potentially a $5,000 to $10,000 civil

[111] Actions constituting false claims under D.C. law include: (1) claims for products or services not provided; (2) material misstatements on a bid or request for payments, including those that inflate the amount of a claim; (3) conspiracy; (4) delivering deficient or defective products; (5) the false receipt of property; (6) buying from unauthorized sellers; and (7) using a false record or statement to avoid payment. *See* D. C. Code §2-381.02(a).

penalty per false claim; individuals initiating *qui tam* litigation are entitled to 10 to 40 percent of the proceeds of a successful claim, depending on whether the District intervenes.[112] §§ 2-381.02(a), 2-381.03.

Note: If a worker is fired because of his or her participation in a false claim, retaliation protection is available only if the worker voluntarily discloses all relevant information and the employer had harassed or threatened the worker into engaging in the activity that gave rise to the false claim. § 2-308.16(d).

Employees of the Federal Government and Employees of Federal Government Contractors

Federal Employee Whistleblowers

The 1978 Civil Service Reform Act, 5 U.S.C. § 2302, protects many categories of federal government employees (and applicants for employment) from retaliation for whistleblowing. Under the law, it is unlawful to retaliate against such employees or applicants who have (1) complained that a law, rule or regulation has been violated; (2) complained of gross mismanagement, gross waste of funds, abuse of authority, or a "substantial and specific danger to public health or safety;" or (3) disclosed to the Special Counsel or Inspector General that there has been such a legal violation, gross mismanagement, gross waste, abuse of authority or substantial danger to health or safety. § 2302(b)(8).

The act also makes it unlawful to do the following:

- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation." 5 U.S.C. § 2302(b)(9)(A).
- Discriminate against a federal government employee or applicant on the basis of the employee's testifying or assisting another individual in the exercise of any right referred to in subsection (b)(9)(A). § 2302(b)(9)(B).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because the employee is "cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law." § 2302(b)(9)(C).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of their refusal to obey an order that "would require the individual to violate a law." § 2302(b)(9)(D).

The 2012 Whistleblower Protection Enhancement Act, Pub. L. No. 112-199, 126 Stat. 1465 ("WPEA"), strengthened protections under 5 U.S.C. § 2302. Disclosures can no longer be excluded from protections because (1) the disclosure was made to a supervisor or to a person

[112] *Qui tam* complaints must first be filed under seal with the court and notice given to D.C. Corporation Counsel, after which Corporation Counsel has 180 days to decide if the District will intervene. *See* § 2-381.03.

participating in the legal violation, gross mismanagement, gross waste, abuse of authority or substantial danger to health or safety; (2) the disclosure revealed information that had been previously disclosed; (3) of the employee's motive for making the disclosure; (3) the disclosure was not made in writing; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time passed since the occurrence of the events described in the disclosure. § 2302(f)(1). The WPEA expressly protects employees who make disclosures in the normal course of their duties and up the chain of command. *See* § 2302(f). Transportation Security Administration security officers are no longer excluded from whistleblower protections. *See* § 2304(a).

Additionally, the Inspector General for each agency must now designate a Whistleblower Protection Ombudsman tasked with explaining to employees the process for submitting retaliation claims with the Office of Special Counsel as well as the process for filing whistleblower disclosures. *See* 5 U.S.C.A. App. 3 § 3(d),

The WPEA expands the remedies available in whistleblower claims. Employees may now pursue compensatory damages in addition to reversal of adverse personnel actions. 5 U.S.C. § 1204(g)(1)(A)(ii), (g)(2).

Note: Under the WPEA, whistleblower protections supersede agency non-disclosure agreements, and all such agreements signed after the WPEA went into effect must advise employees of this exception. *See* 5 U.S.C. § 2302(a)(2)(xi), (b)(13)

False Claims Act Claims

Please see the Wage & Hour Chapter of this manual for a detailed discussion about bringing and enforcing claims under the False Claims Act.

Maryland

Maryland also subscribes to the general employment-at-will common law doctrine; however, it recognizes a narrowly defined public policy exception in wrongful discharge claims.

First, the exception may only apply when it provides a remedy for an "otherwise unremedied violation of public policy." *See Wholey v. Sears, Roebuck & Co.*, 370 Md. 38, 52 (Md. 2002). Generally, this operates to bar retaliatory discrimination claims that could otherwise be brought under Title VII or the Maryland Human Rights Act. The Maryland courts, however, have held that where Title VII or the Maryland Human Rights Act do not apply, because, for example, the employer has less than 15 employees, the employee can sue in court under a wrongful discharge cause of action. *See Kerrigan v. Magnum Entertainment, Inc.*, 804 F. Supp. 733, 736-37 (D. Md. 1992).

Second, the "public policy" must be "reasonably discernible from prescribed constitutional or statutory mandates." *Id.* at 53. In *Wholey*, the Maryland Court of Appeals held

that a wrongful termination claim could fall within the public policy exception if the employee gave testimony (as a victim or a witness) at an official proceeding or reported a suspected crime to the appropriate law enforcement or judicial officer. *Id.* at 61.

The Maryland courts have also recognized wrongful termination claims in cases where workers were fired for: (1) filing workers' compensation claims, *see Finch v. Holladay-Tyler Printing, Inc.*, 586 A.2d 1275 (Md. 1991); (2) refusing to commit the tort of invasion of privacy of a third person, *see Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144 (Md. Ct. Spec. App. 1990); (3) filing assault and battery charges against a supervisor, *see Watson v. Peoples Sec. Lif Ins. Co.*, 588 A.2d 760 (Md. 1991); (4) reporting abuse and neglect of children to the proper authorities, *see Bleich v. Florence Crittendon Servs. Of Baltimore, Inc.*, 632 A.2d 463 (Md. Ct. Spec. App. 1993); and (5) exercising the right to free speech, *see DeBleecker v. Montgomery County*, 438 A.2d 1348 (Md. 1982).

Virginia

Virginia also adheres to the employment-at-will doctrine, and like D.C. and Maryland, it also applies a public policy exception to the doctrine. In order to invoke this exception, a worker must be a member of class of individuals that the specific public policy, enunciated in a Virginia state statute, is intended to benefit. *See Dray v. New Mkt. Poultry Prods., Inc.*, 518 S.E.2d 312 (Va. 1999); *Lawrence Chrysler Plymouth Corp. v. Brooks*, 465 S.E.2d 806 (Va. 1996). Like Maryland, if the statute enunciating the public policy already provides the worker with a remedy, such as the Virginia Human Rights Act, the worker cannot also maintain a wrongful termination claim. *See Doss v. Jamco, Inc.*, 492 S.E.2d 441 (Va. 1997).

Welfare to Work

When a participant in a welfare-to-work program is terminated, s/he may be able to demand a hearing to protest the termination under the due process clause of the Fifth Amendment of U.S. Constitution. *See Goldberg v. Kelly*, 397 U.S. 254 (1970).

Undocumented Workers

While there is no law that prevents undocumented workers from bringing claims for wrongful discharge, such claims may not be welcome in certain jurisdictions. For example, in *Egbuna v. Time-Life Libraries*, the Fourth Circuit found that the plaintiff could not demonstrate that he was a victim of discrimination because at the time he sought employment, he was unqualified for the position he sought by virtue of his failure to possess legal documentation authorizing him (an alien) to work in the United States. 153 F.3d 184 (4th Cir. 1998). *See also Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502 (4th Cir. 1999) (undocumented worker not eligible for Title VII or ADEA protection); *Reyes-Gaona v. North Carolina Growers Assoc.*, 2000 U.S.

Dist. LEXIS 14701 (4th Cir. 2000) (undocumented worker cannot bring claim under the 1967 Age Discrimination in Employment Act).

The 4th Circuit's approach most likely precludes the bringing of such actions in the District of Columbia. So far, the D.C. Circuit has not reached this issue, and there is no requirement that a worker be "qualified" to sustain a cause of action for wrongful discharge.