PULLMAN &COMLEY

# Making Sure Your At-Will Employees Remain At-Will

## Working Together

08.02.2017
By Margaret Bartiromo

Almost every state, including Connecticut, recognizes the doctrine of employment-at-will, meaning that in the absence of a contractual provision to the contrary, the employer or the employee can terminate the employment relationship at any time, for any reason or for no reason.

There are **federal and state statutory exceptions** to the employment-at-will doctrine, such as Title VII of the Civil Rights Act of 1964, which is the federal statute barring employment discrimination on the basis of race, sex and various other characteristics; and the federal Fair Labor Standards Act, which prohibits retaliation against any person who has filed a wage complaint with the US Department of Labor or cooperated in an FLSA investigation (29 U.S.C. §215(a)(3)). In Connecticut, employers with three or more employees may not make employment decisions based on an employee's race, religion, age, sex or other protected class, including, as of October 1, status as a veteran (CGS §46a-60). Other Connecticut statutes protect an employee from being terminated because, for example, he or she reported an employer's illegal activities to a public body (CGS §31-51m); served as a juror (CGS §51-247a); or discussed his or her wages with another employee (CGS §31-40z). Employees also cannot be discharged for reasons that violate **public policy**, such as for refusing to work under unsafe conditions (see our prior blog on the public policy exception here).

Employers must also ensure that their supervisors do not unwittingly modify the at-will relationship. Statements such as "you'll have a long career here" or "you'll be taken care of" may be interpreted by an employee to mean that an **implied contract of employment** has been formed. Connecticut courts recognize a claim for wrongful termination based on an implied employment contract if the employee can prove that the employer agreed, by words or action, not to terminate the employee without just cause and that the parties agreed on definite terms (such as compensation and fringe benefits) that are supported by consideration (such as a bonus or pay raise).

A supervisor's statements about an employee's future employment may also form the basis of a cause of action for **negligent misrepresentation**. A recent example is the case of Geany v. City Carting, Inc., where the Connecticut Superior Court (J.D. of Fairfield at Bridgeport) rejected an allegation that an implied contract had been formed, but allowed a claim of negligent misrepresentation to proceed by an employee who argued that he was discharged despite the comments of two superiors that as long as he kept his "nose clean," he had no fear of losing his job. The court found that the employee sufficiently pleaded the four elements of negligent misrepresentation: (1) the employer made a misrepresentation of fact; (2) the employer knew or should have known the statement was false; (3) the employee reasonably relied on the misrepresentation; and (4) the

employee suffered pecuniary harm as a result (that is, he remained in the employer's employment and did not seek other employment opportunities). Importantly, the court in Geany found the negligent misrepresentation claim to be viable even though the employee handbook clearly stated that employment was at-will.

In light of Geany, employers should instruct their supervisors and managers to exercise caution when commenting about an employee's prospects with the company, whether in the context of a formal performance evaluation or in casual conversation, because it may be difficult (or inconvenient) for an employee to distinguish between a remark intended as a simple compliment and a remark intended as an assurance of future employment. To reduce the risk of liability for an implied contract or negligent misrepresentation, employers should warn their supervisory employees not to make definite promises about an employee's potential with the company (e.g., "you'll be here for the long haul") and to use more guarded language (e.g., "while we can't predict the future, we hope that our relationship with you will continue to prosper"). And, finally, employee handbooks should state not only that employees are "at-will," but also that the "at-will" arrangement can only be altered in a writing signed by the employee and an authorized officer of the company.

**Posted in** Company Handbooks

**Tags:** At-Will Employment, Employee Relations, Fair Labor Standards Act (FLSA), Title VII, U.S. Department of Labor