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Seventh Edition

Employment Law for Human Resource Practice

David J. Walsh

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Emeritus Professor, Miami University

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***Employment Law for Human Resource Practice,* Seventh Edition**
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Cover Image Source: 317929406/Rawpixel.com /Shutterstock

Library of Congress Control Number: 2022918862

SE ISBN: 978-0-357-71754-7
LLF ISBN: 978-0-357-71755-4

Cengage
200 Pier 4 Boulevard
Boston, MA 02210
USA

Printed in Mexico
Print Number: 01 Print Year: 2022

With appreciation, for my wife Susan, mother Mary, brothers Phil and George, and sister Sue.

Brief Contents

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Part 5 Terminating Employment

Preface

This is a book about employment law—the set of legal requirements that govern the workplace. A distinction is often made between "employment law" and "labor law," with the latter describing laws related to unions and collective bargaining, but I will generally use the term "employment law" to refer to both. This book has two main objectives. The first is to **explain the major employment laws and types of legal claims faced by employers**. Which things are legal matters? What does the law say about those matters? How are cases decided? The second objective is to **explain what employment law means for human resources practice**. What is it that employers should be doing to comply with the law? What is the legal reasoning behind this practical advice?

Special Features of This Text

Unique Employment Life Cycle Approach

These dual purposes of understanding the substance of employment law and its implications for human resources practice account for the way this book is organized. The first three chapters provide broad overviews. The remainder of the book traces the steps in the employment process and addresses the particular legal issues associated with them. We start with issues that lead up to hiring and promotion, including recruitment, interviewing, background checks, references, and employment testing. We then turn to a range of issues that arise when a person is on the job, including harassment, reasonable accommodation of disability, compensation, benefits, performance appraisal, and occupational safety and health. The last two chapters of the book deal with issues related to the termination of employment. This structure is intended to highlight the legal issues that managers regularly confront.

> The employee life cycle approach to this text offers students the ability to understand the employment process, from beginning to end, while considering the legal environment and its implications for business success. Walsh's personnel law book provides a solid foundation for students to successfully navigate the always changing and rarely certain areas of personnel law within an organization.
>
> **-Professor Sarah Sanders Smith, SPHR, Purdue University**

> Of all of the texts that I reviewed, this one has the most practical and usable advice for soon-be-HR practitioners. The life cycle approach is strong and the writing easy to read.
>
> **-Nancy K. Lahmers, JD, The Ohio State University**

Practical Focus

This book is full of advice for carrying out human resource activities in a lawful manner. These guidelines are general principles for sound human resources practice. They cannot be—and do not purport to be—specific legal advice for particular situations that you might encounter. Only a trained legal professional thoroughly familiar with the details of your case can provide the latter.

> This text offers a unique human resources perspective of employment law that is typically not afforded attention in other comparable texts.
>
> **-Dr. Kim LaFevor, Athens State University**

Interesting Features Included in Each Chapter

Clippings This feature consists of brief synopses of recent cases, events, or studies that illustrate the issues dealt with in each chapter. The clippings should pique your interest and begin to show how employment law relates to real things that are happening in the world around us.

> I love the Clippings features—they are well chosen and give the students a great intro into why what we are covering is relevant to their businesses.
>
> **-Alexis C. Knapp, Houston Baptist University**

Learning Objectives The beginning of each chapter in this book includes a succinct listing of the key "take-aways" from that chapter. Looking at these objectives before diving into the contents of a chapter should help focus your reading on the most central information. After reading a chapter, these objectives can also serve as a check on the effectiveness of your reading.

The Changing Workplace This feature adds a forward-looking flavor to the book by highlighting contemporary developments in the workplace, the workforce, and human resource practices that have particular implications for the law. The business world is nothing if not dynamic. Changes in the workplace raise new legal questions and point to the types of legal disputes that we can expect to see more of in the future.

Just the Facts This feature provides succinct statements of the facts from some interesting court decisions. You are not told the outcomes of the cases; instead, you are given the information needed to make your own determinations ("just the facts"). Thinking through these cases and arriving at decisions is a great way to test your grasp of legal concepts.

Practical Considerations Employers need to follow many rules to meet their legal obligations to employees. But legal compliance is not entirely cut-and-dried. Managers have many choices about how to comply with the law, and this feature highlights some of those choices.

Elements of a Claim In any situation that gives rise to a legal dispute, numerous facts might be considered. The facts that we deem most relevant and the order in which we consider them go a long way toward determining

the outcome of our deliberations. When judges decide cases, they typically rely on established frameworks that spell out a methodology for deciding those cases. Who has the burden of proof? What must the plaintiff show? What must the defendant show? In which order should certain facts be considered? This feature lays out these frameworks—the "elements" of particular legal claims. Grasping this information gives us real insight into how cases are decided. Judges still exercise considerable discretion and judgment in applying these frameworks, but they make the process of arriving at decisions in legal disputes far more systematic and consistent than it would otherwise be.

Practical Implications of the Law Each chapter in this book contains many suggestions for carrying out human resources activities in a lawful manner. This advice appears in **bold type** to make it stand out from the rest of the text. This advice should be considered in the context of the specific legal problems that it aims to help employers avoid. It is important to know not only what to do but also the legal reasoning for why those things should be done.

The law is a basic determinant of human resources practice and one that cannot be ignored. However, the law is best conceived of as providing a "floor," rather than a "ceiling," for such practices. In other words, it establishes minimum standards of acceptable treatment of employees, but often it is sensible for employers—based on motivational, pragmatic, or ethical considerations—to go well beyond the bare minimum legal requirements. Thus, our purpose in understanding what the law requires is not to identify "loopholes" that can be exploited or to advocate superficial measures that look good on paper but fail to realize the underlying purposes (e.g., equal employment opportunity) of the law. Instead, this book encourages you to embrace the "spirit"—and not merely the "letter"—of the law. It invites you to consider how to achieve these important social purposes by implementing policies and practices that also make sense given the operational realities of the workplace.

Practical Advice Summary For easy reference, the practical advice sprinkled liberally throughout chapters is collected at the end of each chapter. This summary can be used as a convenient "checklist" for legal compliance.

Legal Cases Each chapter contains three or four substantial excerpts from decisions in court cases. One of the things that is unusual (and admirable) about legal decision making is that the decision makers (judges) often set down in writing their rationales for the decisions they make in the cases that are brought before them. This gives us the opportunity to read firsthand accounts of legal disputes, to have the decision makers explain the relevant rules of law, and to see how those principles were applied to the facts of cases to arrive at decisions. I describe the law and other cases for you as well, but there is nothing like reading cases to get a real feel for the law. Getting comfortable with reading legal cases is a bit like learning a new language. It will take some doing, but with diligent effort and practice, it will pay off in terms of enhanced ability to access and understand the law.

The words in the case excerpts are the same as those you would find if you looked up the cases online or in print. However, to maximize readability, I have shortened the case decisions by focusing on a brief statement of the facts, the legal issue, and (at greatest length) the explanation of the decision maker's rationale. Where part of a sentence is removed, you will see three dots (. . .). Where more than part of a sentence is removed, you will see three stars (* * *). This marker alerts you that text that appears in the full case decision has been removed in this book. Legal decisions are replete with numerous footnotes and citations to previous cases that addressed similar questions. In most instances, I have removed the citations and footnotes from the case excerpts. Occasionally, I have included in brackets [ ] a brief explanation of a legal term.

What Is New in This Edition

This edition of ***Employment Law for Human Resource Practice*** retains the essential structure and focus of the previous editions. Linking a thorough understanding of principles of employment law to advice on how to conduct human resources practice remains the central aim of this book. Consistent with this aim, the book continues to be organized around stages in the employment process, from the formation of an employment relationship through the termination of that relationship. This seventh edition is the product of a thorough revision of the previous edition, aimed at enhancing clarity and ensuring that the material is as current as possible.

The chapter Learning Objectives mentioned above are new to this edition. Also, for the first time with this edition, I have personally reviewed and written the definitions of terms in the glossary. I hope that the glossary will be a much more useful tool for readers of this book. In any event, the "buck" now stops here for the full contents of this book, with the exception of the index. Users of this text will also find a significant number of new case excerpts. Indeed, nearly two-thirds of the chapter cases are new to this edition. If, through a lapse in taste or judgment, I have eliminated one of your favorite cases from the previous edition, chances are the case still appears somewhere in this edition, perhaps as a new end-of-chapter question.

Insofar as COVID-19 has left an indelible mark on our lives and workplaces, and has still not fully run its course, legal issues raised by the actions of employers and employees in response to the pandemic necessarily find their way into multiple sections of this book. I have included this material not for the sake of re-hashing past events or cataloging pandemic-specific enactments (most of which are no longer in effect), but rather to highlight the many interesting employment law questions that the pandemic has raised. I hope that I have struck a reasonable balance between not ignoring this momentous set of events and not obsessing over them either.

My hope is that both students who are reading this book for the first time and instructors who have used previous editions will find it engaging and informative.

Significant Revisions

Here are some highlights of the revised contents of this edition.

- **Chapter 1**: This chapter includes two new excerpted cases, ***Warner v. United Natural Foods, Inc.*** (employment at will) and ***OTO, L.L.C. v. Kho*** (enforceability of arbitration agreements, procedural unconscionability). The issue of mandatory arbitration agreements receives updated and extended treatment, including class arbitrations.
- **Chapter 2**: This chapter maintains the previous edition's focus on the classification of workers, including "gig" workers, as employees or independent contractors. New cases illustrate the application of the economic realities test (***Acosta v. Off Duty Police Services, Inc.***) and the ABC test (***People v. Uber Technologies, Inc.***). The discussion of the employment status of graduate assistants and student-athletes has been updated.
- **Chapter 3**: Three of the four cases excerpted in this chapter are new to this edition. These new chapter cases are ***Robertson v. Riverstone Communities, LLC*** (disparate treatment, race discrimination), ***Strothers v. City of Laurel*** (retaliation), and ***Robertson v. Wisconsin Department of Health Services*** (retaliation). The contrasting outcomes in these chapter cases should help students better understand the reach and limits of anti-discrimination laws.
- **Chapter 4**: Legal issues surrounding the use of social media for recruiting are highlighted in a substantially revised Changing Workplace feature. An interesting new case from academia, ***Helmuth v. Troy University*** (ADA, medical inquiries) is included. There is also a new discussion of "no-poaching" agreements between employers.
- **Chapter 5**: Coverage of immigration, DACA, and recent changes in the enforcement of immigration laws is expanded and updated. There are three new cases excerpted in this chapter including ***Doe v. Yum! Brands, Inc.*** (negligent hiring, respondeat superior) and ***Moraes v. White*** (defamation).
- **Chapter 6**: Two new excerpted cases appear in this chapter: ***EEOC v. McLeod Health, Inc.*** (medical exams of current employees, direct threat standard) and ***United States EEOC v. Stan Koch & Sons Trucking*** (disparate impact of a physical abilities test). There is an entirely new Changing Workplace feature on workplace COVID testing and inquiries into the vaccination status of employees.
- **Chapter 7**: This chapter includes a new discussion of hair style discrimination and an entirely new Changing Workplace feature on the use of artificial intelligence (AI) in hiring.
- **Chapter 8**: There are two new chapter cases: ***Parker v. Reema Consulting Services*** (hostile environment claim based on circulation of a false rumor that the plaintiff slept with the boss to get a promotion) and ***Wyatt v. Nissan North America, Inc.*** (affirmative defense, retaliation). The use of nondisclosure agreements (NDAs) in harassment cases is discussed.

- **Chapter 9**: Three new chapter cases appear in this edition: ***Hostettler v. College of Wooster*** (essential functions, "qualified individual with a disability"), ***Fisher v. Nissan North America, Inc.*** (reasonable accommodation), and ***Bilinsky v. American Airlines*** (remote work as a reasonable accommodation). There is an entirely new Changing Workplace feature on the reasonable accommodation of both disability and religion in the COVID-19 workplace. Material on the "ministerial exception" to anti-discrimination laws is update.
- **Chapter 10**: Three new case excerpts appear in this chapter, including ***Ramji v. Hospital Housekeeping Systems, L.L.C.*** (overlap between the FMLA and workers' compensation), ***Durham v. Rural Metro Corp.*** (light-duty "accommodation" under the PDA), and ***Bostock v. Clayton County*** (discrimination based on sexual orientation and gender identity under Title VII). The discussion of discrimination based on sexual orientation and gender identity is substantially revised.
- **Chapter 11**: There are two new chapter cases: ***Peterson v. Nelnet Diversified Solutions, LLC*** (FLSA, compensable time) and ***Hobbs v. Evo, Inc.*** (white-collar FLSA exemptions, duties test for "highly compensated employees"). A new Clippings feature update the story of the U.S. women's soccer team's quest for pay equity.
- **Chapter 12**: Two of the three new chapter cases are ***Garner v. Central States*** (ERISA, abuse of discretion in the administration of a health plan) and ***Hughes v. Northwestern University*** (fiduciary duty to 401(k) plan participants). There are new Clippings features on medical debt in the United States and the problem of "surprise medical bills." The discussion of the financial status of multi-employer pension plans is update.
- **Chapter 13**: New to this edition is ***NLRB v. Maine Coast Regional Health Facilities*** (concerted activity). There is an entirely new Changing Workplace feature on the upsurge of union organizing and labor activism, focusing on developments at Starbucks, Amazon.com, and Google. The discussion of agency fees for public employees is revised in light of the Supreme Court's ruling in ***Janus v. AFSCME Council 31.***
- **Chapter 14**: Four excerpted cases are new to this edition: ***Southern Hens, Inc. v. OSHRC*** (violation of OSHA safety standards), ***F&H Coatings, LLC v. Acosta*** (general duty clause), ***Intercontinental Hotels Group v. Utah Labor Commission*** (workers' compensation, "arise out of and in the course of employment"), and ***Tripp v. Scott Emergency Communication Center*** (workers' compensation for PTSD). There is an entirely new Changing Workplace feature on heat exposure as a growing workplace hazard. There is also a new discussion of OSHA emergency temporary standards in light of the Supreme Court's ruling that OSHA does not have the authority to impose a broad workplace COVID-19 vaccination requirement.
- **Chapter 15**: Three new cases are excerpted, including ***United States v. Shelton*** (reasonable expectation of privacy under the 4th Amendment), ***Martin v. Mooney*** (public disclosure of private facts), and ***Dittman v. UPMC*** (liability for failing to safeguard employee data). The Changing

Workplace feature on electronic monitoring of remote and mobile employees is substantially up-dated.

- **Chapter 16**: Two new chapter cases are ***Meehan v. Medical Information Technology, Inc.*** (public policy exception to employment at will, exercising a statutory right) and ***Moser v. Las Vegas Metropolitan Police Department*** (1st Amendment speech case involving a social media post by a police department sniper).
- **Chapter 17**: Two new chapter cases are ***CNG Financial Corp. v. Brichler*** (enforceability of a non-compete, trade secrets) and ***Denson v. Donald J. Trump for President, Inc.*** (enforceability of a broad nondisclosure and nondisparagement agreement). The discussion within the chapter of noncompetition agreements and nondisclosure agreements is expanded.

Supplements

Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at **www.cengage.com.** to search for and access this product and its online resources.

Note to the Instructor

Since I have been touting the contents of this book, it seems only fair to acknowledge material that is largely omitted. Beyond a glancing blow struck in Chapter 1, this book provides relatively little information about such matters as the legislative process, courtroom procedures, and the historical development of employment laws. These are all worthwhile topics, but they are not emphasized in this book because its focus is the current substance of employment law and the implications for human resources practice. The treatment of labor law in this book does not reach a number of the more specialized issues in this area, but I do attempt to show how labor law continues to be relevant to both unionized and nonunion workplaces. Additionally, while cross-national comparisons can enhance our understanding of U.S. law, a comparative perspective is beyond the scope of this book.

Acknowledgments

Thanks to the many faculty and students who have used ***Employment Law for Human Resource Practice***. I hope that this edition will serve your needs even better. If you are not presently using this book, I hope that you will consider adopting it. Please do not hesitate to contact me regarding any questions you have about the book (and ancillary materials) or suggestions for improvement (walshdj@miamioh.edu).

Many thanks also to numerous others at Cengage and its business partners. Being an author provides a small glimpse of the "cast of thousands" who are needed to produce a work of this type.

Finally, I wish to thank and publicly acknowledge the following individuals who provided valuable comments and suggestions that helped shape this edition and previous editions:

Frederick R. Brodzinski
The City College of New York

Lisa A. Burke
University of Tennessee at Chattanooga

Bruce W. Byars
University of North Dakota

Terry Conry
Ohio University

Diya Das
Bryant University

Thomas Daymont
Temple University

Linda Sue Ficht
Indiana University, Kokomo

Jason M. Harris
Augustana College

Michael A. Katz
Delaware State University

Alexis C. Knapp
Houston Baptist University

Kim Lafevor
Athens State University

Nancy K. Lahmers
The Ohio State University

Susan Lubinski
Slippery Rock University

Jeanne M. MacDonald
Dickinson State University

James F. Morgan
California State University, Chico

Diane M. Pfadenhauer
St. Joseph's College

Sarah Sanders Smith
Purdue University North Central

Vicki Fairbanks Taylor
Shippensburg University

Christine M. Westphal
Suffolk University

Part 1

Introduction to Employment Law

1 Overview of Employment Law

This first chapter presents a big picture of the body of law that we will apply to particular human resources practices throughout this book. This chapter contains an overview of employment laws, the rights they confer on employees, and the processes involved in enforcing these laws. Special attention is given to the use of alternatives to litigation to resolve employment disputes.

Learning Objectives

After reading this chapter, you should be able to:

- Have a broad grasp of the various sources of employment law and the rights these laws confer upon employees.
- Recognize some key contextual factors affecting whether and how employment laws apply to particular cases.
- Gain an appreciation for the complexities of enforcing employees' rights and some typical features of enforcement processes.
- Understand that arbitration agreements are now widely used by employers to keep cases out of court, but that these agreements are not always enforceable.

Heard at the Staff Meeting

Congratulations on your new job as human resources manager! You pour a cup of coffee and settle into your seat to hear the following reports from staff members:

"Now that vaccines for COVID-19 are readily available, we are insisting that all employees must be vaccinated. Any employee who does not comply will be terminated. No exceptions!"

"In the interest of security, we now have a firm that checks the backgrounds of our job candidates. Anyone with an arrest or conviction is immediately dropped from consideration for employment."

"Some of our employees have taken to demonstrating outside of our offices during their lunchbreaks to protest what they see as our insufficient commitment to diversity and inclusion. It makes us look bad. The protesters should be informed that their lack of loyalty makes them ineligible for promotion."

"Make sure that all of our employees and new hires sign Non-Disclosure Agreements (NDAs). Let our employees know that we intend to vigorously enforce these agreements against any employees who divulge internal company information to government agencies, the press, or any other party."

You get up to get another—large—cup of coffee and feel fortunate that you were paying attention during that employment law class you took.

Which legal issues emerged during this staff meeting? What should this company be doing differently to better comply with the law? Although you might not encounter this many legal problems in one sitting, employment law pervades virtually every aspect of human resources practice, and managers regularly confront employment law questions.

U.S. Employment Law Is a Fragmented Work in Progress

"Just tell me what the law is, and I'll follow it." Were matters only that simple! No single set of employment laws covers all workers in the United States. Instead, the employment law system is a patchwork of federal, state, and local laws. Whether and how laws apply also depend on such things as whether the employees work for the government or in the private sector, whether they have union representation, and the size of their employer. Our principal focus will be on federal laws because these reach most widely across U.S. workplaces and often serve as models for state and local laws. However, we will also mention significant variations in the employment laws of different states.

There is another problem with the idea of just learning the legal rules and adhering to them. Employment law is dynamic. New law is created and old law is reinterpreted continuously. Changing workplace practices also pose new legal questions. At any point in time, there are "well-settled" legal questions on which there is consensus, other matters that are only partially settled (perhaps because only a few cases have arisen or because courts have issued conflicting decisions), and still other questions that have yet to be considered by the courts and other legal decision makers. Attaining a solid grasp of employment law principles will allow you to make informed judgments in most situations. You must be prepared to tolerate some ambiguity and keep learning, however, as the law of the workplace continues to develop.

Sources of Employment Law

What comes to mind when you think of the law? Judges deciding court cases? Congress legislating? The Constitution? All of these are parts of the law in general and employment law in particular. Legal rules governing the workplace are found in the U.S. Constitution and state constitutions,

statutes enacted by legislatures, executive orders issued by presidents and governors, regulations created by administrative agencies, and judicially authored common law.

Constitutions

Constitutions are the most basic source of law. **Constitutions** address the relationships between different levels of government (e.g., states and the federal government) and between governments and their citizens. A legal claim based on a constitution must generally assert a violation of someone's constitutional rights by the government (in legal parlance, the element of "state action" must be present). In practical terms, this means that usually only employees of government agencies—and not employees of private corporations—can look to the U.S. Constitution or state constitutions for protection in the workplace. Constitutional protections available to government employees include speech rights, freedom of religion, protection from unreasonable search and seizure, equal protection under the law, and due process rights.

Statutes

In our system of government, voters elect representatives to legislative bodies such as the U.S. Congress. These bodies enact laws, or **statutes**, many of which affect the workplace. Among the many important statutes with implications for human resources practice are Title VII of the Civil Rights Act, the National Labor Relations Act, the Equal Pay Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Employee Retirement Income Security Act.

Executive Orders

The executive branch of government has the power to issue executive orders that affect the employment practices of government agencies and companies that have contracts to provide goods and services to the government. **Executive orders** function much like statutes, although they reach fewer workplaces and can be overridden by the legislative branch. One important example of an executive order affecting employment is Executive Order (E.O.) 11246, which establishes affirmative action requirements for companies that do business with the federal government.

Regulations, Guidelines, and Administrative Decisions

When Congress enacts a statute, it often creates an agency, or authorizes an existing one, to administer and enforce that law. Legislators do not have the expertise (and sometimes do not have the political will) to fill in all the details necessary to put statutes into practice. For example, Congress mandated in the Occupational Safety and Health Act that employers provide safe workplaces but largely left it to the Occupational Safety and Health Administration (OSHA) to give content to that broad principle by creating safety standards

governing particular workplace hazards. Formal **regulations** are put in place only after an elaborate set of requirements for public comment and review has been followed. Regulations are entitled to considerable deference from the courts (generally, they will be upheld when challenged), provided that the regulations are viewed as reasonable interpretations of the statutes on which they are based.[1] Agencies also contribute to the law through their decisions in individual cases that are brought before them and the guidance that they provide in complying with laws.

Common Law

Courts are sometimes asked to resolve disputes over matters that have not been objects of legislation or regulation. Over time, courts have recognized **common law** claims to enforce private agreements and to remedy certain types of harm. Common law is defined by state courts, but broad similarities exist across states. One branch of common law is the traditional role of the courts in interpreting and enforcing contracts. The other branch is recognition of various **tort** claims to compensate persons who have been harmed. Tort claims relevant to employment law include negligence, defamation, invasion of privacy, infliction of emotional distress, and wrongful discharge in violation of public policy.

Substantive Rights under Employment Laws

Employment laws confer rights on employees and impose corresponding responsibilities on employers. Paradoxically, the starting point for understanding employee rights is a legal doctrine holding that employees do not have any right to be employed or to retain their employment. This doctrine, known as **employment at will**, holds that in the absence of a contract promising employment for a specified duration, the employment relationship can be severed at any time and for any reason not specifically prohibited by law. Statutory and other rights conferred on employees have significantly blunted the force of employment at will. Nevertheless, in the absence of any clear right that employees can assert not to be terminated, employment at will is the default rule that permits employers to terminate employment without needing to have "good" reasons for doing so.

Broadly speaking, employees have the following rights under employment laws.

Nondiscrimination and Equal Employment Opportunity

A central part of employment law is the set of protections for employees against discrimination based on their race, sex, age, and other grounds. Title VII of the Civil Rights Act of 1964, the Age Discrimination in

[1] *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984); *but see, West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

Employment Act, the Equal Pay Act, and the Americans with Disabilities Act are examples of federal laws that prohibit discrimination in employment and express the societal value of equal employment opportunity.

Freedom to Engage in Concerted Activity and Collective Bargaining

Another approach to protecting workers is to provide them with greater leverage in dealing with their employers and negotiating contractual standards of fair treatment. Labor laws exist to protect the rights of employees to join together to form labor unions and attempt to improve their terms and conditions of employment through collective bargaining with their employers. Important federal labor laws include the National Labor Relations Act, the Railway Labor Act, and the Civil Service Reform Act (covering collective bargaining by federal government employees).

Terms and Conditions of Employment That Meet Minimum Standards

Some employment laws protect workers in a more direct fashion by specifying minimum standards of pay, safety, and other aspects of employment. Federal laws exemplifying this approach include the Fair Labor Standards Act (minimum wage and overtime pay requirements), the Occupational Safety and Health Act (workplace safety standards), and the Family and Medical Leave Act (leave policy requirements).

Protection of Fundamental Rights

Some legal challenges to employer practices are based on broader civil liberties and rights. For example, a variety of privacy-related protections exist, including privacy torts, the Electronic Communications Privacy Act, the Employee Polygraph Protection Act, and the Fair Credit Reporting Act.

Compensation for Certain Types of Harm

Employees can take legal action to recover damages when, for example, they are the victims of employer negligence, are defamed, or have emotional distress inflicted upon them; their employment contract is breached; or they are wrongfully discharged.

In the *Warner v. United Natural Foods, Inc.* case that follows, a terminated employee sued his former employer. Although one might sympathize with the employee under the facts of this case, it is apparent from this decision that *employment at will* still presents a large hurdle for terminated employees.

Warner v. United Natural Foods, Inc.,

513 F. Supp 3d 477 (M.D. Pa., January 13, 2021).

Opinion by Chief U.S. District Judge John E. Jones III:

Defendant United Natural Foods, Inc. ("UNFI"), a Rhode Island corporation, maintains a wholesale food distribution operation in York, PA. On December 16, 2019, UNFI hired Plaintiff Dennis Warner as a loader at that York location.

In the months immediately thereafter, the COVID-19 pandemic hit the Commonwealth of Pennsylvania. On March 6, 2020, Governor Wolf declared a state of emergency … . On March 19, Governor Wolf issued an executive order prohibiting all non-life sustaining businesses from operating. For those essential businesses permitted to remain open, compliance with certain mitigation efforts, such as social distancing protocols, was mandated. Because Defendant UNFI is a wholesale food distributer, it qualified as an "essential" business and was permitted to remain in operation subject to those mitigation standards.

The March 19 order also directed the Secretary of Health to identify further disease mitigation efforts. On April 15, 2020, the Secretary of Health ordered essential businesses to implement certain social distancing, mitigation, and cleaning protocols to help contain the spread of the COVID-19. The Secretary of Health also instructed that employees of essential businesses who develop COVID-19 symptoms "should notify their superior and stay home." Soon after, the Department of Health created an online COVID-19 complaint form for business patrons and employees to report any relevant issues or concerns (such as lack of social distancing, employees coming to work sick, or employers not providing employees with enough personal protective equipment) directly to state public health officials. In the weeks preceding the March 19 and April 15 orders from, respectively, the Governor and the Secretary of Health, Plaintiff "noticed that Defendant was not implementing social distancing and COVID-19 mitigation measures," as required.

In early May, Plaintiff began experiencing COVID-19 symptoms. He visited his doctor, who advised him to self-quarantine pending the result of a COVID-19 test. Plaintiff then notified two supervisors at work of his situation; Plaintiff was "directed" by those supervisors to self-quarantine and not report to work until he received the test result.

In the meantime, Plaintiff proceeded to report Defendant to the Department of Health, using the department's online COVID-19 complaint form, for what he perceived to be violations of the Secretary of Health's April 15 order. These alleged violations included "not adequately sanitizing the York County facility, [] not enforcing social distancing amongst its employees, and [] not notifying its employees when they came in contact with a coworker who had contracted COVID-19." In his complaint, Plaintiff identified himself as an employee of UNFI. Plaintiff avers, upon information and belief, that a state official then contacted Defendant regarding his complaint.

On or around May 20, 2020, UNFI's Director of Human Resources, Lori Leedy, reached out to Plaintiff Warner. Ms. Leedy asked, allegedly "[i]n a hostile manner," why Plaintiff believed UNFI had not been adequately sanitizing the facility. Ms. Leedy also explained to Plaintiff that UNFI could not notify employees about other employees who contracted COVID-19 due to certain confidentiality concerns.

The next day, Plaintiff received a negative result from his COVID-19 test. On his next scheduled workday, May 27, Plaintiff returned to the York facility. While attempting to hand Ms. Leedy paperwork that confirmed his negative test result, Ms. Leedy told Plaintiff that he should not bother because he was soon going to be terminated. When Plaintiff asked for clarification, he was allegedly ignored and escorted off the premises.

*** Plaintiff sets forth two theories in support of his wrongful termination claim: first, that he was wrongfully terminated in retaliation for his complaint to the Department of Health; alternatively, that he was wrongfully terminated because he missed work pending the result of his COVID-19 test in accordance with the March 19 and April 15 executive orders recommending that employees stay home if symptomatic. ***

Discussion

Employment in Pennsylvania is typically at-will. "[T]he presumption of all non-contractual employment relations is that it is at-will and … this presumption is an extremely strong one." "In the context of an employment-at-will relationship, Pennsylvania courts have long recognized that an employer may terminate an employee for any

(continued)

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reason absent a contractual or statutory provision to the contrary." There is one exception to this general rule: when a termination violates a "clear mandate of public policy." *** [However,] [t]he Supreme Court of Pennsylvania has instructed that a court should utilize the public policy exception "[o]nly in the clearest of cases."

What constitutes "public policy" in the Commonwealth is determined by reference to judicial decisions of Pennsylvania courts, the Pennsylvania constitution, and statutes promulgated by the Pennsylvania legislature. An employee's subjective belief that his termination violated public policy is not sufficient: "[A]bsent a violation of law, it is difficult for an at-will employee seeking recovery for wrongful discharge to point to a common law, legislative, or constitutional principle from which a clear public policy [mandate] could be inferred." Accordingly, "Pennsylvania courts have recognized the public policy exception where the employer: (1) compels the employee to engage in criminal activity; (2) prevents the employee from complying with a duty imposed by statute; or (3) discharges the employee when a statute expressly prohibits such termination." ***

[W]e are skeptical that Plaintiff has alleged an articulable and recognizable public policy that can premise a wrongful termination claim under either theory. This is not to say that we condone Defendant's alleged conduct. Indeed, we are considerably troubled by Plaintiff's allegations. But the Supreme Court of Pennsylvania has instructed courts to ascertain whether an employer's conduct implicates public policy by reference to the state constitution, Pennsylvania judicial precedent, and statutes promulgated by the Pennsylvania legislature. We see no clear pronouncement of public policy regarding an employer's responsibilities during the COVID-19 crisis in any of those sources that can sustain Plaintiff's theories.

Further, we have not identified any case to support the proposition that an executive order alone can articulate the Commonwealth's public policy. And this makes sense—an executive order, especially one enacted under the Emergency Code to respond to a crisis, is usually temporary, and does not undergo the same rigorous enactment process as a statute or administrative regulation.

We are sympathetic to Plaintiff's argument that Defendant's conduct potentially undermined the Commonwealth's ability to mitigate the spread of COVID-19. It is also true that the Governor's and Secretary of Health's powers to mandate certain pandemic mitigation standards do derive from statute, namely the Emergency Code. But … we must heed the instructions of the Pennsylvania Supreme Court: the public policy exception should only apply in "the most limited of circumstances where the termination implicates a clear mandate of public policy in this Commonwealth." We are hesitant to pronounce that an employment decision potentially inconsistent with an executive branch's COVID-19 mitigation efforts clearly violates public policy where there is no affirmative indication that the legislature would agree. ***

Plaintiff has not convincingly shown us any "well-defined, universal public sentiment" that Defendant violated. Again, to reiterate, we do not excuse Defendant's alleged conduct. But public policy of the Commonwealth of Pennsylvania cannot be based on the whims of an individual judge or the allegations of an aggrieved employee. Because Plaintiff has not identified any clear pronouncement of public policy that Defendant allegedly violated, Plaintiff cannot state a claim for wrongful termination in violation of public policy.

But even if we found that clearly-established public policy was implicated—that is, if we were inclined to let this case proceed given the obvious public health concerns inherent in dismissing an employee who reports (presumably in good faith) violations of the executive branch's COVID-19 mitigation efforts—we would still be compelled to dismiss this case … . As we have stated, application of the public policy exception has been largely limited to circumstances where an employer: "(1) compels the employee to engage in criminal activity; (2) prevents the employee from complying with a duty imposed by statute; or (3) discharges the employee when a statute expressly prohibits such termination." Plaintiff has failed to plausibly allege that any of these three circumstances are present here, under either of his two theories of liability.

For the first theory—that he was wrongfully terminated based on his complaint to the Department of Health—Plaintiff was not under any affirmative or statutory duty to report alleged violations of the executive branch's

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COVID-19 mitigation orders. Plaintiff's argument that one need not be under any affirmative duty to make a report does not withstand scrutiny. Pennsylvania state and federal courts have consistently dismissed wrongful termination claims premised on retaliation theories where the plaintiff had no duty to make the report he or she was allegedly fired for submitting. ***

Plaintiff's second, alternative theory also fails. To reiterate, Plaintiff claims he was fired because he stayed home from work while he awaited the results of his COVID-19 test. He avers that because the Secretary of Health's April 15 order instructed that symptomatic employees "should notify their supervisor and stay home," and because violations of the Pennsylvania Disease Prevention and Control Law could potentially yield a fine or jail sentence, Defendant essentially terminated him for refusing to commit a crime. There are several problems with this theory, however. First, it is far from certain that Plaintiff would have suffered criminal penalties if he worked instead of self-quarantining pending his COVID-19 test result. The April 15 order Plaintiff references merely encouraged employees to stay home if they were symptomatic, as indicated by the word "should." The order does not threaten any enforcement against individual employees. Second, while one who violates the Disease Prevention and Control Law faces certain criminal penalties, one who ignored the Secretary of Health's recommendation likely would not be in violation of "any provisions of [the Disease Prevention and Control] act or any regulations." The generalized instruction to stay home from work is not enshrined in any provision of the Disease Prevention and Control Law or in any Department of Health regulation, and Plaintiff was not individually ordered to self-isolate or quarantine pursuant to the Department of Health's codified authority. Third, and perhaps most fatally, Plaintiff's theory is simply implausible. Plaintiff avers in his Amended Complaint that he notified his supervisors that he had COVID-19 symptoms and that he had taken a COVID-19 test; following this conversation, those supervisors "directed" him "to self-quarantine pending the results of [the] COVID-19 test." In the next paragraph, Plaintiff again clearly states that he stayed home from work "[a]s directed by . . . Defendant[.]". In other words, Plaintiff pleads that he quarantined while waiting for test results at the direction of his supervisors. It is implausible that Defendant instructed him to stay home from work while he waited for his test results, and then fired him because he stayed home from work while waiting for his test results. We cannot sustain a claim pled in this manner. Because neither of Plaintiff's theories of liability are plausibly alleged, we will grant the Motion and dismiss this case.

Conclusion

For the foregoing reasons, we shall grant Defendant's Motion to Dismiss. ***

Case Questions

1. What was the legal issue in this case? What did the court decide?
2. What arguments and evidence support the plaintiff's (Warner) claim that he was wrongfully terminated?
3. Why does the court, despite expressing sympathy for the plaintiff, rule for the defendant employer?
4. Do you agree with the decision in this case? Why or why not?
5. What, if any, implications does this decision hold for the efforts of public health officials to deal with the COVID-19 pandemic?

The foregoing excerpt from *Warner v. United Natural Foods, Inc.*, is the first of a number of employment law cases that you will have the opportunity to read in this text. The words are those of the judge who wrote the decision. You would find the same words if you looked up the case—which you can easily do by using an online legal database and searching for either the names of the parties or the citation that appears below the names of the parties. The only difference is that we have shortened the case by selecting only the most essential details and by removing internal citations