

Employment & Labor Law 101
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If you intend on ever being an employee or an employer in your life, you should possess a basic understanding of employment & labor laws. The truth is many people are unaware of the distinction between typical office conflict and actual unlawful conduct. Nearly every person you meet will have some story of a job they worked where they saw or experienced a hostile work environment, discrimination, or harassment. But, not all those stories involve illegal activity. As I often tell potential clients calling for advice, “There is no law against having a bad boss or rude coworkers.”

I. Introduction to At-Will Employment and its Exceptions

Employment law is a labyrinth of federal and state statutes, administrative regulations, and common law. Most states, including Ohio, adhere to the legal framework called “at-will employment”¹.

Under at-will employment, both the employer and the employee may terminate the employment relationship at any time and for any reason not contrary to law. In other words, continued employment is at the will, or whim, of either party. There is no requirement to establish a justification to terminate the relationship, nor is there a requirement to provide the other party with a reason for terminating the relationship. At-will employment provides maximum flexibility to both parties at the risk of continued employment. What follows are the many exceptions or modifications to the at-will employment relationship.

¹ Montana operates under a statutory scheme that requires an employer to demonstrate good cause prior to terminating an employee.

A. Labor Unions & Collective Bargaining Agreements

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices. Today, only 10.7% of workers in the United States are members of a labor union – half the rate of 1983.

- Under the NLRA, employees possess the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.
- NLRA makes it unlawful for an employer to refuse to bargain collectively with the employees' representative.
- Collective bargaining agreements may encompass nearly any aspect of the terms and conditions of employment. Most commonly bargained terms include: wages, overtime eligibility, disciplinary process, grievance procedure, and layoffs.
- Employer typically reserves all rights to amend the terms and conditions of employment not identified in the collective bargaining agreement.
- In exchange for the benefits set forth in the collective bargaining agreement, employees agree not to strike. Disputes are handled through an internal grievance process that may end in binding arbitration.

- NLRA also offers employers, employees, and unions the ability to file administrative charges with the National Labor Relations Board for potential unfair labor practices.
- Recent US Supreme Court decision in *Janus v. AFSCME* eliminates ability of public sector unions to compel non-member employees to pay union dues.

B. Title VII of the Civil Rights Act of 1964 (“Title VII”)

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer or labor organization to discriminate against employees on the basis of race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), and national origin.

- Coverage applies to private employers, public employers, and labor unions with more than 15 employees.
- The law makes it illegal for an employer to make any employment decision because of a person's race, color, religion, sex, or national origin. That means an employer may not discriminate when it comes to such things as hiring, firing, promotions, and pay. It also means an employer may not discriminate, for example, when granting breaks, approving leave, assigning work stations, or setting any other term or condition of employment - however small.

- Prohibitions include both disparate impact and disparate treatment claims.
 - “Disparate impact” is what occurs when an organization’s actions, policies, or some other aspect of their processes inadvertently result in discrimination against people who are in a protected class. This happens when one or more protected groups are negatively impacted more so than other groups, even though the policy, action, or item in question would otherwise appear to be neutral. What matters is the outcome, not the intent.
 - “Disparate treatment” is the intentional treatment of individuals in a protect class less favorably than others.

C. Americans With Disabilities Act (“ADA”)

- Prohibits discrimination against qualified employees and applicants with a disability.
- ADA defines “disability” as:
 - A physical or mental impairment that substantially limits one or more major life activities (“actual disability”); or
 - A record of a physical or mental impairment that substantially limited a major life activity (“record of”); or

- A covered entity takes an action prohibited by the ADA because of an actual or *perceived* impairment that is not both transitory and minor (“regarded as”).
- Employee must be able to perform the essential functions of the job with or without a reasonable accommodation.
- An accommodation is any change in the work environment or the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.

D. Family and Medical Leave Act

- Provides eligible employees with 12 weeks of unpaid leave for:
 - The birth and care of a newborn child
 - Placement of a child with the employee for adoption or foster care;
 - To care for the serious health condition of a spouse, child, or parent of the employee; or
 - Because of the employee’s own serious health condition that makes that employee unable to perform the functions of his/her job.
- Leave requirements apply only to covered employers and eligible employees.
- A covered employer is one who:
 - Employees 50 or more employees within a 75 mile radius for at least 20 weeks during current or preceding calendar year.

- An eligible employee is one who:
 - Has worked at least 12 months and 1250 hours prior to the start of the leave and who works at a worksite where there are 50 or more employees within a 75 mile radius.
- A serious health condition means an illness, injury, impairment, or physical or mental condition that involves:
 - Any period of incapacity or treatment connected with inpatient care at a hospital, hospice, or residential medical care facility;
 - A period of incapacity requiring absence of more than three calendar days from work, school, or regular daily activities that involve treatment by (or under the supervision of) a healthcare provider;
 - Any period of incapacity due to pregnancy;
 - Any period of incapacity due to chronic serious health conditions, i.e. asthma, diabetes, epilepsy, etc.; or
 - A period of incapacity that is permanent or long-term due to a condition of which treatment may not be effective, i.e. Alzheimer's, stroke, terminal diseases.
- After approving an employee for FMLA, the employer must maintain the employee's same level of benefits under a group health plan.
- When returning from leave, the employer must allow the employee to return to the same or an equivalent job, absent some minor exceptions.

- No requirement to exhaust administrative remedies through the EEOC. Plaintiffs may pursue private cause of action directly through federal district court.
- No compensatory damages, but successful claimants may recover liquidated damages equal to their economic loss unless the employer proves to the satisfaction of the court that its unlawful conduct was made in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation.

E. Fair Labor Standards Act

- Establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- FLSA requires, among other things, the payment of time and half of an employee's regular hourly rate for all hours worked in excess of 40 in one workweek.
- There are numerous exemptions under the FLSA's overtime provisions including:
 - **Executive Exemption**
 - Primary duties of the employee include the management of a customarily recognized department or subdivision, regularly directs the work of two or more employees, and has the authority to hire or fire other employees or

provides recommendations on hiring/firing decisions that are considered by the ultimate decision maker.

○ **Administrative Exemption**

- Primary duties of the employee include the performance of office or non-manual work directly related to the management or general business operations of the employer or its customers and include the exercise of discretion and independence with respect to matters of significance.

○ **Professional Exemption**

- Primary duties of the employee include performing work that requires knowledge of an advance type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (“Learned Professional”) or includes work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (“Creative Professional”).

○ **Highly Compensated Employee Exemption**

- Employees performing office or non-manual work and who are paid a total annual compensation of \$100,000 or more and if they customarily and regularly perform at least one

of the duties of an exempt executive, administrative, or learned or creative professional.

- **Computer Professionals**

- Employee must be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.

F. Ohio Revised Code §4112

- State law that prohibits discrimination in employment, housing, and higher learning.
- Protected classes include race, color, religion, sex, military status, national origin, disability, age, or ancestry.
- Covered employers are the state, any political subdivision, private employers with four or more employees, and *any person* acting directly or indirectly in the interest of an employer.
 - Claimants may sue individual supervisors for discrimination or retaliation – in practice this is useful to defeat diversity jurisdiction and keep matters in state court.
- No exhaustion of administrative remedy requirement – claimants may file directly in court.
- Claims under §4112, excluding age discrimination claims, are governed by a **six-year** statute of limitations. See below on limitations concerning age claims.

II. Administrative Remedies

A. Equal Employment Opportunity Commission (“EEOC”)

Established under Title VII, the EEOC enforces federal laws pertaining to employment discrimination. EEOC enforces protections of Title VII (race, color, religion, sex, and national origin) as well as the ADA and the Age Discrimination in Employment Act (“ADEA”).

- EEOC investigation begins with the filing of a charge by an employee.
- Employees must file a charge with the EEOC within 180 calendar days from the day the discrimination took place. The 180-calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis. The rules are slightly different for age discrimination charges. For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.
- Prior to formal investigation, both parties are offered the opportunity to go to an EEOC sponsored mediation. If one or both parties decline mediation, the file is transferred to investigations.
- During the investigation phase, an EEOC investigator is assigned to the charge. The investigator may request the employer to provide a position statement and provide additional evidence.

- Once the investigator has completed the investigation, the EEOC will render a determination on the merits of the charge.
 - EEOC determines if “there is reasonable cause to believe that determination occurred”
 - If EEOC is unable to conclude discrimination occurred, then the claimant is issued a Dismissal and Notice of Rights letter, commonly known as a “Right to Sue” letter. The notice informs the charging party that she has the right to file a lawsuit in federal court within 90 days from the date of its receipt. If the charging party does not file within 90 days, the claim is barred.
 - If EEOC concludes there is reasonable cause to believe discrimination occurred, it will invite the parties to engage in an informal resolution of the claims through conciliation. If/when a conciliation does not succeed in resolving the charge, the EEOC has authority to enforce violations by filing a lawsuit in federal court or it may issue a Right to Sue letter to the charging party.
 - In practice, parties face a long wait before an EEOC investigation ever concludes. The current backlog of EEOC charges in the Cleveland office is between two to three years.
 - A charging party may request a Right to Sue letter prior to the EEOC concluding its investigation. If 180 days has past since the charge was filed, the EEOC must provide the Right to Sue letter.

If fewer than 180 days have passed since the charge was filed, the EEOC will only provide the Right to Sue letter if it feels it will not be able to complete the investigation within 180 days.

- Claimants **must** obtain a Right to Sue letter before filing in federal court alleging claims under Title VII and the ADA. Claims for age discrimination under the ADEA are handled slightly differently, but still require a claimant to first file with the EEOC.

B. Ohio Civil Rights Commission

Much like the EEOC, the Ohio Civil Rights Commission (“OCRC”) enforces prohibitions against discrimination on the basis of certain protected characteristics. The OCRC differs from the EEOC in the following ways:

- Charging parties must file within six months from the date of discrimination.
- State law requires OCRC to conclude all investigations within one year from the date of filing.
- Current law does not bar concurrent claims in the OCRC and litigation.
- Claimant has much less control over the process. While claimants may request the OCRC dismiss its investigation, the OCRC retains discretion to pursue all charges brought before it.

C. Local Agencies – Akron Civil Rights Commission

Recently, municipalities have created their own administrative agencies to enforce typically more expansive local anti-discrimination laws. The City of

Akron created the Akron Civil Rights Commission in 2017. The City is still crafting rules and regulations, but it appears as though the Commission will operate in much the same manner as the Ohio Civil Rights Commission.

III. Common Trap – Ohio Age Discrimination Claims

Under Ohio Revised Code §4112, claimants alleging age discrimination have four avenues.

1. **ORC 4112.02(A)** states that it is unlawful for an employer to discriminate on the basis of age. This prohibition encompasses many employer actions, including but not limited to, discharge without just cause, refusal to hire, denial of privileges, and failure to promote. **4112.02(N)** permits individuals to sue employers for age discrimination prohibited by 4112.02(A).
2. **ORC 4112.14(A)** prohibits employers from discriminating in job openings against any applicant or discharging without just cause any employee age 40 or older who otherwise is able to perform and meet job requirements. **4112.14(B)** permits individuals to sue for violations of 4112.14(A).
3. **ORC 4112.05(B)** allows a person to obtain administrative relief by filing a charge with the Ohio Civil Rights Commission, alleging another person, including an employer, has engaged in unlawful discrimination under 4112.02.
4. **ORC 4112.99** provides the right to sue those who violate any part of Chapter 4112, including the prohibitions against age discrimination.

Case law has held that claims under 4112.02, 4112.14, and 4112.05 are mutually exclusive. This becomes problematic because certain claims provide for shorter statute of limitations and more limited remedies. The table below summarizes the state of Ohio's age discrimination laws.

Statute	Statute of Limitation	Damages
ORC 4112.02(A) / ORC 4112.02(N)	180 days	Reinstatement, lost wages & fringe benefits, compensatory and potential punitive damages. No attorney fees.
ORC 4112.14(A) / ORC 4112.14(B)	6 years	Reinstatement, lost wages & fringe benefits. Attorney fees & costs. No compensatory or punitive damages. No jury trial.
ORC 4112.05(B)	6 months to file with OCRC	Reinstatement, lost wages & fringe benefits, potential punitive damages
ORC 4112.99	180 days	Depends on whether claim is more related to 4112.02 or 4112.14.

There is wide consensus between labor and management that Ohio's age discrimination laws require clarification and amendment. There is legislation pending in the Ohio General Assembly that address this issue, but until its passage, practitioners are warned to fully research the ramifications of Ohio's age discrimination choose your own adventure series.

his administrative remedies and having obtained a Notice of Right to Sue, on February 21, 2014, in the above mentioned EEOC charge.

4. Venue is proper in the Northern District of Ohio, as a substantial part of the events giving rise to Plaintiff's cause of action occurred in Cuyahoga County, Ohio.

COUNT ONE

5. From 1997 to 2011, Plaintiff [REDACTED] was employed as a security guard for the Ford Motor Company.

6. At all times herein relevant, Plaintiff was a member of the Plant Protection Association National union and entitled to its associated protections.

7. In 2011, Ford Motor Company outsourced its guard duty responsibilities to Defendant [REDACTED]. Due to union contracts and negotiations, Plaintiff's employment was continued after that transition.

8. While an employee of [REDACTED], Plaintiff's immediate supervisors and managers were exclusively Caucasian. Plaintiff was one of two African American males employed by Defendant as security guards for the Ford Motor Company plant referenced above.

9. At all times herein relevant, Plaintiff was an exemplary employee with only minor disciplinary infractions, related to tardiness.

10. At no time while an employee of Defendant was Plaintiff disciplined for dereliction of duty, post abandonment, insubordination, or physical threats.

11. On March 7, 2012, Plaintiff [REDACTED] reported to work for his typical 11:00 p.m. – 7:00 a.m. shift.

12. Upon arrival, Plaintiff notified his immediate supervisor, [REDACTED], that he was not feeling well and that he may require permission to leave work early.

13. At 11:20 p.m., Plaintiff reported to his assigned station to begin his regular duties. As part of his regular duties, Plaintiff was required to perform “perimeter checks” around the Ford Motor Company facility. These perimeter checks required Plaintiff to use a company vehicle to leave the property and patrol around the facility to ensure property security. Each perimeter check took approximately 40 minutes to complete.

14. Plaintiff completed two perimeter checks on March 7, 2012-March 8, 2012. Plaintiff performed his first perimeter check from 11:20 p.m. – 12:00 a.m and his second from 12:20 a.m. – 1:00 a.m.

15. From 1:00 a.m. to 1:50 a.m. Plaintiff took a half hour lunch break and twenty minute personal break.

16. At approximately 1:50 a.m., Plaintiff notified Mr. [REDACTED] that he was still not feeling well and requested permission to go home. Mr. [REDACTED] approved Plaintiff’s request by stating “See you tomorrow”.

17. Plaintiff’s conduct during his shift was with the full knowledge and approval of his supervisors.

18. On March 14, 2012, Plaintiff was summarily terminated for an alleged physical threat of a coworker, gross insubordination, misuse of a company vehicle and post abandonment.

19. Specifically, Defendant notified Plaintiff he was terminated for allegedly telling [REDACTED] employee [REDACTED] [REDACTED] that he would “kick his ass” if he reported Plaintiff leaving the premises. By Mr. [REDACTED] own admission, Plaintiff’s alleged threat was purportedly made in late 2010 – before Plaintiff’s employment with Defendant and two years before his termination.

20. Prior to the decision to terminate, Defendant failed to allow Plaintiff the opportunity to rebut the charges against him. Furthermore, Defendant failed to follow established internal investigatory procedures in relation to its decision to terminate Plaintiff.

21. Similarly situated Caucasian employees, i.e. Mr. [REDACTED], facing similar disciplinary infractions were provided the ability to consult with union representatives and offer a response to the allegations. In addition, when disciplining Caucasian employees, Defendant routinely performed thorough investigations prior to issuing discipline.

22. In disciplining Caucasian employees, Defendant provided more favorable/lenient punishment in the form of dismissed charges or, at most, unpaid suspensions.

23. In apparent foreshadowing of Plaintiff's termination, Mr. [REDACTED] commented in approximately December, 2011, that should there be any disagreement between himself and Plaintiff [REDACTED], the company would believe Mr. [REDACTED] due to his skin color.

24. Plaintiff's race was a motivating factor in the determination to terminate his employment. Defendant's racial preference and discrimination violates Plaintiff's rights under Title VII of the Civil Rights Act of 1964.

25. Upon information and belief, subsequent to Plaintiff's termination, Defendant replaced Plaintiff with a Caucasian male.

26. As a direct and proximate result of Defendant's deliberate and/or intentional misconduct Plaintiff sustained economic and non-economic damages including but not limited to: loss of past and future income and diminished earning capacity.

WHEREFORE Plaintiff demands judgment against Defendant in an amount of compensatory damages sufficient to make Plaintiff whole and for punitive damages against Defendant in an amount sufficient to deter similar future intentional misconduct, the cost of this action, all interest available by law, attorneys' fees and any other equitable or legal relief this honorable Court finds appropriate.

Respectfully Submitted,

/s/ Michael P. Karst
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JURY DEMAND

A trial by jury is hereby demanded.

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