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# **The Good News and Bad News on Employment at Will**

**for Lorman Education Services' seminar: "Employee  
Discipline and Discharge: How to Avoid Employment  
Litigation in West Virginia" in Morgantown, WV,  
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# Biography: Drew M. Capuder

- ▶ Licensed in West Virginia and Texas; practicing law 23 years.
- ▶ Drew Capuder's practice consists primarily of employment litigation and consulting, and also includes mediation, commercial litigation, and business consulting.
- ▶ Author of Drew Capuder's Employment Law Blog; <http://capuderfantasia.com/blog/>
- ▶ Gina Fantasia's practice focuses on real estate law (especially for banks), insurance law, and business advice.
- ▶ Teaching: "Legal and Ethical Issues in Media," at Fairmont State University (2005 to present).
- ▶ Teaching: Legal Writing at University of Houston Law School (1992-1998).
- ▶ Several appearances during the last 5 years on WAJR's radio program "Ask the Experts"; appearance for WBOY TV on the WVU-Rodriguez lawsuit.
- ▶ Several Lectures and Television Appearances for the Texas Society of CPAs from 1992-1998
- ▶ JD, University of Houston Law School, 1985; BA, University of Southwest Louisiana (now named University of Louisiana), in Music Theory and Composition

# Classic statement of the employment at will rule (page 5)

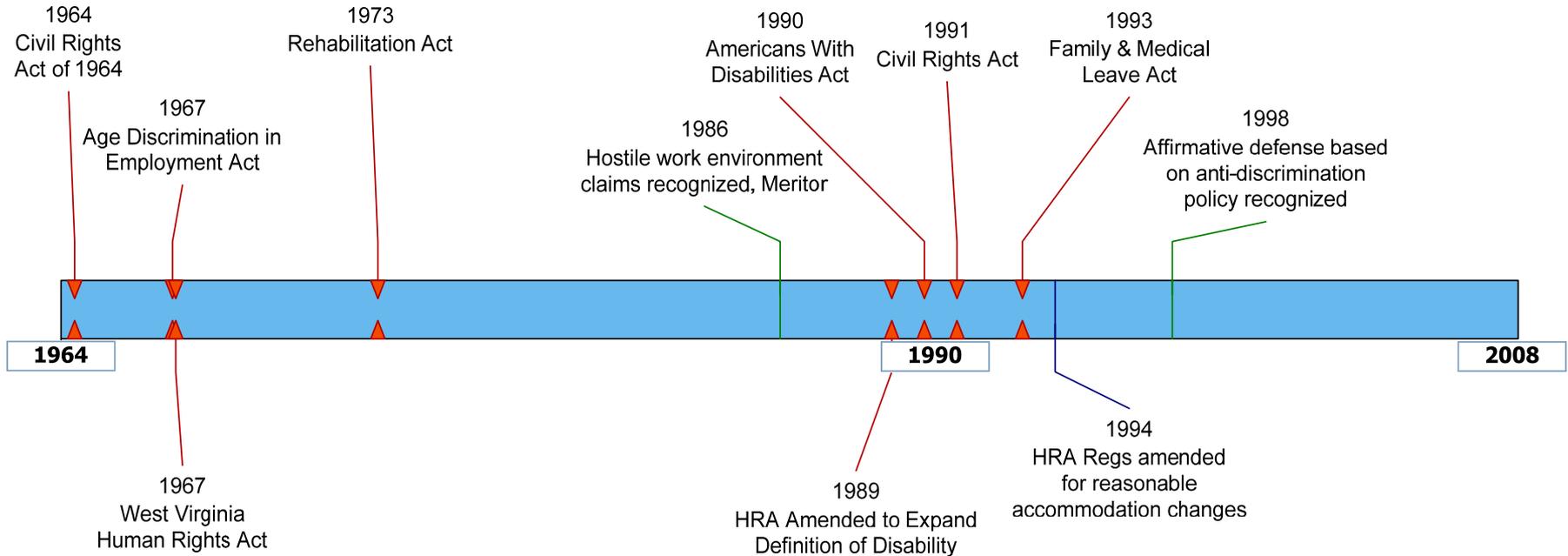
- ▶ An employer may *terminate* an employee for:
  - ▶ Good reasons,
  - ▶ Bad reasons, and
  - ▶ No reason at all.
  - ▶ But not for a reason specifically prohibited by the law.
  - ▶ *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 78, 479 S.E.2d 561, 588 (1996).
- ▶ “[I]n the absence of some contractual or legal provision to the contrary, an employment relationship may be terminated, with or without cause, at the will of either the employer or the employee.” *Bine v. Owens*, 208 W.Va. 679, 682, 542 S.E.2d 842, 845 (2000).

# Examples of good reason, bad reason, no reason (p.5)

- ▶ An employer may *terminate* an employee for all of the following reasons, and here are examples:
  - ▶ No reason:
    - ▶ “Drew, you’re fired.
    - ▶ Why boss?
    - ▶ No reason at all Drew—I just woke up this morning and said to myself that I thought I’d fire the first poor schmuck that I saw this morning.”
    - ▶ *No reason, lawful.*
  - ▶ Bad reason:
    - ▶ “Drew, you’re fired.
    - ▶ Why boss? Heck, I’ve been working here for 37 years and I’ve won all performance and humanitarian awards. Just last Tuesday, boss, you and the Dalai Lama said I was the greatest person who ever lived.
    - ▶ Well, Drew, I think you stole 10 dollars out of the cash register yesterday.
    - ▶ Yikes, boss, the cash register is constantly under video surveillance. You can watch the video and you’ll see that I didn’t steal the 10 dollars. You know I’ve taken a vow of poverty and give all my salary to charity, after making sure grandma’s iron lung is properly maintained.
    - ▶ Drew, you know I’m bored by TV. And I never said that I was a darned monument to justice. You’re fired, and you’re ugly, too.”
    - ▶ *Bad reason, lawful.*
  - ▶ Good reason:
    - ▶ “Drew, you’re fired.
    - ▶ Why boss?
    - ▶ Drew, yesterday, you shot 12 co-workers to death in the company lunch room.
    - ▶ Boss, Fred shot 14 co-workers last week and you didn’t fire him! That’s discrimination!!
    - ▶ Come on, Drew, you know the SWAT team shot Fred to death before I could fire him. Hell, I even did CPR on Fred so I could fire him before he died, but I couldn’t revive the SOB. And by the way, Drew, while you were killing everybody in the lunch room yesterday, I was meeting with auditors, and I found out that you embezzled 12 billion dollars last year. So Drew, you’re fired, and 13 different law enforcement agencies are here to help you collect your personal belongings.”
    - ▶ *Good reason, lawful.*

# History of Employment Discrimination Laws

## Focus on Federal and West Virginia Discrimination



## Limits on statutory exceptions to at will rule (not in article)

- ▶ “It is important that litigants and lower courts do not read too much into today’s ruling. **To be sure, our discrimination laws are not a form of job assurance for handicapped individuals or any other protected class members. Employers retain the right to restructure jobs and exercise business judgment, including even bad judgment. Employees can be let go for any reason or for no reason, provided that the reason is not a prohibited one.** [citations omitted] Accommodation regards efforts that address an individual’s ability to perform a job, not his or her entitlement to it.”
- ▶ *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 79, 479 S.E.2d 561, 589 (1996) (emphasis added)

# Protected characteristics under WV (and federal) anti-discrimination laws (page 6)

- ▶ From the West Virginia Human Rights Act, W.Va. Code § 5-11-9(3), you can't fire (or otherwise disadvantage) an employee:
  - ▶ Because of the employee's **race**
  - ▶ Because of the employee's **religion**
  - ▶ Because of the employee's **color**
  - ▶ Because of the employee's **national origin**
  - ▶ Because of the employee's **ancestry**
  - ▶ Because of the employee's **sex**
  - ▶ Because of the employee's **age**
  - ▶ Because of the employee's **blindness or disability**

# Protected characteristics under WV Workers' Compensation Act (pages 6-7)

- ▶ From the West Virginia Workers' Compensation Act, W. Va. Code § 23-1-1 *et seq.*, you can't fire (or otherwise disadvantage) an employee:
  - ▶ Because the employee received or attempted to receive benefits under the Act, § 23-5A-1
  - ▶ Because the employee is “off work due to a compensable injury” and “is receiving or is eligible to receive temporary total disability benefits”, § 23-5A-3(b)

# Termination in violation of public policy under the *Harless* case (pages 7-8)

- ▶ Under the doctrine enunciated in *Harless v. First National Bank of Fairmont*, 162 W.Va. 116, 246 S.E.2d 270, 275 (1978) (emphasis added), a discharge is actionable where the **“employer's motivation for the discharge contravenes some substantial public policy principle.”**

# Categories of claims under the *Harless* case (pages 7-8)

- ▶ The categories thus far of prohibited reasons under the *Harless* doctrine are:

Category	Example
Because the employer pressured the employee to break the law and the employee refused	Example: Employer fired employee for refusing to operate vehicle with brakes in unsafe working condition in violation of specific W.Va. statutes. See, e.g., <i>Lilly v. Overnight Transportation Co.</i> , 188 W.Va. 538, 425 S.E.2d 214 (1992).
Because the employee complained about the employer breaking the law (regardless of whether the complaining employee himself was pressured to break the law)	Example: Employee complains that his employer bank is overcharging customers in violation of consumer protection law, and employer retaliates and fires the employee, see, e.g., <i>Harless v. First National Bank of Fairmont</i> , 162 W.Va. 116, 246 S.E.2d 270, 275 (1978).
Because the employer insisted that employee do something which violated a right of the employee, and the employee refused	Example: Employee refused to take a mandatory drug test and got fired; the demand for a drug test violated the employee's right of privacy, and the employer's termination of the employee was actionable, <i>Twigg v. Hercules Corp.</i> , 185 W.Va. 155, 406 S.E.2d 52 (1990).
Because the employee did something which the law regards as a right	Example: Employee in convenience store is being robbed, in self defense shoots the robber, and employer fired the employee; employee exercised right of self-defense and could not be fired for doing so, <i>Feliciano v. 7-Eleven, Inc.</i> , 210 W.Va. 740; 559 S.E.2d 713 (2001).

# Thoughts on Preventing Employment Litigation (pages 13-25)

- ▶ What causes risk in the work place? (things, documents, conduct, people)
- ▶ Who might complain and who might sue? (employees, former employees, others)
- ▶ Points in time at which risks arise (drafting policies, creating positions, key employment decisions, reductions in force, plant closings)
- ▶ What can you do to control the risk?
- ▶ Forums in which risks and exposure are decided (grievance proceedings, EEOC, arbitration, court, mediation, trial)
- ▶ Possible outcomes of litigation (the good and the bad)
- ▶ Negative effects of litigation (so we can focus on avoidance, and control the negative effects)

# What causes risk in the workplace (pages 14-17)?

- ▶ **People**
  - ▶ Supervisors, co-workers, HR, personnel
  - ▶ Customers
  - ▶ Vendors
- ▶ **Conduct**
  - ▶ Decisions: termination, hiring, promotion, raises, evaluations, benefits, investigations
  - ▶ Treatment of employees: sexual conduct, anger, profanity, humiliation, disparaging remarks, favoritism, violence, favoritism, ostracizing, denial of accommodations
  - ▶ Breaking the law: discrimination, dangerous conduct, illegal business practices
- ▶ **Physical things**
  - ▶ Physical facilities and layout
  - ▶ Computers, phones
- ▶ **Documents**
  - ▶ Policies, emails, memos, letters
  - ▶ Specific: termination letters, performance reviews, job offer letters, disciplinary memos, grievance decisions, etc.

# Who might complain and who might sue (pages 17-18)?

- ▶ **Current employees. Types:**
  - ▶ The complainer
  - ▶ The lawsuit seeker
  - ▶ The bad employee
  - ▶ The good employee
- ▶ **Former employees**
  - ▶ Same types as the current employees, except (probably) for the good employee
- ▶ **Others**
  - ▶ Relatives of the employees who think they were wronged
  - ▶ Friends of the employees who think they were wronged
  - ▶ Co-workers (they might “oppose” mistreatment of others)
  - ▶ Customers
  - ▶ Vendors
- ▶ **Lawyers of current and past employees**
  - ▶ The good lawyer
  - ▶ The stupid lawyer
  - ▶ The dishonest lawyer
  - ▶ (Your paper trail might dissuade some of these lawyers from filing suit)

# Points in time at which risk arises (pages 18-19)?

- ▶ Drafting/formulation of policies/procedures;
- ▶ Creating a position;
- ▶ Posting a position;
- ▶ Interviews;
- ▶ Hiring;
- ▶ Reviews;
- ▶ Discipline;
- ▶ Investigations;
- ▶ Grievance proceedings;
- ▶ Promotions;
- ▶ Raises;
- ▶ Termination;
- ▶ Phone calls/discussions with employees after termination (including the exit interview);
- ▶ Sending an explanation for termination (including responding to proceedings such as claims for unemployment benefits);
- ▶ Reductions in force; and
- ▶ Plant closings.

# What can you do to control the risk (pages 19-20)? Examine the following:

- ▶ Current practices at the company;
- ▶ Current documents that relate to the event/item;
- ▶ What are we doing wrong?;
- ▶ What are we doing that may be failing to comply with the law (that is potentially a very different issue from what we are doing wrong)?;
- ▶ What risks arise out of both:
  - ▶ The event, even if we are handing it perfectly,
  - ▶ Our practices, if those practices are imperfect, and
  - ▶ (Note: In other words, what are the inherent risks attached to the event/situation, and what are the risks attached to our imperfect handling of it?);
- ▶ How can we reduce the risks:
  - ▶ Changes in policies/procedures;
  - ▶ Changes in practices;
  - ▶ Changes in documents;
  - ▶ Changes in training; and
  - ▶ Changes in follow up.

# Forums in which risks and exposure are addressed (pages 20-21)?

- ▶ Informal meetings and discussions;
- ▶ Internal grievance processes;
- ▶ Union grievance proceedings;
- ▶ Equal Employment Opportunity Commission;
- ▶ Department of Labor (federal and state);
- ▶ West Virginia Human Rights Commission;
- ▶ Arbitration;
- ▶ Mediation;
- ▶ Court:
  - ▶ Trial courts, and
  - ▶ Appellate courts.

## Possible outcomes in litigation (pages 21-22)?

- ▶ You (your company) did nothing wrong, and there is no realistic possibility that you will be adjudicated to have violated the rights of the plaintiff-employee.
- ▶ You very likely did nothing wrong, and a reasonable judge or jury should find in your favor, but there is a realistic possibility that a judge or jury could find against you.
- ▶ There is significant evidence that you did something wrong, and a reasonable judge or jury could find for you or against you.
- ▶ There is very significant evidence that you did something wrong, and it is much more likely than not that a judge or jury will find against you.

# Limitations on your ability to evaluate your risk in litigation (page 22)?

- ▶ You know facts (or believe you know facts) which the jury will never know, so any reliance on those facts will improperly skew an evaluation of that the jury will likely conclude.
- ▶ You don't know facts the jury will likely learn at trial from your opponent. No matter how well you know the facts of a particular employment dispute, it is unlikely that you will be able to walk away from trial without having experienced substantial surprises.
- ▶ Your evaluation of facts, and your predictions of what should happen at trial, is burdened with a wide range of personal, financial, and business biases or predispositions that create significant doubt as to whether your evaluation of likely outcome will be a predictor for what a jury or judge might conclude.

# Negative effects of litigation, many of which can be controlled (page 23-24)?

- ▶ Diverted (wasted) management time.
- ▶ Litigation expense
  - ▶ Attorneys' fees and expenses for the employer.
  - ▶ Expenses for employees involved in the litigation (testifying, meeting with counsel, etc.)
  - ▶ The value of the lost time of your employees.
  - ▶ If the employee prevails, the reasonable attorneys' fees and expenses incurred by the employee's lawyer.
- ▶ Co-workers disrupted through litigation meetings, depositions, hearings, and trials
- ▶ Gossip in the workplace about the litigation, including large amounts of inaccurate gossip
- ▶ Negative effects on other employee's morale, and stirring up bad feelings amongst other employees. Lawsuits frequently generate in co-workers a supportive attitude toward the former employee suing you.
- ▶ Encouraging litigation from other employees.
- ▶ Negative effects on the employer's reputation, internally, and outside the workplace.
- ▶ Possible negative effects on recruiting.
- ▶ Potential negative effects on business.
  - ▶ Lost employee time.
  - ▶ Possible, discouraging certain customers from doing business with you.
- ▶ Negative publicity with the media.
- ▶ Damage awards from the jury or jury; settlements.