Ain't Nothing Wrong With That: What makes a discharge "wrongful"?

The question I get asked most goes something like this:

The wind-up:

"Uh, yeah… (*I don't know why it usually starts with, "Uh, yeah," but it does*) —

- "My boss just fired me . . .
  . . . because of something I posted on Facebook."
  . . . because he thought I stole money, but I didn't."
  . . . because he said he doesn't like me."
  . . . because he said I have a bad attitude."
  . . . for being late one time, but I never even had a write up."
  . . . etc., etc., etc., ad nauseam.

And the delivery:

- Can he do that? (which means, "Is that a wrongful discharge?")

This is the point where I start to subconsciously hear the guitar-rich (it's actually a pedal steel) strains of "Ain't Nothing Wrong With That" — a catchy funk song from Robert Randolph and the Family. An excerpt from the lyrics says it all:

> . . . Suit and tie or tie-dye, it don't matter
> Snake skins, Timberlands, it don't matter
> Tight fade or long braid, it don't matter
> Red head or brunette, it don't matter. . .

Not to be too crass, but when it comes to getting fired in the State of Tennessee (or any other "at-will" state), none of the reasons at the top of this post (or in these lyrics) constitutes a wrongful discharge. Now re-read the lyrics, but this time, before each line, say: "He could fire you for wearing / being…" And why could he do that? The chorus has the answer: "(I'm tellin' you) Ain't nothing wrong with that!"

At-Will Employment

I know, I know — you want to know *why* there's nothing wrong with that. Well, for starters, Tennessee is an at-will employment state. That means that (outside of a written contract, a union, or some other government procedure giving rise to just cause protection) an employer can terminate an employee for a good reason, a bad reason, or no reason at all — so long as it's not an *unlawful* reason. To illustrate with a silly example: Foolhardy Boss holds a meeting in which he asks employees born in the month of May to raise their hands. After observing the room, Foolhardy Boss declares, "Everyone with your hand up: You're fired." That's crazy, *right*?! Yes, it is. But the real question is, is it legal? Again, yes, it is. While absurd, this demonstrates that however morally wrong a decision may be, it doesn't necessarily translate into a legal wrong. For however unseemly Foolhardy's decision may be, there is nothing *legally*

wrong with it — because being born in the month of May does not fall under a "protected category" in the eyes of the law.

What makes a discharge unlawful then? In an at-will employment state like Tennessee, there must be one of two things: (1) a law that prohibits the termination for some reason (such as Title VII, the Americans with Disabilities Act, etc.); or (2) a contract or other source of rights (e.g., the Constitution) that gives employees in that position some level of protection. The first category includes most types of discrimination and retaliation, while the second typically arises in the presence of a written employment contract, a collective bargaining agreement (for unionized employees), or for government employees whom may have protections under state and/or federal constitutional law. But each of these categories has its nuances.

Anti-Discrimination Laws

This first category is the one most people think of as the classic wrongful discharge. There are many state and federal laws that give rise to these types of claims. Federal law sources include the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Civil Rights Act of 1866 (Section 1981), the Family Medical Leave Act (FMLA), the Immigration Reform and Control Act (IRCA), the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act of 1964. State law sources of anti-discrimination laws are typically adjuncts to the federal law. For instance, the Tennessee Human Rights Act mostly mirrors Title VII. But where Title VII only applies to employers with 15 or more employees, the THRA applies to smaller companies with only eight employees.

Each of these laws prohibits discrimination on the basis of some protected characteristic. Title VII, for example, bans discrimination on the basis of one's color, race, religion, sex, or national origin. To this, the Tennessee Human Rights Act adds creed (the rather mysterious protected class that most believe pertains to a sincerely held religious, moral, or ethical belief and any practices or observances associated with it) and age, which federal law covers under the ADEA. Similarly, the ADA forbids discrimination based on one's disability and GINA upon one's genetic information (which may indicate a predisposition for certain diseases, etc.). The FMLA is slightly different in that it prohibits "interference with" taking leave under the Act, which includes discharging someone for taking FMLA leave.

Anti-Retaliation Laws

The FMLA also prevents retaliation after taking leave — a common thread for many state and federal statutes. Title VII, for instance, prohibits not only discrimination, but prevents an employer from taking retaliatory action against an employee who has filed an EEOC charge or has assisted another employee with her discrimination claim. Many state and federal laws provide this sort of anti-retaliation protection despite not having anything to do with discrimination. For example, the purpose of the FLSA is to set the standard for minimum wage and overtime. But Section 15(a)(3) of the Act also bans retaliation against any employee who has made a claim for wages under the FLSA or has assisted another employee with his claim. *See* DOL Fact Sheet No. 77(a) (Dec. 2011).

Whistleblower Provisions

The statutory safeguards against retaliation are very similar to whistleblower protections. Some of the more commonly mentioned whistleblower laws are the Whistleblower Protection Act, which applies only to federal employees; the Dodd-Frank Wall Street Reform and Consumer Protection Act; and the Sarbanes-Oxley Act of 2002 ("SOX"). In all, there are at least 18 federal statutes with whistleblower protections embedded in the language — each with differing methods and timeframes for raising an initial claim.

Nearly all whistleblower claims under federal law must be raised first with the Secretary of Labor. And quickly! The statutory time period for raising most claims is only 30 days. But some are longer, such as claims under SOX and the Commercial Motor Vehicle Safety Act (CMVSA), which have a 180-day filing period. The Congressional Research Service put out a helpful report in 2013 that summarizes the method, time limit, and remedies available for all federal whistleblower and retaliation claims (available here).

Most states also have whistleblower protections either by statute or under the state's common law. In Tennessee, the Tennessee Public Protection Act provides that "no employee shall be discharged or terminated solely for refusing to participate in, or refusing to remain silent about, illegal activities." Tenn. Code Ann. § 50-1-304. Tennessee also once had a long-standing common law whistleblower and retaliation protection, but the State amended the law beginning July 1, 2014, to make clear that the statute is now the exclusive remedy in these types of cases. Although incomplete, the National Conference of State Legislatures has a nice compilation of each state's whistleblower laws.

Other Sources of Protection

Beyond discrimination, retaliation, and whistleblower laws, there are a few other ways that a wrongful discharge claim can arise: an employment contract, a collective bargaining agreement, and government employment.

Employment Contracts and CBAs

Once of the first lawsuits that I litigated fresh out of law school was a wrongful discharge case from a very fastidious and cautious client. This client took the advice "document everything" — which is typically great advice for companies to follow — to a new and ultimately damaging level. His mistake? A written employment contract for a two-year term. The one thing you don't want to paper up in an at-will employment state is the employment relationship itself.

What's wrong with an employment contract? Nothing, in general. But a contract for a specific term gives rise to an expectation that the employee will work for the length of the agreement. If the company terminates the agreement by firing the employee — also known as a breach of contract — there must be "just cause" for the employer's decision to terminate. That is the same reason that virtually every employee handbook includes a statement to the effect that "No written statements or policies contained in this Handbook or any other Company documents will alter the employment at-will relationship of the employee."

In the absence of language to the contrary, a written employment contract destroys the employment at-will relationship, giving rise to just cause protection for the employee. Once this happens, a just cause analysis — the cornerstone of traditional labor law — becomes the standard for whether the employer was justified in firing the employee. Under that analysis, the employer must assess whether:

1. The employee knew of the company's policy;
2. The company's policy was reasonable;
3. The company investigated to determine that the employee violated the policy;
4. The investigation was fair and objective;
5. Substantial evidence existed of the employee's violation of the policy;
6. The company's policy was consistently applied; and
7. The discipline was reasonable and proportional (the punishment fit the crime).

This is the same analysis that commonly applies under a collective bargaining agreement between a company and a labor union. A CBA is the agreement negotiated between an employer and a union that governs wages, hours, and other working conditions. Most CBAs will contain provisions giving employees extra protections (such as just cause, a grievance procedure, and the right to union representation). These protections usually go far beyond what would be available in an at-will environment where an employer can fire someone for a good reason, a bad reason, or no reason at all — so long as it's not an unlawful reason. *See Stein v. Davidson Hotel Co.,* 945 S.W.2d 714, 716 (Tenn. 1997).

Government Employment

Government employees have greater protections under the law compared to the average worker in the private sector. That's because when you work for the government, the constitutional protections you enjoy as a citizen extend to the workplace — after all, the government *is* your employer. This means that a different set of rules apply to local, state, and federal government employees by virtue of the Fifth and Fourteenth Amendments to the United States Constitution.

Under the Constitution, the government cannot deprive a citizen of "life, liberty or property" without due process of law. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court ruled that government employees have a property interest in their jobs, and that, as with other constitutional rights, due process demands that the government must give employees notice and the opportunity for a hearing before depriving them of property. If fired for an arbitrary reason — as would be perfectly acceptable in an at-will environment — an employee may have a constitutional claim for violation of his due process rights.

Other Constitutional rights also play a role in the government employment setting. For instance, the Fourth Amendment protects citizens against unlawful searches and seizures. In the government workplace, this means that the Constitution protects a public employee against unreasonable searches of his workplace or belongings by his employer. The reasonableness of the employer's search is determined by whether the employee has a legitimate expectation of

privacy in the area or item searched. To be sure, an employee would not have a reasonable expectation of privacy in an item left in plain view, in which case a search would be per se reasonable. But when an employee has an expectation of privacy, then a search will only be reasonable when: (1) it is justified at its inception; (2) the method of searching is reasonably related to the objectives of the search; and (3) the search is not excessively intrusive in light of the circumstances. If a search is found to be unreasonable, then a government employer cannot use material taken from an employee in termination procedures.

Additionally, the First Amendment prevents the government for firing employees for their speech and opinions about matters of public concern. Under the First Amendment, speech is protected if it is related to a matter of public concern as opposed to a merely private grievance. If, for example, a police officer complains on Facebook about his police department's failure to promote female officers and harassing conditions in the workplace, then the police department would be on shaky constitutional footing in firing the employee based on his statements because they pertain to matters of a public concern. *See, e.g., Perry v. McGinnis,* 209 F.3d 597 (6th Cir.2000) (holding that an employee was speaking on a matter of public concern even when airing a personal grievance about racial discrimination).

Conclusion

Not every discharge that comes across as morally wrong will qualify as a wrongful discharge in the eyes of the law. Employers in an at-will employment state like Tennessee are generally free to terminate employees as they see fit as long as they do not violate a statutory, contractual, or constitutional proscription. With that said, the law in most circumstances guards against discrimination based on an employee's inclusion in a protected category, such age, race, color, religion, sex, or on the basis of a disability. There are also usually anti-retaliation protections when employees exercise their rights under state and federal law. Additionally, employment contracts, CBAs, and government employment may give rise to protections above and beyond baseline at-will employment. But apart from these protections, the answer to whether a discharge is wrongful — nine times out of ten — is: "Ain't Nothing Wrong With That."