

Employment Issues

Attorney Robert Duffrin

Stark County Prosecuting Attorney Kyle L. Stone

Fair Use of Materials 17 USC §§ 106-107

Introduction

- ✓ Avoid Labor and Employment Pitfalls – Review and Update
- ✓ High Times: Marijuana is legal in Ohio – now what?
- ✓ Questions and Attempted Answers



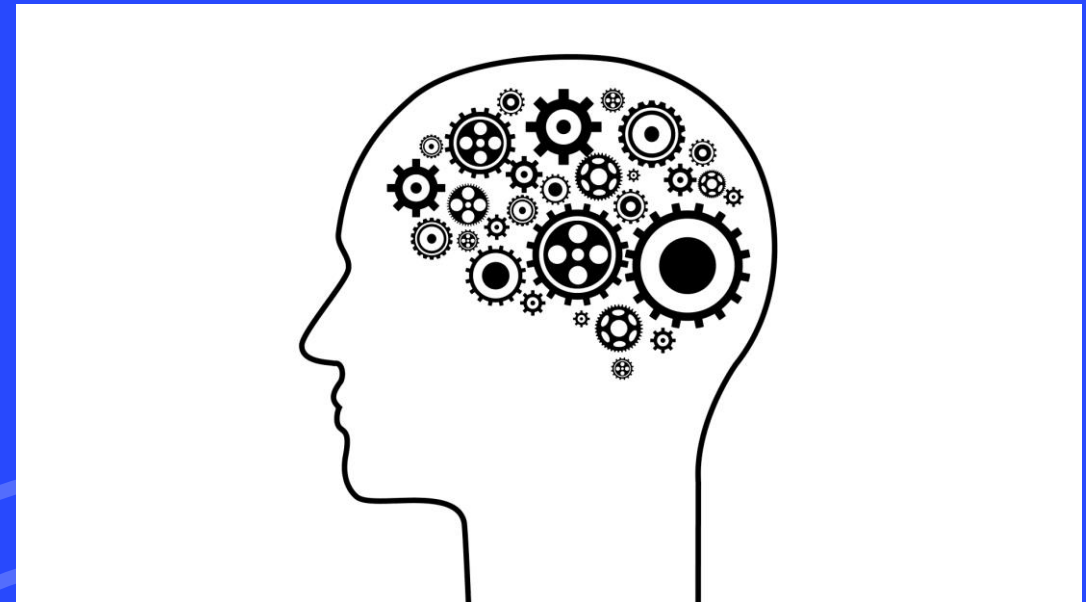


Fired – no chance agreement!

The Analysis of Employee Termination



- Is this person in a protected class?
- Is there a disability issue?
- What is being paid out?
- Is there another reason for termination?
- NO ONE WANTS TO GET SUED!



Age Discrimination in Employment Act (ADEA)



Protects Persons Over 40 From Discrimination

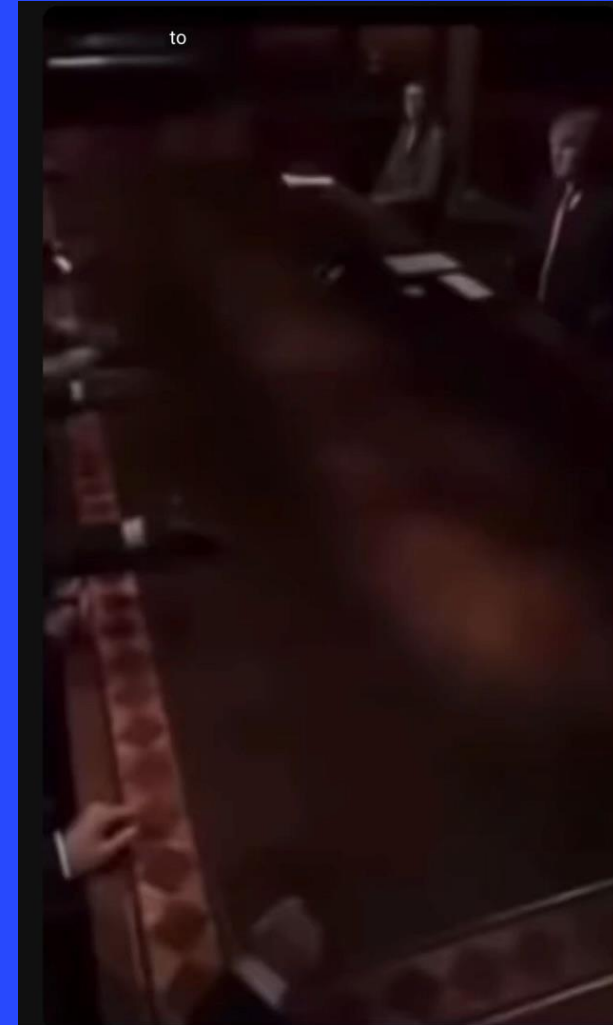


EXCEPTION:

Bona fide Occupational Qualification –
Example: Law Enforcement

Title VII Civil Rights Act

- RACE
- COLOR
- RELIGION
- SEX
- SEXUAL ORIENTATION / TRANSGENDER
- NATIONAL ORIGIN



Americans With Disabilities Act

- Protects individuals with disabilities from employment discrimination.
- Requires Reasonable Accommodations – Unless an undue hardship.
- Employees must perform the essential functions of their job with or without a reasonable accommodation.
- Prohibited to inquire about disability – may violate ADA.

Pregnant Workers Fairness Act 2022

In effect on June 27, 2023 · 42 USC § 2000gg

- Requires Reasonable Accommodations for job applicants and employees with “known limitations” related to pregnancy, childbirth, or related medical condition. Physical, mental or episodic impediment or problem.
- Mirrors the ADA except the conditions of the employee does not have to be significant – designed for normal pregnancies and births
- Accommodations may include a later starting time, more breaks, avoidance of strenuous activity and compounds or materials not safe for pregnancy. Time off for childbirth and recovery.
- The “undue hardship” for accommodations applies – employer difficulty or expense.

Prohibited Employer Conduct:

- Require an employee to accept an accommodation without a discussion with employee.
- Deny a job to qualified person because of the need for accommodation .
- Require the employee to take leave if another reasonable accommodation can be provided
- Retaliate against an individual for reporting or opposing unlawful discrimination
- Interfere with any individual rights under PWFA.

FLSA – Fair Labor Standards Act

Exempt Employees

Executive / Administrative / Professional Employees

Salaried / make over \$35,568 will increase to \$55,068

Highly compensated is \$107,432 and it will go to \$143,988* (probable)

VACATION time and compensation time programs are not specifically addressed by FLSA –

Exempt Employees – Salaried workers – that do not receive overtime –

1. You should not reduce vacation time for time out of the office for part of a day unless the employee voluntarily take the time as vacation time. – The time is already earned and cannot be forced to be take. Exempt employees cannot have salary reduced.
2. You can't reduce the accrual of vacation if some is late, ill, or misses parts of days.
3. You can't reduce vacation as discipline

Other Federal Acts Employment Related



Equal Pay Act of 1963
Protects Against Gender Discrimination in Pay.



Genetic Information Nondiscrimination Act
(GINA)



Family Medical Leave Act (FMLA)



Employment Discrimination

- Discrimination
- Retaliation
- Harassment



Claims for Discrimination or Violation of the Employment Acts

Federal Claims

- Federal Claims = Equal Employment Opportunity Commission (EEOC)
 - EEOC Administers, investigates, and enforces the civil rights laws in workplace discrimination

Ohio Employment Law Uniformity Act – April 15, 2021



Exhaustion of Administrative Remedies – Two Years

Must file claim with Ohio Civil Rights Commission - OCRC



Statute of Limitations is (2) two years from the date of alleged discrimination – tolled time until OCRC pending – 60 days following disposition



Act codifies the affirmative defense in hostile work environment that employer (1) exercised reasonable care to correct or prevent sexually harassing behavior; (2) employee failed to take advantage of corrective opportunities provided by the employer or avoid harm – not available if supervisor resulted in tangible employment action against the employee.



Damage cap -- \$250K noneconomic compensatory damages – punitive damages cannot exceed two times the amount of compensatory damages.

Oh the issues you will encounter...



Alcoholism

IS IT A DISABILITY?

- Does it substantially limit participation in a major life activity? May not be a disability...
- Examples: Working, learning, caring for oneself.
- Accommodation: Time off

CBA Agreements

WHAT TO ADD?

Rather than employer conducting investigations regarding claims of discrimination include language that mandates OCRC to do the investigation

Watch the Legal Line

BEWARE OF SUITS

- A non-lawyer cannot prepare a legally binding collective bargaining agreement, an addition, or modification.
- A non-lawyer may not provide legal analysis regarding labor agreements
- § 4705.07 Unauthorized Practice



Social Media & the 1st Amendment

Being FIRED over Facebook posts may not be a 1st Amendment violation giving rise to an employee's lawsuit. Governments' interest in maintaining an effective, harmonious workplace that provides essential public services outweighs employee's interest in expression if that opinion is really bad.

Matters of Public Concern – speech about issues needed or appropriate to enable others to make informed decisions about the operation of their government.

A 1st Amendment retaliation employment claim by a public sector employee must involve speech as a private citizen and not as an employee.

Marquardt v. Carlton 2023 WL 395027 (6th)

Bennett v. Metro Gov't Nashville 977 F.3d 530

Farhat v. Jopke, 370 F.3d 580 (6th 2004)

Weed is legal Now What?

- What is Marijuana?
- What are employers permitted to do?
- How to handle the issues – so far...



Last Chance Agreements

- Legal Documents and involve all Parties including Union.
 - Agreements may have definitions in conflict with LCA
- Executive or Contracting Authority had to execute
- Waiver by Contracting Authority and Waiver in CBA for LCA

What is Marijuana ?

Cannabis sativa

- Scientific name of that is commonly referred to as marijuana.
- The plant includes both hemp and marijuana

What makes it marijuana?

All parts of the plant (Cannabis sativa) with a concentration of more than .3% (dried) of delta-9 tetrahydrocannabinol – THC

What makes it hemp?

Any part of the plant with .3% or less of delta-9 tetrahydrocannabinol – THC.

Cannabinoids



There are over 100 cannabinoids in Cannabis sativa – they are biologically active chemical constituents, and many interact with the human nervous system.



- CBD –
- Cannabinoid derived that does not have a psychoactive activity.
- Hemp Derived
- FDA approved for treatment of some epilepsy disorders

Delta-8 THC

- Legal under U.S. Farm Bill
- 7 CFR 990.01
- Used in industrialized hemp.

TEXTILES

- Clothing
- Diapers
- Handbags
- Denim
- Shoes
- Fine Fabrics

INDUSTRIAL TEXTILES

- Rope
- Canvas
- Tarps
- Carpeting
- Netting
- Caulking
- Moulded Parts

PAPER

- Printing
- Newsprint
- Cardboard
- Packaging

FOODS

- Hemp Seed Hearts
- Hemp Seed Oil
- Hemp Protein Powder
- EFA Food Supplements

BUILDING MATERIALS

- Oil Paints
- Varnishes
- Printing Inks
- Fuel
- Solvents
- Coatings
- Fibreboard
- Insulation
- Acrylics
- Fiberglass Substitute

BODY CARE

- Soaps
- Shampoos
- Lotions
- Balms
- Cosmetics



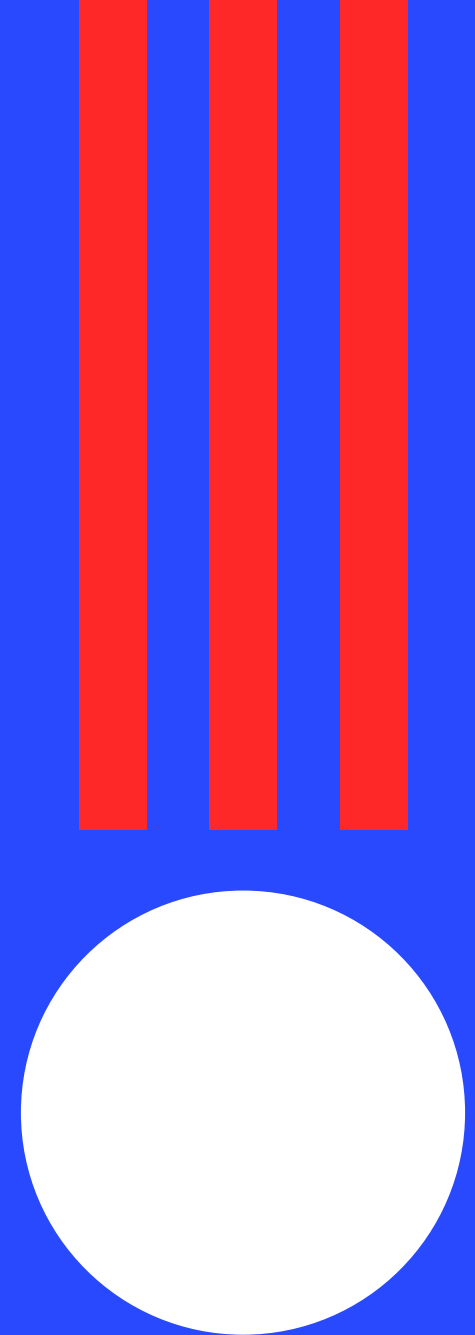
Ohio Employer Rights Regarding Weed

R.C. 3780.35

1. No accommodations for Employee use, possession, or distribution of cannabis
2. Employers are not prohibited from refusing to hire, discharging, disciplining, or otherwise take an adverse action against an employee because of use, possession, or distribution of marijuana and they cannot be sued because of it.
3. You can have or create zero tolerance drug policy and drug testing policy.
4. No interference with federal restrictions regarding DOT regulations
5. Workers Compensation rebates or discounts will continue with drug free work policy
6. Unemployment Compensation denied for marijuana use related termination – “just cause”

The Blunt Weed Facts

1. Employers are not prohibited from refusing to hire, discharging, disciplining, or otherwise take an adverse action against an employee because of use, possession, or distribution of marijuana.
2. Enforce a Drug Free workplace.
3. Workers' Compensation = use of marijuana in violation of policy is "just cause" for termination.
4. Titles I and II of ADA provide NO protection against discrimination on the basis of marijuana or prescribed medical marijuana. *Forest City Residential v. Beasley*, 71 F. Supp. 3d 715 (E.D. Mich. 2014)
5. Marijuana business must still comply with Title III of the ADA (access/use compliance), Title VII of the CRA, FLSA, and OSHA.



Thank you

Robert Duffrin

