Harvey Gorman v. Sterling & Morgan, P.A.

STATEMENT OF LAW

A. **Employment-At-Will Doctrine.**

The Employment-At-Will Doctrine is well recognized in New State. Under that doctrine, an employer may fire an employee who has no contrary employment contract for a good reason, bad reason, or no reason at all. Under the law, both employer and employee reasonably expect employment to be at-will, unless stated to the contrary in explicit, contractual terms.

The doctrine of at-will employment is subject to only a number of limited exceptions. Among such exceptions is an employer's violation of public policy in dismissing an employee.

B. **Violation of Public Policy**

An employee-at-will has a cause of action for wrongful discharge when the discharge is "contrary to a clear mandate of public policy." The elements of a wrongful discharge claim based on public policy are as follows:

- Employer directed employee to perform an act that would violate a statute or clearly expressed public policy;
- Employee was terminated as a result of refusing to perform the act; and
- Employer was aware or should have been aware that employee's refusal was based upon employee's reasonable belief that the act was illegal or against public policy.

Traditionally, the sources of policy for a wrongful discharge claim are Constitutional or statutory provisions. However, in *New State*, a plaintiff may sustain a wrongful discharge claim based on a discharge contrary to a clear mandate of public policy from a non-legislative source. *See e.g., New State Hospital and Medical Service v. Diana Smith*.

C. Contract

Under certain circumstances, employment for an indefinite term (and the accompanying at-will employee status) can be transformed into an express or implied employment contract by promises contained in an employment manual or other writing indicating that an employee may only be fired for cause.

In this case, plaintiff Harvey Gorman argues that he was not an "at-will" employee, relying on his bonuses and assignment to the CyLab team, as well as statements allegedly made by the firm's partners at the end of his formal three-year evaluation to the effect that if he continued to develop in the manner in which he had, he would be a "partner in no time."

The trier of fact must look to the substance of the employer's general policy rather than the form in which it is expressed. However, plaintiff bears the burden of submitting adequate proof that an express or implied contract was formed.

The key consideration in interpreting the language of the company manual, other written policies, or in oral promises, is the employee's reasonable expectation. Habit or custom cannot be the basis of the contractual "promise" and "reasonable expectations." Instead, an explicit affirmation of definitive contractual terms is required. A major factor in the trier of fact's analysis is whether the statements rise to the level of promises on the part of an employer.

D. Just cause

Termination of an employee is never wrongful when an employer makes good faith determination that "just cause" is present. Just cause is defined in 16 New State Statutes '39-6 as:

[a] fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. A discharge for "just cause" is one based on facts that (1) are supported by substantial evidence and (2) are reasonably believed by the employer to be true and also (3) is not for any arbitrary, capricious, or illegal reason.

The employer does not have to be correct, and juries may not second guess the employer, so long as the termination was based on a good faith determination with credible support that good cause existed.

Under New State law, the determination of whether just cause existed involves weighing plaintiff's performance, the employer's reason for termination, and whether a reasonable employer, acting in good faith, would conclude that discharge had a good and sufficient basis. Therefore, the trier of fact must determine just cause through the eyes of a reasonable employer, not from the viewpoint of the employee.

E. Damages

Plaintiff's lost wage claim is limited to that period of time within which plaintiff could or should have found equivalent work. The law provides that damages based on mere speculation or conjecture may not be recovered. Recognizing the contractual nature of a wrongful discharge action, recovery of damages is limited under controlling case law by the general principles that: (1) The damages are those arising naturally according to the usual course of things from the breach of the contract, or such as may fairly and reasonably be supposed to have been in the contemplation of the parties to the contract at the time it was made, as a probable result of the breach; and (2) there must be reasonably certain and definite consequences of the breach as distinguished from the mere quantitative uncertainty.

An employer does not insure future wages until retirement age for a wrongfully discharged employee. Prior to allowing a plaintiff to recover an extended period of pay the trier of fact must analyze whether the wrongful discharge has impaired the person's future earning capacity. The mere fact that plaintiff is unemployed at the time of trial does not automatically prove that he will be unable to obtain equivalent employment for the remainder of his or her work life expectancy.

New State Rule of Evidence 1001

DEFINITIONS:

For purposes of this article, the following definitions are applicable:

(1) **Writings and Recordings**. "Writings" and "recordings" consist of letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) **Photographs.** "Photographs" includes still photographs, X-ray films, videotapes, motion pictures or other similar methods of recording information.

(3) **Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any print out or other output readable by sight, shown to reflect the data accurately, is an "original."

New State Rule of Civil Procedure 33

INTERROGATORIES TO PARTIES

(a) **Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objection if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the Summons and Complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Standard Interrogatories.** In all cases, the following standard interrogatories may be served by one party or the other unless otherwise ordered by the court for good cause shown. The interrogatories shall be deemed to continue from the time of service until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party.

(1) Give the names and addresses of persons known to you or your attorney to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

(2) Set forth a list of photographs, plats, sketches or other prepared documents in your possession or your attorney's possession that relate to your claim in this case.

(3) Set forth the names and addresses of all physicians who have treated you and all hospitals to which you have been committed in connection with your injuries and also set forth a statement of all medical costs involved.

(4) Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

(5) Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the party.

(6) List the names and addresses of any expert witnesses whom you propose to use as witnesses at the trial of this case.

(7) For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

New State Rule of Civil Procedure 26(b)(5)

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

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(b) **Scope of Discovery**.

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(5) **Claims of Privilege or Protection of Trial Preparation Materials.** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

New State Rules of Professional Conduct

RULES 3.4, FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.