

EMPLOYEE BILL OF RIGHTS

THERE OUGHT TO BE A LAW...

(Twas' The Night Before Being Fired...)

Tis' The Season to be Jolly, Peace on Earth, and Goodwill Toward All. Any culture would naturally embrace these common-sense humane and human aspirations.

THE FACTS

It's a cold blustery snow laden evening in late December, managing the late night stress of getting that report in on time to your boss and arranging last minute gifts for your children including your chronically sick child (the beneficiary of your company's health plans which has been a god-send, thanks to claims management by HR), when you find yourself unexpectedly in the emergency room, clasping your wife's limp hand as the medical crew feverishly apply their skills to attend to her life-threatening automobile accident injuries. Bad things can happen to good people.

You earlier sent a text, voicemail and email to your boss you will be a little late with that report ... and why.

Your mobile phone rings, you step out in the hall – less noise. Its your boss and head of HR – you apologize for the background noise advising where you are, thankful they called to express their sympathy.

A slight pause, then HR and your boss collectively progress implementation with the precision of a surgeon's scalpel, the company's standard Human Relations termination policy playbook: there's no good time to announce a termination, it's ok to do it by phone, be direct, keep it short, keep it impersonal, shut down access to email. The sonic unexpected unemotional announcement: "***The company is going through a downsizing, your department is no longer needed, you are terminated effective immediately, and thank you for your service.***" After all, Texas¹ is an employment at-will State and the general rule is that a company can fire at any time, with or without cause, unless there are exceptions, no protected right is violated or valid wrongful discharge claim. No obligation to give notice or a severance package.

Of course, all this can be altered if there is a written employment contract.² But there usually is not one...

You are shocked again within but a span of a few hours into the reality of life. Where sugar plums should have been prancing through your mind, your emotions and adrenalin are in high gear (and you may be the next gurney resident lying next to your wife), since a lot is on your plate at the moment: *The why me guilt trip? I have never had a performance issue?*

Perhaps this scenario is a little overly dramatic...or is it?

THE MYTH OF BUSINESS

We all get the message...business is business...and business decisions must be devoid of emotional personal influence. But whoa Bucky! This re-play that message in a little different context...

What is the whole purpose of business? Last time I checked it is to provide goods or services for the benefit of us human's and... our ecosystem (...protecting endangered species). Business' ultimate objective is not to appease some unemotional unhuman mainframe computer somewhere (although with the advent of Artificial Intelligence (not the calendar kind)...maybe us humans may well end up there...where DNA infused servant organisms bow down to a dystopian master machine).

I have never encountered a person (HR staff or management) who would volunteer themselves or one of their children to be subject to an unexpected immediate employment termination event, yet they willingly more times than not, inflict that circumstance on others.

SCIENTER

HR staff (and company managers) know or have reason to know about employee termination characteristics:

- It is easier to find a new job when employed than when unemployed.
- Effects of intentional infliction of emotional distress that can accompany a termination event include: chronic stress, worrying anxiety, depression, PTSD, self-harm, drug use, migraines, fatigue, digestive issues.
- Being fired is among one of the top causes of significant life stresses...

EMPLOYEE RIGHTS

How are employee rights protected from cruel and unusual termination circumstances³?

EMPLOYEE BILL OF RIGHTS⁴

There ought to be a law: ***THE EMPLOYEE [DECENCY] BILL OF RIGHTS ACT OF 2024...** unless for good cause, termination events must not encompass cruel and unusual methods, requires reasonable notice and time to find a new job and can't occur on the eve of major holidays, or birthdays, or during the early phases of other significant employee stressful life events known by the employer – statutory defined cruel and unusual wrongful discharge termination events. Violation of the Act will entitle the employee to reasonable attorney's fees and cost of suit.*

WRONGFUL DISCHARGE – EMPLOYEE STATUTORY RIGHTS

Federal⁵ and Texas⁶ statutory wrongful discharge rights are primarily based on whether or not the terminated employee has suffered discrimination (race, color, religion, national origin; pregnancy; age; disability; gender identity; citizenship status; or genetic information) or retaliation against having engaged in lawful conduct (i.e., whistleblower rights), a protected class.

The Federal Worker Adjustment and Retraining Notification Act⁷, will apply if huge layoffs or plant closure.⁸

WRONGFUL DISCHARGE – EMPLOYEE COMMON LAW TORT RIGHTS

Common law tort wrongful discharge termination claims can include:

Employee at Will is a precondition event in Texas to bring a [common law tort] wrongful discharge action (if an employment contract, claims are brought under a breach of that agreement plus any applicable statutory claim).⁹

Good Faith and Fair Dealing¹⁰ and **Negligent Infliction Of Emotional Distress**¹¹ wrongful discharge tort claims are not recognized in Texas.

Constructive Discharge¹², **Promissory Estoppel**¹³ and **Intentional Infliction of Emotional Distress**¹⁴ are recognized in Texas, (*was there an extreme and outrageous employment termination conduct that goes beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community?*),

Employee Handbooks: Texas does not hold that an employee handbook is a contract between employer and employee.¹⁵

OTHER CAUSES OF ACTION

Other causes of action that may be incidentally connected to an employment termination event.

Civil Assault¹⁶; **Defamation**¹⁷ (**Libel**¹⁸ and **Slander**¹⁹) are actionable in Texas. **Expression of Opinion** is not actionable for defamation²⁰.

THE MORE HONEST PLAYBOOK ARGUMENT

Employers can humanely and honorably reduce termination emotional distress and liability by:

- Requiring review of a contemplated disciplinary decision by another who has no personal bias against the employee.
- Documenting, signing, dating every critical incident.
- The executive responsible for employment decisions should make the final determination to discharge the employee, based upon the recommendation of lower line management and a human resources executive.
 - Always consider alternatives to discharge; last-chance agreements, demotion, option to resign, settlement agreements.
- Consider the timing of the termination. Do not terminate an employee before the employee's birthday or major holidays or during the early periods the employer knows that the employee is suffering a significant stressful life event (death of a loved one, divorce).
 - The timing of termination should not be based on a financial decision to hurriedly conclude the event before the end of a financial year in order to write off termination expenses.
- Keep the disciplinary or termination process private.
- Give notice of termination to allow the employee an opportunity to find another job ("transparent separation") and consider offering the employee the dignity to resign.

- Set a timeframe for progress on the job hunt — six weeks for junior employees; three months for senior ones.
- Five key payoffs for noticed terminations: Improved relationships; Enhanced reputation with remaining employees); Smoother transitions; Reduced legal risk; New customers and clients
- Two managers or a manager and human resource representative should be present at the time of communicating an employee’s dismissal. Communicate the termination plans in person and not by electronic means (phone, email, text).
- Make any severance package and health plan continuance allowances (whether the employee is terminated or allowed to voluntarily resign), reasonable and consistent with what other terminated employees have been offered.
 - Severance plans should be looked upon as a humane gesture and not merely one of avoiding legal liabilities by virtue of the employee accepting offered severance ‘hush money’ pay in exchange for signing a severance contract and give up any legal rights to sue the employer.
- If termination is based on employee performance, have in place prior communicated disciplinary acts that demonstrate the employee was given reasonable opportunities to correct their behaviour.
- If termination is not based on employees performance, explain to the employee the reasons: change in business plan, financial difficulties (reduction in force for cost savings), etc., and why employee was selected as one of the terminated employees.
- Provide employer paid job counseling and placement services.

AN HONORABLE QUESTION FOR JURORS:

Is..

- A surprise employer discretionary employment termination event,
- given by phone,
- to an employee,
- effectively immediately,
- when the termination is not based on the employee’s performance or conduct,
- given on the eve of a major holiday or the employee’s birthday or during the early phase the employer knows that the employee is suffering a major life stress event,
- a wrongful discharge circumstance because
 - ***SUCH CONDUCT IS EXTREME AND OUTRAGEOUS AND GOES BEYOND ALL POSSIBLE BOUNDS OF DECENCY, AND IS ATROCIOUS, AND UTTERLY INTOLERABLE IN A CIVILIZED COMMUNITY?***

¹ *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998); *Cnty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017); *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396 (Tex. 2014).

² *Carnation Co. v. Borner*, 610 S.W.2d 450, 453, 455 (Tex. 1980); *Leonard v. City of Burkburnett*, 02-22-00266-CV (Tex. App. Nov 02, 2023).

³ After all, the bad guys, convicted criminals, are protected from cruel and unusual punishment as provided by the U.S. Const., amend. VIII. Common sense suggests innocent employees equally need protection from cruel and unusual wrongful discharge events.

⁴ HOPE SRPINGS ETERNAL.

⁵ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq; The Pregnancy Discrimination Act of 1978 amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq; The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; Title I, Civil Rights Act of 1991, §§ 102-103, 42 U.S.C. § 1977A; Rehabilitation Act of 1973 § 501 and 505, 29 U.S.C. § 701 et seq; The Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff; The Pregnant Workers Fairness Act of 2022, 42 U.S.C. § 2000gg; Immigration and Nationality Act, 8 U.S.C. §§ 1503.

⁶ Texas Labor Code, Chapter 21.

⁷ 26 CFR 639

⁸ The stress of losing a job is the same whether its one employee or a whole plant full of employees. Why largeness of the size of a layoff has statutory layoff protection but a single employee does not is one of the mysteries of mankind, right in there with magnetism and gravity. There ought to be a law (just like the law of gravity).

⁹ *Federal Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 283, 284 (Tex. 1993).

¹⁰ *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000); *Winters v. Houston Chronicle Publishing Co.*, 795 S.W.2d 723, 724-25 n. 2 (Tex.1990); *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 70 n. 1 (Tex.1989), rev'd on other grounds, 498 U.S. 133, (1990); see also *Day & Zimmermann, Inc. v. Hatridge*, 831 S.W.2d 65, 71 (Tex.App.--Texarkana 1992, writ denied); *Winograd v. Willis*, 789 S.W.2d 307, 312 (Tex.App.--Houston [14th Dist.] 1990, writ denied); *Hicks v. Baylor University Medical Center*, 789 S.W.2d 299, 303, 304 (Tex.App. – Dallas 1990); *Lumpkin v. H & C Communications, Inc.*, 755 S.W.2d 538, 540 (Tex.App.--Houston [1st Dist.] 1988, writ denied); *Federal Exp. Corp. v. Dutschmann*, 846 S.W.2d 282, 283 n. 1(Tex. 1993)

¹¹ *Bosch v. Dallas General Life Insurance Co.*, No. 14-04-00661-CV, (Tex. App. Houston [14th Dist.] 2005); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993); *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713, 721 (Tex. App.-San Antonio 1994, writ denied).

¹² *Baylor University v. Coley*, 221 S.W.3d 599, 605 (Tex. 2007), citing *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

¹³ *Jody James Farms v. Altman Grp., Inc.*, 547 S.W.3d 624, 637-640 (Tex. 2018).

¹⁴ *Brewerton v. Dalrymple*, 997 S.W.2d 212, 215 (Tex. 1999) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)).

¹⁵ *City of Denton v. Rushing*, 570 S.W.3d 708, 712-713 (Tex. 2019).

¹⁶ *Moore's Inc. v. Garcia*, 604 S.W.2d 261, 264 (Tex.Civ.App.-Corpus Christi 1980, writ ref'd n.r.e.); *Johnson v. Davis*, 178 S.W.3d 230, 241-242 (Tex. 2005); see also Texas Penal Code § 22.01(a)(3)).

¹⁷ *Anderson v. Durant*, 550 S.W.3d 605, 618 (Tex. 2018).

¹⁸ Tex. Civ. Prac. & Rem. Code Ann. § 73.001; *Palacios v. Ramos*, No. 04-04-00780-CV (TX 2/15/2006), No. 04-04-00780-CV. (Tex. Feb 15, 2006).

¹⁹ *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex.1995); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 48 (Tex.Civ.App -Corpus Christi 2001); *Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 140 (Tex.App.-Fort Worth 2001, rev'd on other grounds, 80 S.W.3d 573 (Tex.2002)); *Mustang Athletic Corp. v. Monroe*, 137 S.W.3d 336, 339 (Tex.App.-Beaumont 2004, no pet.) (citing *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex.1984) (reh. den.)).

²⁰ *Bentley v. Bunton*, 94 S.W.3d 561, 583, 604 (Tex. 2002).