2750 EMPLOYMENT RELATIONS: WRONGFUL DISCHARGE — PUBLIC POLICY

In Wisconsin, an employer may discharge an employee for good reason, for no reason, or even for a reason that is morally wrong, without committing a legal wrong. An exception to this rule is [where the termination of the employee's job violates] [where the employee is discharged for refusing an employer's command to do something that would itself violate] a well-established and important public policy. Public policy in Wisconsin prohibits the firing of an employee for (insert policy).

(Plaintiff) claims that (he) (she) was fired from (his) (her) job by (defendant) because (give public policy being violated, e.g., (he) (she) refused to commit perjury). If you find that (defendant) fired (plaintiff) for that reason, then (plaintiff) was wrongfully discharged.

A discharge is not wrongful merely because it is retaliatory, unreasonable, or motivated by bad faith or malice. Further, a discharge is not wrongful merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

SPECIAL VERDICT

Was (plaintiff) wrongfully discharged from (his) (her) employment by (defendant)?

ANSWER: _____

Yes or No

COMMENT

This instruction was approved in 1985 and revised in 1991 and 1995. The comment was updated in 1986, 1987, 1995, 1998, 2018, and 2020.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983); Ferraro v. Koelsch, 124 Wis.2d 154, 368 N.W.2d 666 (1985); Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Yanta v. Montgomery Ward & Co., Inc., 66 Wis.2d 53, 244 N.W.2d 389 (1974). See also Schultz v. Industrial Coils, Inc., 125 Wis.2d 520, 373 N.W.2d 74 (Ct. App. 1985). A claim for wrongful discharge based on public policy may be grounded upon an administrative rule. Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992).

Employment-at-Will Doctrine. In Brockmeyer, the court expressly refused to require good faith in the termination of employment contracts. However, the court did recognize the "public policy exception" to the employment-at-will doctrine. The court stated that the public policy claimed by the plaintiff must be evidenced by a constitutional or statutory provision. The other two exceptions to employment-at-will are: (1) where an employment contract specifies a period of employment and (2) where a statutory provision governs the employment agreement. The various Wisconsin statutory provisions prohibiting the discharge of an employee for certain reasons are listed by the court in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d at 567 and 568 n.9.

In Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986), the court concluded that Wis. Stat. § 103.455 articulates a "fundamental and well-defined public policy" within the public policy exception to the employment-at-will doctrine. This statute proscribes economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence, or willful misconduct. Wandry, supra at 47.

In Hausman v. St. Croix Care Center, 214 Wis.2d 654, 571 N.W.2d 393 (1997), the supreme court examined the employment-at-will doctrine, surveyed the breadth of the narrow public policy exception to the doctrine, and determined whether the case fell within its requirements. In its decision, the court rejected the plaintiffs' claims that the facts as alleged fit within the existing public policy exception and declined to adopt a broad whistle-blower exception. However, the court recognized that the plaintiffs' compliance with an affirmative legal duty requiring them to take action to prevent abuse or neglect of nursing home residents comports with a well-defined public policy and the rationale of the court's public policy exception to the employment-at-will doctrine.

The plaintiff-employee bears the burden of proving that the dismissal violates a clear mandate of public policy. Kempfer v. Automated Finishing, Inc., 211 Wis.2d 100, 564 N.W.2d 692 (1997). In Kempfer, the court said that if a public policy is not contained in a statutory, constitutional, or administrative provision, it cannot fall under the public policy exception to the employment-at-will doctrine. However, just because a public policy is evidenced by a statutory, constitutional, or administrative provision does not mean that it falls under the exception. 211 Wis.2d at 112. The public policy must still be found to be fundamental and well defined. In Kempfer, the court noted that an administrative rule is less likely to satisfy the fundamental and well defined requirements than a statutory provision and that a statutory provision is less likely to rise to the level of fundamental and well defined than a constitutional provision. In Kempfer, the supreme court made clear that the Wisconsin public policy exception to the employment-at-will doctrine is very narrow. It only provides that an employee

may not be discharged for refusing a command to violate a fundamental and well-defined public policy that is evidenced by a constitutional, statutory, or administrative provision. With the exception of such a public policy, an employer may discharge an employee at will for any reason or for no reason.

Procedure. In Brockmeyer, the court explained the format for wrongful discharge litigation. The threshold determination of whether the public policy asserted by the plaintiff is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Brockmeyer v. Dun & Bradstreet, supra at 574. At trial, the plaintiff must then "demonstrate" to the jury that "the conduct that caused the discharge was consistent with a clear and compelling public policy." The decision in Brockmeyer, supra at 574, suggests by way of dicta that an employer must then produce evidence to prove that the dismissal was for "just cause." See also Winkelman, supra at 24. The Committee is of the opinion that "just cause" need not be proved but only that the discharge was for a reason other than a violation of a clear and compelling public policy.

Remedies. In Brockmeyer v. Dun & Bradstreet, supra, the court determined that a wrongful discharge claim is a contract action. It specifically rejected tort remedies including punitive damages. Instead, it stated, at 113 Wis.2d at 575:

> We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole."

The court, in Brockmeyer, also held that where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive. 113 Wis.2d at 576 n.17.

Effect of Employee Handbooks. Representations in an employee's handbook may limit the power of an employer to terminate an employment relationship which would otherwise be terminable at will. Ferraro v. Koelsch, supra. A handbook may convert the employment relationship into one that can only be terminated by adherence to contractual terms.

Attorney's Fee. Attorney's fees are not available in a common law wrongful discharge cause of action. Winkelman v. Beloit Memorial Hosp., supra.

Intentional disability discrimination. An employer engages in employment discrimination if it terminates a person from employment "because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322(1). Two methods of determining whether an employer intentionally terminated employment "because of" disability are available. The first method asks whether the employer held "actual discriminatory animus against an employee because that employee was an individual with a disability[.]" Maeder v. Univ. of Wisconsin-Madison, ERD Case No. CR200501824 (LIRC June 28, 2013). The alternative method, known as the "inference method," finds intent to discriminate when an employer bases its adverse action on "a problem with that employee's behavior or performance which is caused by the employee's disability." See Id. A violation of Wis. Stat. § 111.322(1) cannot be found to have occurred under the inference method of proving intentional discrimination unless the employee proves the employer knew that a disability caused the conduct on which adverse employment decision was made, and that the employer had this knowledge at the time it made the decision. Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2018 WI 76, 382 Wis.2d 624, 657, 914 N.W.2d 1 (2018).

Probationary Employees: For decisions discussing the applicability of procedural guarantees outlined in sec. 62.13(5) as they pertain to probationary employees, see Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 104 Wis.2d 498, 311 N.W.2d 646 (1981); and State v. City of Prescott, 390 Wis.2d 378, 938 N.W.2d 602, 2020 WI App 3.