

# What Are My Rights?

A SPECIAL REPORT on Employee Rights in Kentucky



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## What Are My Rights?

### The Purpose of This Book

Down through and over the course of many years, a large number of people have called me who are concerned about some situation that has come up in their workplace and want to know what their rights are. Sometimes, they have issues that have justified hiring me to represent them and a lawsuit has been filed. Most often, and in the vast majority of contacts, it is simply an individual for whom something has come up in their workplace that concerns them, they want to understand better their situation and what their rights are. Almost always, they are people expecting nothing more than to be treated fairly and in accord with whatever rights the law may grant them in the particular situation.

I am also often frequently contacted by people who feel that they have been or are being discriminated against,

or that they are being harassed, or that they are being subjected to a “hostile work environment.” Of course, in the vast majority of instances, the distinctions and differences that employers make by, between and among employees, however unreasonable and inequitable they may appear or in fact be, do not support a claim that unlawful discrimination has occurred. Similarly, that someone feels they are being “harassed” or that they are working in a “hostile work environment” does not mean that they are being treated in any way that the law or courts consider illegal or unlawful. Surprisingly, I have found that people often draw some comfort from their conclusion that while they may be being treated in a way that makes them uncomfortable, they are not being treated unlawfully and this appears to make the situation appear more benign and one that they feel better about their ability to handle.



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The purpose of this book is not to provide any comprehensive analysis of employment law in Kentucky. There are many, many issues that it will not attempt to even discuss such as tenure rights for teachers and civil servants, for instance, that will just have to be left for another book. It is rather an attempt simply to provide some basic information along the lines for which I have been contacted now thousands of times by people who have questions for which they want and need some answers.

Please understand that this book does not provide legal advice to anyone regarding their particular situation. It is to provide information, in a general way, about some aspects of employees' rights in Kentucky and to help individuals make a decision about whether they should consult a qualified and knowledgeable lawyer about their particular situation.

#### **What At-Will Employment Means**

Kentucky is (and all states are) what is often referred to as an "at-will" state. That means, as a general rule, that neither the employer nor the

employee is bound to the other and that each retains the right to continue or terminate the **employer-employee relationship at their own free will. Hence, the shorthand term "at-will."** Sometimes the "employment at-will" doctrine is confused with "right-to-work" laws, which deal with a situation this book will not cover which is rights that apply where the employees in a workplace were organized into a labor union.

Stated most broadly, the "employment at-will" doctrine means that an employer may terminate an employee's job at any time for any *reason that is not unlawful*.

The "employment at-will" doctrine does not require an employer to be fair, to be equitable, it certainly does not require an employer to be wise in their management of employees, and it does not impose on an employer any restriction of any kind, *except that the employer may not fire or otherwise treat the employee unlawfully*.

Many times, I have heard the "employment at-will" doctrine described to me by someone who has called my



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office as meaning that they can be fired at any time for any reason. That is incorrect: the “at-will” doctrine does not strip an employee of all rights where they are fired for an unlawful reason. If you are fired for an unlawful reason, there are remedies that you may pursue in court or before some agency such as the Equal Employment Opportunity Commission to get back your job, recover damages, and, in some cases, recover punitive damages.

#### **What is Wrongful Termination?**

A wrongful termination is an unlawful termination. In the broadest and most general sense, there are three types of unlawful termination. One is where the termination is motivated in substantial part by some protected characteristic such as the individual's age, gender, race, disability, or some other protected characteristic. A second is where an employee is terminated in substantial part because they have engaged in some type of protected activity such as filing for and pursuing workers' compensation benefits or reporting a situation that poses a danger to the quality of care provided a patient in a

healthcare facility. A third is where the employee is fired in substantial part because they have refused to violate a law in the course of their employment.

These are three very broad and general categories; most unlawful terminations fit into one of three. However, there are many, many other specific and particular situations where a termination can be unlawful and this is not an exhaustive list just a general description.

#### **What is Unlawful Discrimination?**

Unlawful discrimination occurs where a substantial and motivating factor for which an employee or an applicant for employment is denied employment, some benefit of employment, or is otherwise subjected to what is known as an “adverse employment action” because of some characteristic such as gender, race, color, religion, national origin, age 40 and over, or because of a disability. If the employment action – whether it be promotion, firing, a raise, or whatever – is not based in substantial and motivating part on one or more of these specific characteristics,



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it is not unlawful discrimination.

Employment discrimination law is dedicated to the very American principle that individuals should rise, succeed, and engage in what the Founders of this Nation describe as the pursuit of happiness based on their individual merits. Employment discrimination law advances the very fundamental notion that in this great nation, people should raise on their merits and what they can do, not what they are.

Put most basically and simply, if the situation at your workplace or your prospective workplace that concerns you has arisen on account of your race, age, gender, etc., it may be that you are being subjected to unlawful discrimination. Keep in mind that even if that is so, you still face the challenge of proving that the actions that concern you are based on age, race, etc.

#### **What is a Hostile Work Environment?**

A “hostile work environment” is created, exists where some offensive conduct in the

A “hostile work environment” exists where some offensive conduct in the workplace arises from or is based on some characteristic such as age, age, sex, etc. and has the effect of making it harder for the individual to perform their job and if any reasonable person were put in the individual’s job, would make it harder for that person as well.

A “hostile work environment” apparently arises most commonly in the context of sexual harassment. A female employee is sexually pursued by a supervisor or co-worker and is subjected to unwanted physical touchings and/or unwelcomed comments with a sexual orientation. Courts generally regard whether a hostile work environment exists as their prerogative to decide. If the woman has been subjected to physical touching, depending upon its severity and frequency, courts generally reduce the requirement for offensive commentary to accompany it. However, in instances where there is no groping, courts generally require that the commentary be more frequent and intense.

A “hostile work environ-



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ment” can arise from circumstances other than sex.

“Hostile environment” cases based on race have also been common. In recent years, “hostile environment” cases based on religion, disability, age, and national origin have become more common.

“Hostile environment” cases can also occur based on sex where there is no sexual connotation to the conduct at issue. For instance, where a manager so mistreats only female employees to the extent that it makes it harder for them to do their job and it would make it harder for a reasonable person in their shoes to do their job, they are being subjected to a “hostile work environment” based on sex, but they are not being sexually harassed in the customary sense of that term.

Having stated the point most broadly – that a “hostile work environment” exists where because of some characteristic such as race, age, gender, etc. it is more difficult for the individual to do their job – what really is the type of conduct that rises to the level of a “hostile work environment”? **This is a difficult question to answer in any categorical or definitive fashion,**

**but here are some examples: an individual established a “hostile environment” based on religion where a supervisor said that he “must be Catholic” because he did not want to do certain things, repeatedly called him a “religious freak,” told him not to talk about “religious bullshit,” said that because of his religion he was not getting sex and told him to “take the Virgin Mary and turn her upside down and pull her dress over her head”;** a woman established a “hostile work environment” based on evidence that her supervisor, at least 18 times during a two-two and a half week time period, made many direct as well as indirect propositions for sex, including following her into the restroom, repeated attempts to touch her breasts, placed his hands down her pants, pulled off her pants, and enlisted the assistance of other to hold her while he attempted to grope her; an African-American individual established a “hostile work environment” based on evidence that throughout his employment supervisors repeatedly called him and other black employees “boy,” “jigaboo,” “nigger,” “porch monkey,”



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“Mighty Joe Young,” and “Zulu warrior,” that supervisors used the term “boy” on a daily basis referring only to black employees and not to white employees, a supervisor told him, in reference to his interracial marriage, that he did not like him “taking our white women” and “that he had a relative that was dating a black man, and he didn’t like that at all,” repeated references to his interracial marriage to a white woman, frequent statements by a supervisor referring to black female employees as “black hookers,” and that another black employee was told by a supervisor that he was being written up because he was “one of them”; a woman established a “hostile work environment” based on evidence that her supervisor made numerous demeaning comments about women in the workplace, including stating that “women should only be in subservient positions,” that women have “no business in construction,” that he “would never work for a woman,” that “he wished he could hire men to do our jobs,” that “women in the department were being paid more than they deserved and that he wanted to fill a particular position

with a man, and that a supervisor told sexually explicit jokes in the office when a co-supervisor was absent on maternity leave”; a woman established a “hostile work environment” based on the evidence that a co-worker rubbed his crotch in front of her nearly every day, asked her on twenty occasions to leave her fiancé, asked her on dates between 30 and 40 times, made repeated comments about her breasts and behind, and on six occasions rubbed Vaseline on her arm or shoulder.

An employee that is the target of a “hostile work environment” is usually required, in order for his or her employer to be liable for any damages caused, to notify the employer in accordance with some established procedure and the employer must fail to take adequate action in response. Most employers have distributed to their employees some statement that sets forth a procedure for an employee to follow if he or she feels that they are being subjected to a hostile work environment, or other wrongful treatment.



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**.Once an employee uses these procedures and provides information to the employer regarding the situation, the employer has a duty to investigate the matter and take adequate and reasonable corrective measures.**

Once an employee uses these procedures and provides information to the employer regarding the situation, the employer has a duty to investigate the matter and take adequate and reasonable corrective measures. There is no specific definition as to how the investigation must be conducted or what the corrective action must be. The corrective action must simply be reasonable calculated to end the conduct giving rise to the hostile work environment. Obviously, that will vary depending upon the circumstances and the employer.

There is no right for the employee who has made the report of a “hostile work environment” to be informed specifically by the employer of the scope of its investigation, its findings, or what corrective action it imposed if any. It is not unusual for employees to feel frustrated regarding the lack of informa-

tion provided to them when they make a report of a “hostile work environment.” Making a “hostile work environment” does not grant an employee the right to engage in managerial actions regarding the matter.

### **A Wrongful Discharge**

Kentucky law does recognize what is known as a “wrongful discharge” lawsuit. This type of case arises where an employee is fired for doing something that the law allows them to do. It also arises where an employee refuses to do something in the course of their employment that is unlawful. These circumstances can vary greatly depending upon circumstances. Generally speaking, however, a wrongful discharge occurs where an employee is fired for either (a) exercising a right granted them by statute or other state legal authority or (b) refusing to violate the law in the course of their employment.

### **What is the Importance of an Employee Manual?**

As the general rule, an employee manual or personnel and procedures handbook does not create the terms of



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an employment contract. The reason for this is that most, if not all, employee handbooks contain some type of language stating as follows: “the company retains the right to change, alter, amend, or suspend terms in this handbook.” What this means is that literally the company retains the right to do what it wants in a particular situation and it is not bound to the employee if the handbook says something otherwise. Although handbooks generally do not create any type of terms of an employment contract, they do serve the useful informational purpose of advising employees of policies on particular issues such as insurance, vacation, leave, pay, and any number of other items that are important to the employee to know.



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## ABOUT THE AUTHOR

### ROBERT L. ABELL

Robert L. Abell has been representing, advising, and counseling individuals about employment law issues for over 20 years. He is a graduate with honors from both the University of Kentucky and the Tulane University Law School. Robert is a member of the National Employment Lawyers Association, American Association for Justice (Employment Rights Section), Kentucky Justice Association, the Kentucky Bar Association, and the Fayette County Bar Association. He has represented clients in state and federal courts and before administrative agencies throughout Kentucky.

You can find out more at [www.RobertAbellLaw.com](http://www.RobertAbellLaw.com), where you will also find additional information that you may either review online or download for reading on your own. You can also visit the Kentucky Employment Law Blog at [http://abelllaw.typepad.com/kentucky\\_employment\\_law/](http://abelllaw.typepad.com/kentucky_employment_law/).