



# the Advocate

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## Avoiding Wrongful Discharge Claims

Until 1980 in New Jersey, in the absence of a contract, employment was at-will, terminable with or without cause. English v. College of Medicine and Dentistry of N.J., 73 N.J. 20, 23 (1977). But in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980) the Supreme Court created an exception to that traditional rule when it held that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."

The Court in Pierce observed that the public policy must be clearly delineated so as not to "interfere with the employer's right to make business decisions and to choose the best personnel for the job." Pierce v. Ortho Pharmaceutical Corp., 84 N.J. at 69.) The Court further stated that "unless an employee-at-will identifies a specific expression of public policy, he may be discharged with or without cause." Id. at 72. Thus, the employee-plaintiff in a Pierce suit bears the burden of identifying the clear mandate of public policy relied on; Id. at 73; as well as the burden of proving causation: "that he was in fact discharged in retaliation for taking action in opposition to corporate action which violated a clear mandate of public policy," and not for some other reason. House v. Carter-Wallace, Inc., 232 N.J. Super. 42 (App. Div.)

### Recognized Public Policy Mandates

Here are some of the recognized public policy mandates which, if violated, will permit the at-will employee to assert a wrongful termination claim.

An at-will employee may not be discharged in retaliation for refusing to engage in conduct that is criminal or otherwise prohibited by law .

This rule was suggested by the Law Division two years before Pierce, in a case in which an x-ray technician had refused to perform a procedure she contended she was legally precluded from performing. O'Sullivan v. Mallon, 160 N.J. Super. 416 (Law Div. 1978).

### Whistleblowers Protected

Whistleblowing, the reporting of improper or illegal activities of supervisors to outside authorities, is clearly protected under Pierce.

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### Great Quotations ...

"Never esteem anything as of advantage to you that will make you break your word or lose your self-respect.."

- Marcus Antonius

Mere internal complaints, however, may not be protected under the whistleblowing exception. "[T]he mere voicing of opposition to corporate policy within a corporation provides an insufficient foundation for assertion of a Pierce claim." House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 49 (App. Div.)

In addition, an at-will employee cannot be terminated as retaliation for seeking workers' compensation benefits. The rule was set down in Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd, 85 N.J. 668 (1981), that policy considerations mandate recognition of a private common law action for employee retaliated against for seeking workers' compensation benefits. It is not even necessary for an employee to have actually filed a workers' compensation claim petition to maintain a cause of action under Pierce; merely attempting to make a claim is sufficient. Cerrachio v. Alden Leeds, Inc., 223 N.J. Super. 435, 442 (App. Div. 1988).

#### Filers of OSHA Complaints Protected

In another protected area, an at-will employee cannot be terminated as retaliation for filing complaints with the Occupational Safety and Health Administration (OSHA). Accordingly, in LePore v. National Tool & Mfg. Co., 115 N.J. 226 (1989), it was held that an employee covered by a collective bargaining agreement may maintain a Pierce action for wrongful discharge for reporting health and safety violations to OSHA. Neither the OSH Act nor §301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185, pre-empt that claim.

In addition, an at-will employee cannot be terminated as retaliation for pursuing a discrimination lawsuit. In Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988) the Supreme Court held that a pro se plaintiff could maintain a Pierce action if she alleged she was "discharged for seeking to establish (by demanding her personnel file) a gender discrimination claim." The Court found that the "public policy of the State of New Jersey should protect those who are in good faith pursuing information relevant to a discriminatory discharge," Id. at 192, and noted that under federal law a retaliatory discharge for pursuing a discrimination claim is itself a discriminatory discharge. Id. at 193.

The Courts have also decided cases involving activities held not to violate any public policy mandate. For example, courts have generally declined to permit claims to proceed where the employee alleges he was retaliated against for exercising a purely personal right or privilege. The Appellate Division decision in DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159 (App. Div. 1991), held no wrongful termination claim could be maintained where the plaintiff alleged that she was terminated because of customer complaints about her adherence to an alleged company policy of distributing expired or nearly-expired drug samples.

#### Wage Dispute Discharge Not Protected

In Alexander v. Kay Finlay Jewelers, Inc., 208 N.J. Super. 503 (App. Div.) it was held that firing an employee for bringing suit over a salary dispute does not violate public policy: "While plaintiff had a legal right to sue his employer for monies considered to be due him in salary, there can be no question that the company also had a compelling interest to operate its business without the harassment of suits by employees dissatisfied with their wages or disgruntled because of a reduction in their salary."

This short this article in not intended to be a complete discussion of wrongful discharge law. It is only an introduction. If you are faced with a possible wrongful discharge situation, consult legal counsel to discuss your specific circumstances.



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