

Wrongful Termination: When Firing Is Illegal



A man in a dark suit and tie is seated at a desk, looking towards a woman whose back is to the camera. They appear to be in a professional meeting. The background shows a window with a view of a city. A teal banner is overlaid at the bottom of the image.

When Firing Is Illegal

WHEN FIRING IS ILLEGAL

If you're reading this chapter it's probably because you got fired—or you're afraid you are about to get fired. You want to know if your employer's actions are illegal. Maybe you want your job back. Or maybe you'd rather sue your employer.

This chapter will lay out what makes firings illegal in Florida. But the first thing to get out of the way is this disclaimer: There are many, many terrible—but completely legal— reasons your boss can send you packing.

You can be fired because your boss doesn't like your tie or because it's Tuesday. You can be the best, most productive employee and still get the boot. That's because we live in a country that practices "at-will employment."

What is at-will employment? The short answer is that you can be fired, demoted, or otherwise punished for any reason that is not specifically prohibited by a law or an agreement.

An agreement is established between you and your employer. Some positions are "term positions," where your company assures you'll be employed during a certain timeframe (like a one-year contract). If an employer violates that agreement, it's probably a breach of contract. Meanwhile, union contracts govern certain jobs, like the teaching profession

Then there's the law: Federal and state laws make certain terminations illegal, and that's what we'll talk about in this chapter.

Keep in mind that each subsection of wrongful termination has its own nuances. Some laws only protect people at medium-to-large companies. One law only covers employees if they've worked for the company at least a year. There are some gray areas, and sometimes the answer is, "it depends." So if you think you've been fired illegally—or may be soon—talk to a qualified attorney who can listen to the specifics of your situation. Our summaries, while hopefully helpful, are only a jumping-off point.



A woman with dark hair, wearing a light blue button-down shirt, is sitting at a desk. She has a distressed expression, with her hands pressed against her temples. In the background, there is a dark blue filing cabinet with several drawers. The overall scene is dimly lit, with a blue tint.

Forced Off the Job: Constructive Discharge

FORCED OFF THE JOB: CONSTRUCTIVE DISCHARGE

You might think that to be covered by the wrongful termination laws, your boss must have fired you. If you walked off the job, that was your choice, right?

Not always. You see, if your working conditions become so bad—so intolerable—that a reasonable person could not be expected to continue working, the courts might treat your decision to leave just like a firing. It's called "constructive discharge."

Constructive discharge developed because courts don't want to let employers off the hook when they make an employee's work-life miserable in an attempt to push the employee to resign. For that reason, employers can sometimes be held responsible even when an employee chooses to leave.

Discrimination



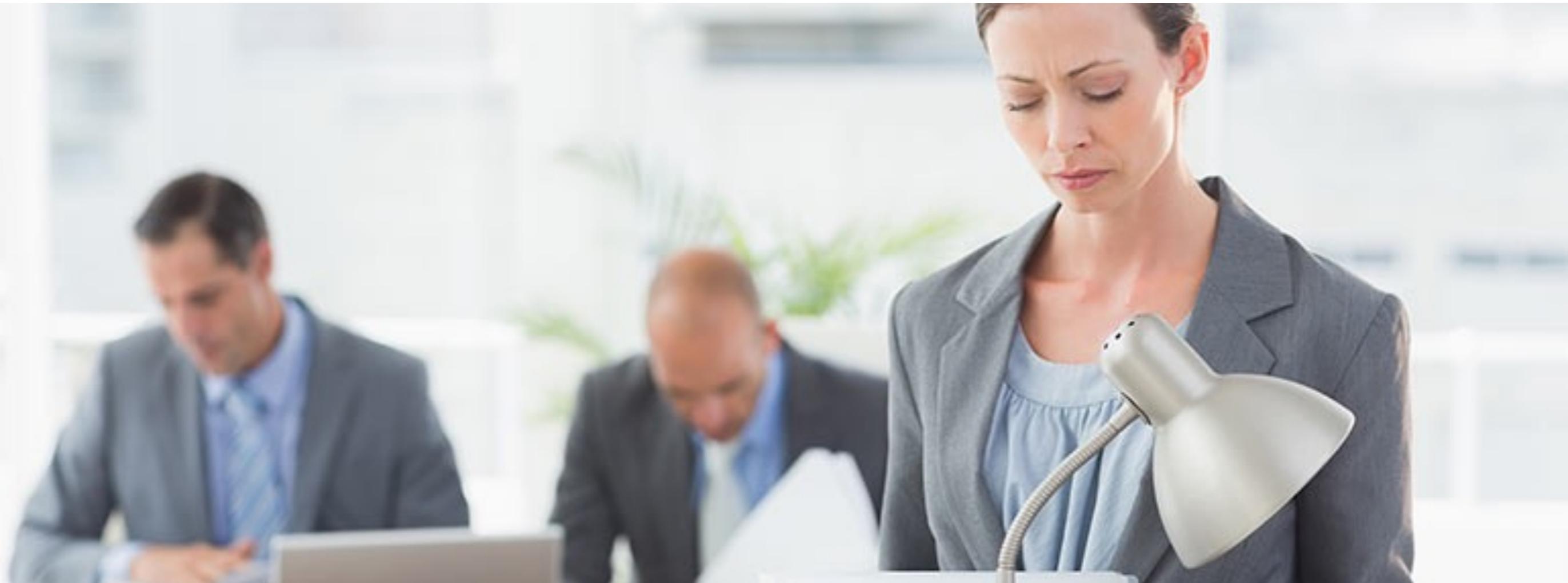
DISCRIMINATION

Employment discrimination on the basis of race, color, national origin, sex, religion, disability, age, and pregnancy is illegal. You cannot be fired because of your status in one of these classes. So, for example, it's illegal to fire someone because she is black or a female or Muslim.

This might seem like an obvious law. Who thinks it's legal to fire someone because of their race, sex, or religion? Most bosses would never say "I'm firing you because you're Latino." The thing is: This still happens. It's just usually a little more subtle.

We once represented a woman who was sexually harassed at work. She was the only woman in her department and the men singled her out for ridicule and disrespect. She reported many instances to higher-ups in the company, but her boss fired her.

He gave her a made-up reason for the firing, but we knew the truth: The company didn't want to deal with the hassle that her being a female had caused. Instead of cracking down on the harassment, they fired her because she was a woman. This kind of termination is illegal.



Retaliation



RETALIATION

It is illegal for an employer to fire an employee who opposes his employer's illegal actions or asserts certain rights under the law. This is called "retaliation," and it is a broad umbrella covering many areas of employment law, such as discrimination and worker's compensation.

However, while it is broad, it only protects people asserting certain rights or opposing certain illegal actions. We'll briefly discuss several common categories, but because this is such a common bad-employer practice, we've created a separate chapter solely on retaliation. Check it out if you think it applies to you.



RETALIATION

Discrimination

The same law that prohibits discrimination on the basis of race, color, national origin, sex, religion, disability, age, and pregnancy also prohibits the firing of workers who oppose such unlawful discrimination.

That means if an employee objects to discrimination based on one of those classes—whether that discrimination is directed at himself or a co-worker—he cannot be fired for doing so. He also cannot be fired for filing a charge of discrimination with the U.S. Equal Employment Opportunities Commission (EEOC).

The idea behind this law is that the government wants to encourage people to stand up to illegal discrimination and feel free to file charges with the EEOC so those instances can be investigated or so a supervisor can ensure the discrimination stops. If workers are afraid that they'll be fired for speaking up, discrimination might go unchecked. This law protects those who oppose discrimination and report it.



RETALIATION

Workers' Compensation Retaliation

Injured employees also have protection from retaliation. For instance, under Florida law you cannot be retaliated against for seeking workers' compensation benefits.

This is a surprisingly common occurrence because employers often get upset that their workers' compensation rates can go up after an employee makes a claim. Likewise, they do not like it that an employee is missing work.



RETALIATION

Whistleblowing

In Florida, it is illegal to fire an employee who objects to or refuses to participate in an illegal activity at work—something that is violating a law, rule, or regulation.

An employee also can't be fired for telling or threatening to tell a government agency about the practice or policy. This is called the Florida Private Sector Whistleblower Act.

A simple example is the fast-food worker who refuses to serve spoiled chicken to customers, despite his supervisor's insistence. He can't be fired for opposing this practice since it is illegal to serve rotten meat in restaurants.

Not every opposing act is protected, though. For example, if you tell a government agency before bringing the violation to the attention of a supervisor, you might not be covered. The idea is that you should give your boss a chance to stop or fix the activity or policy.

We recently represented a client who worked at a bank. Like many businesses, banks are governed by many laws and regulations. Not long after she started her job, this employee was told to revise and backdate a loan application. She knew it violated a federal law to do that, so she refused.

Soon after, her boss called her to lunch and fired her because she didn't know how to "structure a deal." Sure, she was still in her 90-probationary period and could be fired for a variety of perfectly legal reasons—but this was not one of them.

Because she had objected to an unlawful act and refused to participate in it, she was protected and could not be fired for her objection. We represented her until she got a favorable settlement.



RETALIATION

The Family and Medical Leave Act (FMLA)

Employees who have a qualifying serious health condition are entitled to medical leave under the Family Medical Leave Act (FMLA), which allows qualified employees to take up to three months off work to care for themselves or a close family member.

These laws were passed to ensure entitled employees get medical care and leave to take care of themselves and their family members. You can't be fired for properly taking this time, as long as you and your employer are covered by this law. One hurdle to qualification: The employer must have 50+ employees in a 75-mile radius and the employee must have worked there for at least one year and at least 1,250 hours



WAGE AND OVERTIME DISPUTES

If you're being paid less than minimum wage or you aren't getting the overtime you deserve—and you complain about it—your boss can't fire you because of that complaint.

That's because the Fair Labor Standards Act (FLSA), which regulates wages and hours of work, has an anti-retaliation section. Employers can't fire or otherwise retaliate against an employee because he or she has filed a complaint related to the FLSA.

So, for example, if you believe your employer has wrongly misclassified you as a salaried manager and thus refuses to pay you the overtime you deserve—and you complain about it to your boss—your company can't fire you because of that complaint.

Once, a man came to us saying he had been wrongfully terminated due to a wage dispute. It all began when he got an email saying he wouldn't be paid for all the hours he had recently worked. The problem? That violates both federal and state laws governing wages, which ensure people are paid minimum wage and overtime when they are entitled to it. The next day, he emailed his supervisor, objecting to the fact he wasn't being paid. Immediately afterward, he was treated badly at work—and two months later, he was fired. His boss said he was fired for "insubordination," but the truth is that all stemmed from the fact the employer didn't like his email. It didn't want to be challenged, and it didn't want to pay him.



Pregnancy and Disability



PREGNANCY AND DISABILITY

Under the Pregnancy Discrimination Act of 1978, it's illegal for employers to fire, demote, reassign, or refuse to hire a woman for being pregnant. The law says that pregnant women should be treated just like any other employee. So that means an employee cannot be fired because she is pregnant.

Meanwhile, under the Americans with Disabilities Act (ADA), it is illegal to fire someone because he or she is disabled if the employee could perform the essential functions of the job with or without a reasonable accommodation. However, if the employee can't do the essential functions of the job no matter what, or if the needed accommodation would place an "undue burden" on the employer, then the employer doesn't have to accommodate the employee, and he or she can be fired.

These laws sometimes overlap because a pregnant woman might have a medical complication due to her pregnancy that qualifies as a disability under the ADA.

Recent case law and government guidance has muddied the area between these laws, as an employer might be required to accommodate pregnant employees even if they aren't considered disabled by the ADA—unless the employer has a good, nondiscriminatory reason for not accommodating pregnant employees.

This means, for example, a pregnant woman who doesn't want to lift heavy items can get a lifting accommodation if similar co-workers—who have disabilities—also get it. But if no one gets that accommodation, then the pregnant employee likely isn't entitled to it either, and she could be fired for being unable to perform the duties of her job.

Some lawmakers are proposing bills to further protect pregnant women, and this is a constantly evolving area of the law. Because of that, it's best to talk to a qualified employment law attorney to get the latest information and best assessment of your situation.

Sexual Discrimination and Hostile Work Environment



SEXUAL DISCRIMINATION AND HOSTILE WORK ENVIRONMENT

This area overlaps with discrimination and retaliation, so it's a lot like the earlier descriptions. In short, you can't be fired because you are a woman (or man) because "sex" is a protected class under federal law.

Also, while sex discrimination on its own is illegal, employers cannot retaliate against employees who complain about such discrimination of themselves or another. That means an employer can't fire an employee who complains about sex discrimination or harassment in the workplace.

Not every complaint about sex discrimination is protected, though. That's because not every instance of discrimination or harassment is illegal. You are only protected from retaliation if you (1) file a charge of discrimination with the government, (2) participate in a discrimination proceeding or (3) oppose what you in good faith believe is discrimination to yourself or others.

This can be a gray area. For example, does an employee have a "good faith" belief that one unwanted remark is discrimination? Or is it not good faith because it wasn't severe or pervasive? Basically, your reaction to what your employer is doing must be reasonable.



So You Think You Can Sue?



SO YOU THINK YOU CAN SUE?

You've read the chapter—or at least the section that applies to you. If you think you might have a claim for wrongful termination, keep in mind a couple things:

First, statutes of limitation often limit how much time may pass between your firing (or constructive discharge) and the start of a lawsuit. The best advice: Don't wait long to talk to an attorney.

Secondly, before you file a lawsuit, certain claims need to first be submitted to the U.S. Equal Employment Opportunity Commission. These procedural issues can trip up anyone unfamiliar with employment law, so retaining an attorney is highly recommended.



About the Author



ABOUT THE AUTHOR



Matthew K. Fenton has been a member of the Florida Bar since 1994 and has been practicing exclusively in matters arising from the employment relationship since 1997. He received his law degree from the University of Florida, with honors, in 1993, where he served on the Editorial Board of the University of Florida Law Review. Shortly after graduation, he served as law clerk to U.S. Magistrate Judge Mark A. Pizzo from 1995 to 1997. Mr. Fenton is a trial lawyer who has tried numerous employment law cases in both state and federal courts.

He has been selected by his peers for inclusion in every edition of the Best Lawyers in America since 2009 and has been repeatedly selected by his peers as a Florida Super Lawyer in Employment Law, which denotes status as one of the top 5 percent of Florida's lawyers. He has also been selected as a member of the Legal Elite in Employment Law by Florida Trend Magazine, representing approximately 2 percent of the active Florida bar members who practice in Florida. In 2016, Mr. Fenton was selected by Best Lawyers in America as the "Lawyer of the Year" for individuals in Tampa Employment Law.

Mr. Fenton has spoken on employment law topics and authored numerous publications on employment law, most recently contributing a chapter to the American Bar Association's practice guide "Litigating the Workplace Harassment Case." Mr. Fenton is a member of several voluntary bar organizations, including the Hillsborough County Bar Association where he is a past Co-Chair of the Labor and Employment Law Section.

Mr. Fenton is active in both the Florida and national chapters of National Employment Law Association, the Tampa Bay Trial Lawyers Association and the Florida Justice Association. Mr. Fenton has been admitted to practice in all Florida courts, in the United States District Court for the Middle District of Florida, the United States District Court for the Southern District of Florida and in the Eleventh Circuit Court of Appeals.

Mr. Fenton, a lifelong resident of Tampa, Florida, is proud to be married to a first generation Cuban-American, Rebeca Fenton, and father to two wonderful boys. When he is not fighting for employee rights, Mr. Fenton enjoys traveling with his family, collecting and listening to music from a broad variety of musical genres, spending time at the beach, and watching or attending Florida Gator football and basketball.



About the Firm

ABOUT THE FIRM

At Wenzel Fenton Cabassa, P.A., we represent workers who have been wronged by their employers. We strive to get to know each client's unique circumstances, and we advise them on the best course of action. Our objective is to secure justice for our clients and to hold their employers accountable.

At our firm, our attorneys have decades of experience representing employees, so we are uniquely positioned to advise you on the best course of action, whether you've been fired or you're facing problems in your current job.

At Wenzel Fenton Cabassa, we know that good work doesn't always get rewarded. Our firm handles cases involving employment discrimination and harassment, whistle-blowing, civil rights, wrongful termination, the Family Medical Leave Act (FMLA), wage and overtime disputes, workers compensation issues, contract disputes, severance-related issues, EEOC mediations, government investigations, and violations of non-compete and trade secret agreements, among others.

We offer a free initial consultation, during which we will listen to your employment-related issues and discuss the steps we can take to resolve them.

Disclaimer: The facts and circumstances of your case may differ from the matters in which results have been provided. All results of cases handled by the lawyer/firm are not provided. The results provided are not necessarily representative of results obtained by all clients or others with the lawyer/firm. Every case is different, and each client's case must be evaluated and handled on its own merits.

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