

MUNICIPAL EMPLOYMENT LAW

I. EMPLOYMENT LAW IN GENERAL

A. FIRST AMENDMENT

1. A public employee may not be refused employment or terminated for speaking out about a matter of public concern.
 - a. Examples include:
 - (1) How public money is being spent;
 - (2) How arrestees are being treated; and
 - (3) Safety of employees.
 - b. Exception --- *McMurphy v. City of Flushing*, 802 F.2d 191, 197 (6th Cir. 1986). "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."
 - c. See also --- *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006). "When public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes."
 - (1) Facts --- Employee working for a deputy district attorney wrote a memo to the county attorney explaining his concerns about an affidavit used to obtain a search warrant in a pending criminal case. The employee believed that the affidavit contained serious misrepresentations and recommended that the criminal case be dismissed. The county attorney's office nevertheless continued with the prosecution. Thereafter, the employee was reassigned from his position to another courthouse and was denied promotion. He challenged the decisions, claiming that he was retaliated against for the memo he wrote.
 - (2) Holding --- The Supreme Court held that the employee's allegation of unconstitutional retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties.
2. *Sowards v. Loudon County, Tennessee*, 203 F.3d 426 (6th Cir. 2000). A public employee may not be terminated for engaging in political conduct, even if the conduct is supporting the official's opposition or running

against the official, UNLESS the public employee holds one of the following four positions:

- a. a position that is named in federal, state, county, or municipal law and is given discretionary authority;
- b. a position to which a significant amount of the discretionary authority of category one is delegated;
- c. a confidential advisor to category one or category two position-holders on how to exercise their discretionary duties; or
- d. a position that is part of a group of positions filled by balancing out political party representation.

3. The First Amendment test ---

- a. The employee's prima facie case:
 - (1) the employee engaged in protected conduct;
 - (2) an adverse action was taken against the employee that would deter a person of ordinary firmness from continuing to engage in that conduct; and
 - (3) there is a causal connection between elements one and two – that is, the adverse action was motivated at least in part by the employee's protected conduct. *Thaddeus X v. Blatter*, 175 F.3d 378 (6th Cir. 1999).
- b. If the employee meets his burden, then the burden shifts to the employer to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977).
- c. The employer must satisfy the court that the same decision would have been made in order to prevail.
- d. This is not the burden-shifting test set used in discrimination suits.

4. Section I of the Bill of Rights of the Kentucky Constitution

- a. *Taylor v. University Medical Center, Inc.*, 2005 U.S. Dist. LEXIS 7269 (W.D. Ky.) --- Judge Heyburn held that a Plaintiff may not pursue this state constitutional claim because there is no private cause of action under Section I of the Bill of Rights of the Kentucky Constitution.

- b. *Welch v. Cliff Gill, et. al.*, 2006 U.S. Dist. LEXIS 14052 (W.D. Ky.) --- Judge Russell likewise ruled that there is no private cause of action under Section I of the Kentucky Constitution.

B. TITLE VII

1. Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on race, sex, religion, color, national origin.
2. The Title VII Test:
 - a. Plaintiff's prima facie case:
 - (1) he was a member of a protected class;
 - (2) he suffered an adverse employment action;
 - (3) he was qualified for the position; and
 - (4) a similarly-situated person outside the protected class was treated more favorably than he was. *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir.2001); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-3 (6th Cir.1992).
 - b. The burden of production shifts to defendant to articulate legitimate nondiscriminatory reasons for its employment action. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). The ultimate burden of persuasion, however, remains with the plaintiff at all times. *St. Mary's Honor Center*, 113 S.Ct. at 2747.
 - c. Once defendant articulates a legitimate, nondiscriminatory reason, the plaintiff possesses the burden of demonstrating pretext. *St. Mary's Honor Center*, 113 S.Ct. at 2747. "A proffered reason cannot be proved to be 'a pretext for discrimination' unless it can be shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

C. AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

1. The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age.
2. Under the ADEA, it is unlawful to discriminate against a person because of their age with respect to any term, condition, or privilege of employment
3. The ADEA applies to employers with 20 or more employees, including

state and local governments.

4. It is unlawful to include age preferences, limitations, or specifications in job notices or advertisements.
5. Pre-Employment Inquires – The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, requests for age information will be closely scrutinized.
6. Test:
 - a. Prima Facie Case:
 - (1) that they were members of a protected age class;
 - (2) that they were discharged;
 - (3) that they were qualified for the positions they held; and
 - (4) *that they were replaced by a younger worker. O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996).

--- However, in "reduction in force" cases, the fourth prong is modified so that the plaintiffs must provide "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998).
 - b. Once a plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the employer to offer a legitimate, nondiscriminatory reason for the adverse action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 349 (6th Cir. 1998)
 - c. "If the employer meets this burden, the burden of production shifts back to the plaintiff to show that the employer's nondiscriminatory explanation is a mere pretext for intentional age discrimination." *Ercegovich*, 154 F.3d at 350.
7. Bona Fide Occupational Qualification (BFOQ)
 - a. It must be reasonably necessary to the essence of the business; and
 - b. The employer must have a factual basis for believing that all or substantially all persons within the class would be unable to perform the job's duties safely and efficiently or that it would be impossible or impracticable to deal with persons over the age limit

on an individualized basis. *Western Airlines v. Criswell*, 472 U.S. 400 (1985)

--- In 1996, Congress restored to the Age Discrimination in Employment Act ("ADEA") an exemption permitting state and local governments to place age restrictions on the employment of police officers and firefighters. *See* 29 U.S.C. § 623(j) (1994 & Supp V 1999).

--- KRS 95.440 --- "In a city of the second class or urban-county government no person shall be appointed a member of either [a police or fire] department[] if he is over fifty (50) years of age."

8. Releases --- Under the Older Workers Benefit Protection Act (OWBPA) amendment to the ADEA, there are eight minimum requirements an ADEA release must meet before it can be considered "knowing and voluntary." 29 U.S.C. § 626(f). Paraphrasing, they are:
 - a. The release must be written in a manner calculated to be understood by the employee signing the release, or the average individual eligible to participate;
 - b. The release must specifically refer to the ADEA;
 - c. The release must not purport to encompass claims that may arise after the date of signing;
 - d. The employer must provide consideration for the ADEA claim above and beyond that to which the employee would otherwise already be entitled;
 - e. The employee must be advised in writing to consult with an attorney;
 - f. The employee must be given at least 21 or 45 days to consider signing, depending on whether the incentive is offered to a group;
 - g. The release must allow the employee to rescind the agreement up to 7 days after signing; and
 - h. If the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible (or selected) for the program, and the corresponding information relating to employees in the same job titles who were not eligible

(or not selected) for the program. 29 U.S.C. § 626(f)(1).

D. AMERICANS WITH DISABILITIES ACT (ADA)

1. The Americans with Disabilities Act of 1990, prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.
2. An individual with a disability is a person who:
 - a. Has a physical or mental impairment that substantially limits one or more major life activity;
 - b. Has a record of such an impairment; or
 - c. Is regarded as having such an impairment.
3. An individual with a disability is considered to be qualified if they can perform the essential functions of the job with or without reasonable accommodations.
4. Reasonable accommodations may include, but is not limited to:
 - a. Making existing facilities readily accessible and usable by persons with disabilities;
 - b. Job restructuring, modifying work schedules, reassignment to a vacant position;
5. An employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business.
6. Medical Examinations and Inquiries – Employers may not ask job applicants about the existence, nature or severity of a disability.
7. Applicants may be asked about their ability to perform specific job functions. A medical examination may be conditioned on a job offer only if it is required for all entering employees in similar jobs and an employee’s medical condition is relevant to whether the essential functions of the position can be performed.

8. Test:
 - a. Prima facie case:
 - (1) he is an individual with a disability;
 - (2) he is "otherwise qualified" to perform the job requirements, with or without reasonable accommodations; and
 - (3) he was discharged solely by reason of his handicap."

Cotter v. Ajilon Servs., 287 F.3d 593, 598 (6th Cir. 2002)
 - b. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the termination.
 - c. The burden then shifts back to the Plaintiff to demonstrate that the defendants' stated reasons are a pretext for discrimination. *Martin v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, 209 F.3d 931, 934 (6th Cir.) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)), *cert. denied*, 531 U.S. 992, 121 S. Ct. 482 (2000).

E. KRS 344.040 --- KENTUCKY CIVIL RIGHTS ACT

1. The Kentucky Civil Rights Act prohibits discrimination based on:
 - a. Race;
 - b. Color;
 - c. Religion;
 - d. National Origin;
 - e. Sex;
 - f. Age 40 or over;
 - g. Disability; and
 - h. Smoker or non-smoker
2. Burdens of proof and tests are the same as the equivalent federal statutes. *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241 (6th Cir. 1995).

F. FAMILY AND MEDICAL LEAVE ACT (FMLA)

1. The Family and Medical Leave Act entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.
2. The employer may elect to use the calendar year, a fixed 12-month leave or fiscal year, or a 12-month "rolling" period. If not specified in the

employer's personnel policies and procedures, whichever is more advantageous to the employee must be used.

3. Employer Coverage – FMLA applies to all:
 - a. public agencies, including state, local and federal employers;
 - b. private-sector employers who employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year; and who are engaged in commerce or in any industry or activity affecting commerce.
4. Employee Eligibility – To be eligible for FMLA benefits, an employee **must**:
 - a. Work for a covered employer;
 - b. Have worked for the employer for a total of 12 months;
 - c. Have worked at least 1,250 hours over the previous 12 months, and
 - d. Work at a location in the United States where at least 50 employees are employed by the employer within 75 miles.
5. Leave Entitlement – A covered employer must grant an eligible employee up to a total of 12 workweeks of **unpaid** leave during any 12-month period for one or more of the following reasons:
 - a. For the birth and care of the newborn child of the employee;
 - b. For placement with the employee of a son or daughter for adoption or foster care;
 - c. To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
 - d. To take medical leave when the employee is unable to work because of a serious health condition.
6. The employee can be required to use his sick and/or vacation leave while on FMLA.
7. The 12 weeks of leave may be taken continuously in one block of time, or intermittently where medically necessary. 29 USC § 2612(b)(1).
8. Upon returning from FMLA leave, the employee must be returned to the job he left or must be placed in a substantially similar position.
9. Upon exhaustion of FMLA leave, if the employee does not return to work, he is no longer protected by the provisions of FMLA and may be terminated so long as the reason for termination is not in retaliation for exercising his rights under the FMLA.

10. Prima facie case of Interference:

- (a) She was an eligible employee;
- (b) Defendant was an employer as defined under the FMLA;
- (c) She was entitled to leave under the FMLA;
- (d) She gave Defendant notice of her intention to take leave; and
- (e) Defendant denied her FMLA benefits to which she was entitled.
Killian v. Yorozu Automotive Tennessee, Inc., 454 F.3d 549, 556 (6th Cir. 2006).

11. Prima facie case of Retaliation/Discrimination:

- (a) She was engaged in an activity protected by the FMLA;
- (b) Defendant knew she was exercising her rights under the FMLA;
- (c) After learning of the exercise of her FMLA rights, Defendant took an employment action adverse to her; and
- (d) there was a causal connection between the protected FMLA activity and the adverse employment action. *Killian*, 454 F.3d at 556; and *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 314 (6th Cir. 2001)(citing *Canitia v. Yellow Freight Systems, Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990)).

G. EMPLOYEE POLYGRAPH PROTECTION ACT

- 1. In general, the Employee Polygraph Protection Act prohibits private employers from requiring an employee or a prospective employee to submit to a polygraph test. 29 U.S.C 2001 *et seq.*
- 2. Employees of federal, state, and local governments are specifically excluded from the protections of this Act.

H. GENERAL CONSIDERATIONS

- 1. In general, employees in Kentucky are at-will, such that they can be terminated for any reason or no reason, so long as not for one of the reasons previously discussed. *Noel v. Elk Brand Manuf. Co.*, 53 S.W.3d 95 (Ky. 2000).

2. EXCEPTIONS

- a. Employer's policy and procedure manual may alter an employee's at will status. ALL EMPLOYMENT MANUALS SHOULD STATE SOMETHING TO THE EFFECT OF "NOTHING IN THIS MANUAL SHALL BE INTERPRETED TO ALTER THE

EMPLOYMENT AT-WILL DOCTRINE”

- b. Union contracts typically alter the employment relationship.

NOTE:

- (1) It is undisputed that governmental entities have no constitutional duty to bargain collectively with an exclusive bargaining agent. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 99 S.Ct. 1826, 60 L. Ed.2d 360 (1979). In addition, the Kentucky Supreme Court has held that cities do not have a duty to recognize, negotiate, or bargain with a union. *Board of Trustees of Univ. of Kentucky v. Public Emp. Council No. 51 AFSCME*, 571 S.W.2d 616 (Ky. 1978).
 - (2) Under the common law it is recognized that public employees do not have the right to strike or to engage in concerted work stoppages. 48 Am.Jur.2d, Labor and Labor Relations, § 1361 (page Wichita 848); *Public Schools Emp. U., Local No. 513 v. Smith*, 194 Kan. 2, 397 P.2d 357 (1964); *Anderson Fed. of Teachers, Local 519 v. School City of Anderson, Ind.*, 252 Ind. 581, 254 N.E.2d 329 (1970); *Goldberg v. City of Cincinnati*, 23 Ohio App.2d 97, 261 N.E.2d 184 (1970); *Jefferson Co. Teachers’ Assoc. v. Board of Educ.*, 463 S.W.2d 627 (Ky. 1970).
- c. Statutes applicable to municipal employees alter the employment relationship.

II. EMPLOYMENT LAW STATUTES APPLICABLE TO MUNICIPALITIES

A. POLICE OFFICERS --- KRS 15.520 and KRS 95

- 1. KRS 15.520 --- The Police Officers’ Bill of Rights
 - a. Sets forth procedures for investigating a complaint against a police officer filed by a citizen;
 - b. No public statement shall be made until final disposition of the charges;
 - c. Accused officer must be given 72 hours notice of a hearing before the appointing authority;

- d. Any police officer suspended with or without pay who is not given a hearing within sixty (60) days *of any charge being filed*, the charge then shall be dismissed with prejudice and not be considered by any hearing authority and the officer shall be reinstated with full back pay and benefits;
 - e. A police officer may appeal the appointing authority's decision to the circuit court.
2. KRS 95.450 (Second and Third class cities); KRS KRS 95.765 (Fourth and Fifth class cities)
- a. "No member of the police or fire department in cities of the second and third classes or urban-county government shall be reprimanded, dismissed, suspended or reduced in grade or pay for any reason except inefficiency, misconduct, insubordination or violation of law or of the rules adopted by the legislative body, and only after charges are preferred and a hearing conducted as provided in this section."
 - b. Hearing must be held within three (3) days after the charges are filed. --- The Attorney General's office has opined that since KRS 15.520 was enacted after KRS 95.450, the sixty (60) day requirement trumps the three (3) day requirement.
 - c. "When the appointing authority or the head of the department has probable cause to believe a member of the police or fire department has been guilty of conduct justifying dismissal or punishment, he or it may suspend the member from duty or from both pay and duty, pending trial, and the member shall not be placed on duty, or allowed pay, until the charges are heard. If the member is suspended, there shall be no continuances granted without the consent of the member accused."
 - d. The legislative body shall fix the punishment if found guilty by:
 - (1) reprimand;
 - (2) suspension for any length of time not to exceed six (6) months'
 - (3) reducing the grade if the accused is an officer;
 - (4) combining any two (2) or more of those punishments, or
 - (5) dismissal.
 - e. Appeal shall be taken to the circuit court within thirty (30) days.

3. A recent Court of Appeals opinion held that this section is only applicable to complaints received from a citizen and not to internal complaints, such as insubordination, etc. *Marco v. University of Kentucky*, 2006 WL 2520182.
4. *Gardner v. City of Hickman* ---

B. FIREFIGHTERS --- KRS 95.450 and 95.765

1. Basically, same as above.
2. However, since the Police Officer Bill of Rights is not applicable to firefighters, the hearing must be held within three (3) days after charges are filed. Typically can get the firefighter to waive this requirement.

C. CIVIL SERVICE EMPLOYEES --- KRS 90.300 et seq. (Second and Third Class Cities)

1. Any city of the Second or Third Class may elect to adopt civil service by ordinance.
2. Creates a civil service commission that is responsible for:
 - a. test and examine applicants for positions within the city and create a list of not less than three (3) persons for each position to be filled to ultimately be decided by the appointing authority; and
 - b. hold hearings for all civil service employees prior to their discipline. KRS 90.360
 - (1) Hearing to be held not sooner than three (3) days of the date of the service of charges;
 - (2) “In cases where the head of the department or the appointing authority has probable cause to believe an employee has been guilty of conduct justifying his removal or punishment he shall immediately suspend that employee from duty or from both pay and duty pending trial and the employee shall not be placed on duty or allowed pay thereafter until the charges are heard by the civil service commission.”
 - (3) The civil service commission shall punish any employee found guilty by”
 - (a) reprimand;

- (b) suspension for any length of time not to exceed six (6) months;
 - (c) reducing the grade, if the employee's classification warrants;
 - (d) combining any two (2) or more of these punishments; or
 - (e) dismissal.
- (4) An employee found guilty may bring an action in the Circuit Court of the county in which the city is located to contest the action.
- (5) Getting rid of Civil Service:
- (a) Must do so by ordinance;
 - (b) May exclude only portions of the employ, but must do so by ordinance designating the “class of employees . . . to be non-civil service positions.” KRS 90.300, definition of “employee”.
 - (c) May abolish entire civil service scheme; but
 - (d) Likely have to grandfather employees hired pursuant to civil service statute.

D. COURT’S STANDARD OF REVIEW

1. *Crouch v. Jefferson County, Kentucky Police Merit Board*. 773 S.W.2d 461 (Ky. 1988).
 - a. a "modified de novo review." *Id.* at 464.
 - b. The Court stated that "[t]he appellate court judge [i.e., the circuit court judge] does not sit as a board and hear testimony. Nor does he or she determine the credibility or lack thereof, of witnesses." *Id.* at 463.
 - c. The Board’s decision "is not to be disturbed unless it is arbitrary or unreasonable. By ‘arbitrary’ we mean clearly erroneous, and by ‘clearly erroneous’ we mean unsupported by substantial evidence. By ‘unreasonable’ is meant that under the evidence presented there is no room for difference of opinion among reasonable minds." *Id.* at 464; quoting *Thurman v. Meridian Mutual Insur. Co.*, 345 S.W.2d 635, 639 (1961); See also *Stallins v. City of Madisonville*, 707 S.W.2d 349 (Ky. App. 1986).
 - d. "[I]t is incumbent upon the circuit court, sitting as an appellate court for the Board, to base its decision upon the transcript of the proceedings below, and any other evidence which is relevant to the issue of

arbitrariness. No other evidence is to be admitted on appeal." *Id.* "The appeal is not the proper forum to retry the merits." *Id.*

2. *City of Richmond v. Howell*, 448 S.W.2d 662, 664 (Ky. App. 1969).
 - a. "Sound public policy requires that the matter of punishment and discipline of the police officer be left to his employer – the legislative body in the present instance."
 - b. In the *Howell* case, the circuit court had "specifically found that the discharged officer was guilty of some of the charges preferred against him but attempted to ameliorate the penalty." *Id.* at 665. The Court of Appeals held that the circuit court "was clearly without authority in this aspect." *Id.*; see also *Stallins*, 707 S.W.2d at 351 (Discharge of police officer for converting arrestee's pistol, belt, holster, and cartridges to officer's own use was supported by substantial evidence and while punishment was harsh, it was not subject to judicial review).