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## Coates' Canons Blog: Firing At-Will Employees: Legal Limitations

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If you go to work for someone else, the odds are great that you are an employee at will. That's the basic rule in North Carolina, as it is almost everywhere in the United States. In North Carolina, it applies whether you go to work for an individual or a private business or a unit of government.

So what? What does it mean to be an employee at will? It means that you can be fired at any time, for any reason or no reason, with notice or without notice. It means, as a legal matter, that your job hangs by the barest thread, subject to being snipped at any moment, with no recourse. It means, as a practical matter, that the employer holds all the cards in the employment arrangement.

But there is one more element to the law of employment at will: yes, it's true that an at-will employee may be fired for any reason or no reason. But even an employee at will may not be fired for an *unlawful* reason. The law puts in place some protections against dismissal even for at-will employees.

This blog post lists the unlawful reasons. If an employer, private or governmental, fires an employee for any reason not listed here, the law of employment at will prevails, and the employee is out of luck. But if one of these reasons is behind the dismissal, the employer has acted unlawfully and the employee may have legal protection.

### Protections under federal statutes

Federal statutes provide protections to at-will employees, both in the private sector—businesses and non-profits above a minimum number of employees—and in government.

*Race.* Under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.), it is unlawful for an employer to dismiss you (or to discriminate otherwise, such as in hiring, promotions, or compensation) because of your race. This protection applies fully to at-will employees. You can go to the Equal Employment Opportunity Commission and file a charge of discrimination. The EEOC will investigate your claim and, perhaps, make an effort on your behalf to reach an accommodation between you and your employer. If that effort fails, you will be issued a right to sue letter and you can take the employer to court. The effort and expense may be too great, but the legal remedy is there if you can take advantage of it.

*Sex.* Title VII protects you against dismissal—or other discrimination—on account of your sex just as it does on account of your race. The statute uses the term “sex.” In common usage today, however, the term of choice is usually “gender.” For this purpose, the terms are equivalent.

*Religion.* Title VII protects you against discrimination on account of your religion. If you can't work on Saturday because of religious beliefs, the employer is required to make an effort (but not go to great expense) to accommodate your religious need rather than simply fire you.

*National origin.* Title VII does not use the term “ethnicity,” but it gets at the same notion by protecting you against dismissal on account of your national origin.

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*Color.* The fifth, and final, protected characteristic under Title VII is “color.” It correlates closely with race, of course, but it is not the same thing. The protection could apply, for example, if a light-skinned African American employer discriminates against a dark-skinned African American employee because of that employee’s color.

*Age.* Three years after enacting Title VII, Congress passed the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq.. It prohibits dismissal—or other discrimination—on account of a person’s age, once that person reaches 40. It is not unlawful to dismiss an employee who is 35 because that employee is too old, but it is unlawful to dismiss someone who is 41 for being too old. Go figure. When the ADEA was first passed, its protections ended at age 65, and employees were often subject to mandatory retirement at that age. After a few years the age limit was raised to 70, and then the upper limit was removed altogether. It is not unlawful to fire an older worker because she can no longer adequately perform the job, but it is unlawful to fire her just because of her age. The ADEA is administered through the EEOC, as Title VII is.

*Disability.* In 1990, Congress passed the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. The ADA covers many kinds of situations in addition to employment, but its application to employment is its main feature. You may not be fired because of an impairment—mental or physical—that substantially limits you in a major life activity. And the ADA requires an employer to make an effort to accommodate your disability (perhaps at substantial expense). It is unlawful to dismiss you because of your disability or because the employer doesn’t want to make the accommodation. The ADA is administered through the EEOC.

*Genetic information.* The most recent federal statute is the Genetic Information Discrimination Act, 42 U.S.C. 2000ff et. seq. It prohibits discrimination against you because of genetic information about you or information about your family medical history. See the Coates’ Canons blog here.

*Military service.* With some limitations, your employer cannot fire you because you enter military service. The Uniformed Services Employment and Reemployment Rights Act, 39 U.S.C. §§ 4301 et seq., so provides, and also requires that, within limitations, the employer must hold a job for you when you get back from service.

### **Federal constitutional protections**

Protections that stem directly from the United States Constitution apply only to employees of the government—state or local—and not to employees in the private sector. How come? Because the Constitution acts to constrain how government acts. That is, it describes the relationship between citizen and government. It does not directly control how private entities act. When the government becomes an employer and hires you to work for it, you don’t stop being a citizen. Two relationships exist at once—employer/employee and government/citizen. When the government acts against you in the way that any employer might act—say, by firing you—the protections that you enjoy as a citizen may affect the legality of the employer’s action. Employees in the private sector do not have these protections.

*Free speech.* When you go to work for the government, one protection that follows you as a citizen is the right to free speech embedded in the First Amendment. That right is not absolute, but if you believe you were fired because of what you said on a matter of public concern, you can pursue the matter with a lawsuit. The court will balance your interests in speaking out against the governmental employer’s interest in getting the job done without unreasonable disruption. See Coates’ Canons blog posts [here](#) and [here](#).

*Religion (again).* The First Amendment also protects individuals in the free expression of their religion. When you go to work for the government you have the full protection of Title VII, described above, but you also have this constitutional protection and, if you believe your dismissal was based on their religion, you may sue directly under the constitution, in addition to pursuing your Title VII remedy.

*Unreasonable searches.* The Fourth Amendment protects individuals against unreasonable searches and seizures. If a governmental employer looks through your desk drawers or computer-usage records, or demands urine or blood for a drug test, and fires you for what it finds (or because you refuse to go along with the search), the possibility exists that you may sue under the Fourth Amendment. See Coates’ Canons blog posts [here](#) and [here](#).

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## Protections under North Carolina statutes

The North Carolina Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et seq., pulls together provisions scattered throughout the state General Statutes to protect employees against dismissal in particular circumstances. An employee with a claim under REDA goes first to the N.C. Department of Labor with a complaint and then may bring a lawsuit.

*Workers' compensation, wage and hour, and mine safety claims.* Under REDA, it is unlawful for your employer to fire (or otherwise to adversely treat) you because you file a workers' compensation claim or testify with respect to the claim of another employee. The same is true with respect to wage and hour claims under state law and to claims under the state's mine safety law.

*Sickle cell.* Under REDA, you may not be fired (or otherwise adversely treated) you because you possess the sickle cell trait or hemoglobin C trait.

*National guard service.* Under REDA, you may not be fired (or otherwise adversely treated) you because you serve in the National Guard.

*Genetic information (again).* Under REDA, as under GINA, discussed above, you may not be fired because of genetic information about you or a family member.

*Pesticide use.* Under REDA, you may not be fired because you pursue your rights under the state statute on the regulation of the use of pesticides or testify with respect to the claim of another employee.

*Drug paraphernalia sales.* Under REDA, you may not be fired because you refuse to sell certain products banned by the state statute controlling sales of drug usage products.

*Juvenile order compliance.* Under REDA, you may not be fired because you attend a court proceeding or take other actions that a court may order in cases where your child is under the jurisdiction of the juvenile court for delinquency.

*Domestic violence protection.* Under REDA, you may not be fired if, with reasonable notice to the employer, you have to take time off work to obtain, through the judicial system, a domestic violence protection order or civil no-contact order. See G.S. 95-270.

*How you vote.* This prohibition is not in REDA—and it is the only crime in the bunch! G.S. 163-274(a)(6) makes it misdemeanor “to discharge or threaten to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which he may have failed to cast.” You can't be fired for how you vote. Another provision applies only to units of government. It is found at G.S. 163-271. If you work for the government, it says, you may not be fired for how you cast your vote. (Thanks to Don Wright, general counsel at the State Board of Elections, for pointing out G.S. 163-274(a)(6) to me.)

*Serving on election day.* This prohibition is also not in REDA, but is found at G.S. 163-41.2 As long as you give proper notice to your employer that you will be absent, you may not be fired because you agree to serve as a precinct official, appointed by the county board of elections, on election day.

*Whistleblowing.* The North Carolina Whistleblower's Protection Act, found at G.S. 126-84 et seq., protects employees of the state, of community colleges, and public schools from dismissal for reporting violations of law, fraud, misappropriation of resources, specific dangers, and gross mismanagement by their employers. It does not apply to other governmental employees or to employees in the private sector. See Coates' Canon blog post [here](#).

*Refusing to perform abortions.* You can't be fired, if you are a health care provider, because you refuse to participate in an abortion procedure for moral, ethical, or religious reasons. G.S. 14-45.1(e). (Thanks to Gerry Cohen, special counsel, North Carolina General Assembly, for pointing out this provision to me.)

## North Carolina common law protection



The vaguest, and oddest, of the legal provisions restricting the firing of employees is actually not a statute. It is instead a common law provision. That is, it was not developed by the legislature but by the courts, originally in *Sides v. Duke Hospital*, 74 N.C. App. 331 (1985). And it is not an outright prohibition on firing. Instead, it creates the possibility of a monetary recovery in court by someone who has been fired.

*The public policy wrongful discharge tort.* The *Sides* case and the many that have followed it have created this exception to employment at will: if I, the employer, fire you, my employee, because you refuse to do something that would violate the public policy of the state, I have committed the tort of wrongful discharge and you can sue me. If you win, you don't get your job back, you get money from me to compensate you for your lost job. Here is an example: I fire you because you testify against me in court, truthfully, in response to a subpoena. It is the public policy of this state that everyone is to tell the truth in court. I can't get away with firing you because you won't lie in court.

*State constitutional protection.* A rare protection is found under the North Carolina Constitution. Our courts have said, starting with *Corum v. University of North Carolina*, 330 N.C. 761 (1992), that where protections are laid out in the state constitution and are violated by a governmental employer, as in the dismissal of an employee for the legitimate exercise of free speech, the employee may sue directly in state court to remedy the violation, but only if no other provision of law gives the chance at a remedy. There have not been many successful employee lawsuits brought this way.

### Anything I missed?

Do you know of other protections against firing at-will employees, in federal or state law, that I have missed here? I would love to hear about them.

## Links

- [canons.sog.unc.edu/?p=5361](https://canons.sog.unc.edu/?p=5361)
- [canons.sog.unc.edu/?p=5151](https://canons.sog.unc.edu/?p=5151)
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