

1. Employment at Will: A State-by-State Survey

Kentucky

I Overview

Kentucky has adopted the at-will employment doctrine, which provides that an employee who has an employment contract with no express conditions or a definite term may leave or be terminated at any time for good cause (not prohibited by law), for no cause, or for a cause that some might view as morally indefensible. ¹ This chapter will discuss Kentucky law on the following topics:

- The requirement of an indefinite term to qualify as an at-will employment relationship;
- Exceptions to the at-will doctrine, including oral modifications, implied contracts, and employee handbook exceptions;
- The recognition of a common law tort for wrongful discharge;
- The lack of recognition of an implied covenant of good faith and fair dealing in at-will employment relationships;
- The ability of disclaimer provisions in the contract to create an at-will employment relationship;
- The damages awarded for a claim of wrongful discharge;
- Related torts, including fraud, defamation, and intentional infliction of emotional distress;
- Statutes that prohibit termination of at-will employees; and
- A discussion of whether retaliatory conduct in a protected area of the relationship is actionable when the employee is not terminated.

II Employment Contract

The Kentucky courts have recognized the importance of whether or not the parties in the employment relationship have agreed to a definite term. If the term is indefinite, the employment may be terminated by either party at will. ² On the other hand, an employee hired for a definite term may not be terminated without just cause. ³ In determining whether or not there is a definite term, the courts look at the negotiations between the parties and the actual offer by the employer.

The courts of Kentucky have held that the following employment contracts have definite terms:

- The employer sent a letter to the employee stating the annual salary, including a bonus, and a starting date. 4
- The employee made a verbal offer of employment; confirmed the offer in a letter, which reasonably inferred a 13-month employment; and the employer paid moving expenses as consideration for the contract. 5

The Kentucky courts have recognized that the following employment contracts are for indefinite terms and can be terminable at will:

- The term in the employment contract was labeled “ permanent.” 6
- The term in the employment contract stated there would be “ employment as long as the employee does honest or faithful work.” 7
- The term in the employment contract stated there would be “ employment as long as he performs his duties in a successful or satisfactory manner.” 8

II.A Handbooks [Supplemented]

In Kentucky, personnel manuals and handbooks can create contracts under the proper settings. In *Parts Depot, Inc. v. Beiswenger*, the Supreme Court of Kentucky held that the personnel policy became a binding contract. 9 The court stated, “ [o]nce an employer establishes an express personnel policy and the employee continues to work while the policy remains in effect, the policy is deemed an implied contract for so long as it remains in effect.” 10 It has also been recognized that a valid contract existed when an employee handbook used contractual language and did not include a disclaimer. 11

In an unpublished case in the Kentucky Court of Appeals, the court held that an employee handbook modified the at-will employment. 12 The court noted that the employee was required to sign an acknowledgement agreeing to the conditions of the employment, the handbook included a probationary period when the employee could be fired for any reason, the handbook contained a description of the warning and counseling system, and the handbook did not have a disclaimer. 13 There has also been recognition that a company's posted rules of conduct can create an implied contract. 14

In *Nork v. Fetter Printing Co.*, 15 the Kentucky Court of Appeals combined three cases and discussed three situations involving employee handbooks. The court held that in each of the following situations, the employee manual or handbook did not create judicially enforceable employment contracts for definite periods:

- The employment application included a provision stating that the relationship was terminable “ at will of either the employee or employer,” and the handbook only contained nonbinding policies. 16
- The employee handbook contained a disclaimer stating that the manual was not a contract of employment, and the relationship was “ terminable at the will of either the employee or employer.” 17
- The employee manual included a provision for a 90-day probationary period. 18

Based on its opinion in *Nork*, the court implied that an employer's policy could create an enforceable contract but only when the representations contained in employment manuals or handbooks were far more likely to lead a court to believe that the parties mutually intended the manual or the handbook to be contractual. The court commended the use of policies to eliminate arbitrariness in the workplace but noted that such policies did not lead to the formation of contracts in these cases. 19

See also V.C., “ Disclaimers,” below.

[Supplement]

Return to Main Volume

[Editor's note: On page 546 in the Main Edition, the last sentence in the first paragraph in this section should be deleted and replaced with the following:]

It has also been recognized that language in an employee manual may create an implied contract where the manual used contractual language and did not include a disclaimer. S.1

Return to Main Volume

II.B Oral Assurances

It is possible for an employment contract with a definite term to be made through an oral agreement. 20 The Kentucky courts have also found that an oral agreement between the employer and employee can remove the employee from an at-will status. 21 For example, in *Hammond v. Heritage Communications, Inc.*, the employee was hired on an at-will status. 22 Her immediate supervisor told her that she would not be fired if her nude photos appeared in *Playboy* and induced and encouraged her to pose for the magazine. The court found that she was entitled to establish that the oral statements made to her by her supervisor altered her at-will status and that she was thereafter working under the terms of an oral contract for a specific period of time. 23

The courts of Kentucky have also recognized that an implied contract can alter an at-will employment status of an employee. 24 To determine if an implied contract exists, courts will examine offer letters, personnel manuals and handbooks, company procedures and rules, and oral statements made to the employee regarding the offer and employment. In *Shah v. American Synthetic Rubber Corp.*, the Supreme Court of Kentucky held that the employee had entered into an initial 90-day at-will time period followed by protection under the “ for cause” rules of the employer. The employer had told the employee that after the 90-day period, “ he would become a permanent employee dischargeable only for cause in accordance with the personnel policies and procedures established by [the employer].” 25 Therefore, an employee can rely on different forms of evidence to establish an employment contract.

In *Sawyer v. Mills*, 26 the Kentucky Supreme Court recognized that the statute of frauds 27 applied to bar a claim by an employee to a bonus where the agreement was not in writing, and could not be performed within a year. The court specifically held that an audiotape of the defendant's voice agreeing to the bonus was not a writing within the meaning of

the statute of frauds or an electronic agreement under [15 U.S.C. §7006](#). 28 A one-year contract to be commenced in the future cannot be performed within one year of its making, and was therefore barred by the statute of frauds. 29

III Implied Covenant of Good Faith and Fair Dealing

Kentucky decisions have indicated that Kentucky courts are not going to find an implied covenant of good faith and fair dealing in the absence of an express contract. Because an at-will employee may be terminated at any time without cause, it would be difficult for an employee to prove bad faith. 30

IV Public Policy Exception

The Kentucky courts have recognized a claim for wrongful discharge as a tort. The Supreme Court of Kentucky stated, “[a]n employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law. . . . The public policy must be evidenced by a constitutional or statutory provision.” 31 Where the statute defining the public policy provides its own remedies, it will not give rise to a tort claim for wrongful discharge. 32 The applicable statute of limitations for a wrongful discharge claim is five years. 33

The Supreme Court of Kentucky adopted two situations in which a termination violates public policy even without explicit legislative statements. 34 The first situation involved the failure or refusal to violate the law as the reason for the termination of the employee. 35 The second involved the employee's exercise of a right bestowed by well-established legislative enactment. 36 The legislative enactment must be a Kentucky statute or constitutional provision; violation of a federal statute or Kentucky's Supreme Court Rules will not give rise to a wrongful discharge claim. 37

Then, in *Nelson Steel Corp. v. McDaniel*, 38 the Supreme Court further refined the limitations. The court stated that it intended to limit wrongful discharge claims “to those situations where the evidence established the employer was retaliating against the employee” for the two situations listed previously. Whether or not the public policy meets these criteria is a question of law for the court to decide. 39 Also, the statutory or constitutional right must directly implicate the employment relationship, and there must be an employment-related nexus between the policy and the discharge. 40 In *Boykins v. Housing Authority*, the plaintiff was discharged by her employer, the owner of a housing complex where the plaintiff also lived. Plaintiff had sued the housing complex for negligence seeking damages for an accident that occurred to her child. The Kentucky Supreme Court held that no statutory law protects plaintiff as an employee from being discharged or retaliated against because she filed suit as a tenant against her employer. The right to sue does not give rise to an employment-based right in that it lacks an employment-based nexus.

The courts of Kentucky have determined that the following types of claims for discharge do not qualify as public policy exceptions:

- An employer allegedly fired an employee for getting divorced or for expressing an intention to run for public office; 41
- An employer allegedly fired an employee for fraternizing with a female employee; 42

- An employer allegedly fired an employee because he told the employer he intended to go to law school at night; 43
- An employer fired an employee after appearing in Playboy magazine; 44
- Although an employer violated federal law by conducting a drug test on an employee, the employee could not use it to support the wrongful discharge claim because its primary purpose was to protect the public, not the employee; 45 and
- In a sexual discrimination case, a teacher-employee was properly terminated not due to her status as a woman but due to her criminal behavior and DUI guilty plea that provided a nondiscriminatory reason for her termination. 46

A few Kentucky cases have recognized the public policy exception, including the following:

- Prior to the codification of the statute protecting employees who file workers' compensation claims, an employee who sought a workers' compensation claim and was subsequently terminated was protected by public policy; 47 and
- The employee was allegedly discharged for union activity, which was protected by Kentucky Revised Statutes Annotated §336.130, so the employee had a claim for wrongful discharge. 48

Courts applying Kentucky law have also allowed a claim for wrongful discharge in the following situations when an employer has retaliated against an employee for refusal to violate the law:

- An employer terminated an employee after he truthfully answered questions from federal regulators, which led to an EPA citation against the employer; 49 and
- An employer constructively discharged employees after they refused to offer perjured testimony in a shoplifting trial involving their immediate supervisor. The court noted that it was significant that the supervisor asked them to violate the law in a matter that was personal to the supervisor. 50

The Kentucky Supreme Court applied the public policy exception in the context of a public university employee's termination for keeping a pistol in his vehicle. This act violated his employer's policy against firearms possession on university premises. The court held that the employee's termination was contrary to the Commonwealth's public policy, as codified in Ky. Rev. Stat. Chapter 527, in favor of exempting a person's vehicle from firearms regulation. 51

The Kentucky Court of Appeals held that a claim for public policy wrongful discharge may arise where a healthcare facility employee is fired after making an anonymous report about problems with quality of care and patient safety, pursuant to [Ky. Rev. Stat. §216B.165](#) . 52

See also VIII.A., “ Retaliatory Treatment Not Resulting in Termination,” below.

V Burdens of Proof, Just Cause, Disclaimers, and Damages

V.A Burdens of Proof

In a suit for retaliatory discharge under the public policy tort exception to the employment-at-will doctrine, a plaintiff must prove that “ the workers compensation claim was a substantial and motivating factor but for which the employee would not have been discharged.” 53

V.B Just Cause

Even if an employee has a contract of employment for a definite term, the employer will still be legally justified in discharging the employee prior to expiration of the term “ when the employee has been guilty of acts or conduct which manifest negligence, unskillfulness, inefficiency or unfaithfulness to the employer's interests, or of anything which is contrary to a faithful and diligent performance of the services for which he was employed.” 54 The employer bears the burden of proof to justify the termination, and the determination of whether just cause exists is usually a question of fact resting with the jury. 55 Where plaintiff was employed pursuant to a written agreement that employment would be continued for as long as the employer was satisfied with plaintiff's performance, the Kentucky Supreme Court held that the plaintiff had the burden of establishing bad faith by the employer in reaching its decision to terminate. 56 Simply establishing that the employer's evaluation was mistaken is insufficient; the evidence must establish absence of good faith by the employer. 57

V.C Disclaimers

Kentucky courts have recognized the effectiveness of disclaimers in employee handbooks. The courts have held that a clear disclaimer defeats an employee's breach of contract claim. 58 Otherwise, the court would have to disregard the disclaimer and create a termination only for cause, which the court would not do. 59

V.D Damages [Supplemented]

Because wrongful termination is a tort action under Kentucky law, the full array of tort remedies exists. The Kentucky Supreme Court stated that, generally, punitive damages may be recovered on the wrongful termination of an at-will employee when the action is based upon a violation of public policy. 60 The Court of Appeals of Kentucky agreed and noted that punitive damages are appropriate when public policy and statutes are violated to discourage those violations. 61 Although punitive damages are available for most wrongful termination actions, they are not available for actions premised on a violation of Kentucky's Civil Rights Act, 62 and this has been upheld by the Supreme Court of Kentucky. 63 Another statute also limits punitive damages against the principal or employer for acts of an agent or employee only when the employer ratified or authorized the conduct or should have anticipated the conduct. 64 This statute was applied by the Kentucky Supreme Court when it denied punitive damages in a wrongful employment case because there was no evidence that the employer authorized or ratified the conduct. 65

Compensatory damages may also be applicable to all at-will actionable discharges. 66 The Supreme Court of Kentucky held that an at-will employee should be permitted to pursue his or her full expectancy from the contract, which requires awarding compensatory damages. This has also been recognized by the Court of Appeals of Kentucky when an

employee's at-will status was altered by oral assurances made to the employee. 67 The court will allow recovery of compensatory damages if the employee presents evidence that the job position would have been retained by him or her for a definite period of time.

In Kentucky, plaintiffs have a duty affirmatively to plead and prove that they mitigated or made good faith unsuccessful attempts to mitigate damages. 68 Failure to meet this burden only entitles the plaintiff to nominal damages. 69 In a case arising under the Kentucky Merit System laws, the court acknowledged the continuing vitality of *Louisville & Nashville Railroad Co v. Wells*, as applicable to common law and statutorily based claims, and further held that mitigation calculated on a month-by-month basis, as opposed to calculating it in the aggregate from discharge to trial, was appropriate in that particular case. 70 The court said that the precise method of crediting the defendant with mitigation was within the sound discretion of the trial court to avoid a windfall for the plaintiff and serve the goals of the merit board statutes. 71

[Supplement]

Return to Main Volume

[Editor's note: On page 554 in the Main Edition, footnote 61 is updated to read as follows:] *Simpson Cty. Steeplechase Ass'n v. Roberts*, [898 S.W.2d 523](#), 526–27 (Ky. Ct. App. 1995).

Return to Main Volume

VI Related Torts

VI.A Fraud

The Supreme Court of Kentucky has held that representations of job security that are not the complete truth induce reliance and are actionable under a theory of fraud. 72 By intentionally failing to tell employees all of the material facts of its hiring plan, employers mislead the employees and fraud can occur if it is materially misleading. 73

VI.B Intentional Interference With a Contract

Kentucky courts have adopted the Restatement (Second) of Torts 74 as fairly reflecting “ the prevailing law of Kentucky. ” 75 To establish an intentional interference with contract, the plaintiff must prove the seven factors set forth in §767 of the Restatement to show that the interference was improper. 76 Normally for an interference to be improper, some form of malice or “ ill will” by the defendant must be shown, 77 but malice or “ ill will” may be inferred from proof of lack of justification. 78

VI.C Defamation [Supplemented]

Kentucky courts have recognized a tort of defamation for current and former employees. 79 An employer that falsely accuses an employee of a crime or of some other act of moral turpitude can be held liable to the employee for defamation.

80 In a decision containing an exhaustive discussion of the law of defamation and an employer's qualified privilege, the Kentucky Supreme Court upheld plaintiffs' jury verdicts based on statements that "there was more to" plaintiffs' terminations than the theft of candy, which plaintiffs did in fact consume. 81 The ostensible reason for the plaintiffs' termination was that they consumed candy from the store. But the store's manager suggested on various occasions that it was more than that, which allowed the jury to consider that statement as implying an untrue accusation against the plaintiffs.

Employers that are compelled to provide information about an employee may enjoy an absolute privilege under Restatement (Second) of Torts §592A. 82 But when evidence exists that the employer placed intentionally false defamatory information into an employee's personnel file, knowing that it would be disclosed through a subpoena, the privilege could be lost. 83

Kentucky has also granted employers a qualified immunity when employers disclose information about an employee's job performance or conduct to a prospective employer at the request of the employee or the prospective employer so long as the disclosure is not intentionally false, made with reckless disregard for the truth, or constitutes discriminatory treatment proscribed by Kentucky's Civil Rights Act. 84 Kentucky courts have also held that while proof of damages is not required in defamation per se cases (as opposed to defamation per quod) when the statements are made in the context of a labor dispute, actual malice is required by *New York Times Co. v. Sullivan*, 85 and specific proof of damages must be established pursuant to *Linn v. United Plant Guard Workers of America Local 114*. 86

[Supplement]

Return to Main Volume

[Editor's note: On page 556 in the Main Edition, footnote 81 is updated to read as follows:] *Stringer v. Wal-Mart Stores, Inc.*, [151 S.W.3d 781](#), 792–99 (Ky. 2004), overruled on other grounds, *Toler v. Süd-Chemie, Inc.*, [458 S.W.3d 276](#) (Ky. 2014).

Return to Main Volume

VI.C.1 Self-Defamation/Compelled Self-Publication

No Kentucky court has recognized a cause of action for self-defamation or compelled self-publication in the employment context. 87

VI.D Intentional Infliction of Emotional Distress

Kentucky courts recognize a tort of outrage or intentional infliction of emotional distress. 88 For the tort to apply, the emotional distress must be severe. It appears that the courts of Kentucky would recognize a tort for intentional infliction of emotional distress in wrongful discharge cases, but no courts have found that the employer's conduct has been appropriately outrageous. The mere termination and resulting embarrassment of the employee do not rise to the level of

outrageousness to support the claim. 89 In a decision containing a thorough discussion of Kentucky case law, the Supreme Court of Kentucky also found that allegations by an at-will employee that his supervisor manufactured an excuse to fire employees in order to save his own job did not amount to extreme and outrageous conduct. 90 However, the Kentucky Supreme Court affirmed a verdict of outrageous conduct against an employer for post-termination conduct that could be characterized as “ a plan of attempted fraud, deceit, slander, and interference with contractual rights all carefully orchestrated . . . to bring [plaintiff] to his knees” and compel him to sign a release. 91

A supervisory employee, however, who was induced by a hoax caller to participate in the imprisonment and sexual assault of a subordinate employee on the pretense of complying with the orders of a law enforcement officer was entitled to recover on an intentional infliction of emotional distress claim where the employer was aware that the hoax caller had targeted its stores and had done nothing to advise or train its supervisors about how to handle these calls. 92 The court noted that acts of omission rarely arise to the level of intentional conduct necessary to support an interference claim, but when the employer failed to warn the supervisor, when it had a clear duty to warn, the necessary level of intent was established to submit the case to the jury. 93

VI.E Negligence

VI.E.1 Negligent Misrepresentation

Kentucky has not recognized the tort of negligent misrepresentation in connection with an exception to the employment-at-will doctrine. Certain misrepresentations that equate to or may be tantamount to fraud are treated by *United Parcel Services v. Rickert*. 94

VI.E.2 Negligent Hiring

Kentucky recognizes a cause of action for negligent hiring or retention by a third party against an employer whose employee commits a tort as to the third party when the employer knows or should have known that the employee's background or history suggests or predicts that he could commit this sort of tort as to the third party. 95 In both cases, it was alleged that an employer whose employee sexually assaulted a third party knew or should have known that the offending employee was predisposed to be a sexual predator by virtue of his criminal or employment history. To support the finding of negligent retention, the plaintiff must prove that the sexual conduct at issue was nonconsensual (was in fact an assault) and that a tort be committed by the defendant-employer's employee against the plaintiff-employee before the issue of the employer's breach of duty to the third party becomes an issue. 96

VI.E.3 Negligent Training

Kentucky has recognized a negligent training claim as evidence of a tort in an action by an employee against the employer under the negligent supervision theory, 97 but, the court of appeals has not identified the elements of negligent training as an independent cause of action separate from negligent supervision. 98

VI.E.4 Negligent Retention

See 2., above.

VI.E.5 Negligent Supervision

Kentucky has recognized a cause of action for negligent supervision against an employer 99 and has adopted the Restatement (Second) of Agency §231 as establishing the elements of the tort. 100 In order to establish a claim for negligent supervision, the plaintiff must establish a primary tort committed against him or her by an employee of the defendant-employer. 101 The plaintiff also must prove that the primary tort would not have occurred but for the employer's negligent failure to properly train and/or supervise the primary tortfeasor. 102 In addition, the plaintiff must prove that the employer knew or should have known of the risk of harm to the plaintiff arising from its negligence. 103 Employees asserting a claim for negligent supervision against his or her own employer must also overcome a possible affirmative defense that his or her tort claims are barred by the exclusive liability provision of the Kentucky Workers' Compensation Act. 104

VI.E.6 Negligent Infliction of Emotional Distress

Kentucky has not recognized negligent infliction of emotional distress as a separate tortaction in the employment setting. Such an action would likely be subject to the exclusivity provisions of the Kentucky Workers' Compensation Act. 105

VI.E.7 Nonpreemption of Vicarious Liability

In 2014, the Kentucky Supreme Court held that an employer's concession of its respondeat superior liability for the negligence of its employee does not bar a plaintiff from pursuing claims of negligent hiring, retention, and supervision. 106 The court reasoned that an " employer's admission to the existence of an agency relationship from which vicarious liability may arise does not supplant a claim that the employer's own negligence, independent of the negligence of the employee, may have caused or contributed to an injury." 107

VI.F Miscellaneous

VI.F.1 False Imprisonment

Kentucky law recognizes that the tort of false imprisonment can arise in the context of an employer-employee relationship. The tort will lie where there has been a “ deprivation of the liberty of one person by another or detention for however short a time without such person's consent and against his will, whether done by actual violence, threats or otherwise.”

108

In order to constitute a case of false imprisonment, it is essential that there be some direct restraint present. Restraint constituting a false imprisonment may arise out of words, acts, or gestures that induce a reasonable apprehension that force will be used if the plaintiff does not submit. 109 By contrast, “ submission to the mere verbal direction of another unaccompanied by force, or threats of any character, does not constitute false imprisonment. . . . Bare words are insufficient to effect an imprisonment if the person to whom they are spoken is not deprived of freedom of action.” 110

An employee's submission to his employer's verbal directions, unaccompanied by force or threats, does not constitute false imprisonment. And there is no false imprisonment when an employer declines to terminate an interview of his employee if no force or threat of force is used. 111

VII Statutes [Supplemented]

The Kentucky statutes prohibit the termination of an employee, including an employee with an at-will employment status, for any of the following reasons:

- The employee files or pursues a workers' compensation claim against its current employer; 112
- The employee complains of minimum wage or overtime pay violations; 113
- The employee makes a complaint to the employer, commissioner, or those employees who have instituted proceedings or testified in the proceedings; 114
- The employee files a complaint or instituted a cause related to Kentucky's OSHA laws; 115
- The employee is disabled, unless the disability restricts the employee's ability to complete the specific job; 116
- The employee has HIV/AIDS; 117
- The employee is a “ whistle blower” and in good faith reports any facts or information relative to a violation of any law, statute, or rule, or any information regarding violations of mismanagement, waste, fraud, abuse of authority, or a danger to public health and safety; 118
- The employee is in the Kentucky National Guard or Kentucky active militia; 119
- The employee is on jury service; 120
- The employee appears in local, state, or federal court; 121

- The employee takes off work to vote or to request an absentee ballot application; 122
- The employee does not vote for a candidate that the employer told the employee to vote for; 123
- The employee's wages have been subjected to garnishment for debt; 124
- The employee is associated with a union; 125
- The employee is a smoker, as long as the person complies with the workplace smoking policy; 126
- The employee makes a good faith report concerning Medicaid fraud; 127
- The employee makes a complaint in a long-term facility; 128
- The employee in a healthcare facility reports the quality of patient's care or safety; 129
- The healthcare employee refuses to comply with living wills, as long as the employee complies with certain notification and transfer provisions; 130
- The healthcare employee refuses to perform abortions or sterilizations; 131
- The employee is adopting a child under the age of seven; 132 and
- The employee who designates a Sabbath as his or her day of rest. 133

[Supplement]

Return to Main Volume

[Editor's note: On page 563 in the Main Edition, the tenth bulleted item should be deleted and replaced with the following:]

- The employee takes time off for a court-ordered appearance in local, state, or federal court or duly constituted administrative tribunal or hearing, provided the employee provides the employer with prior notice; S.2

Return to Main Volume

VIII Miscellaneous

VIII.A Retaliatory Treatment Not Resulting in Termination

Under Kentucky law, it is unclear whether retaliatory conduct in a protected area of an at-will employment relationship is actionable when the employee is not terminated. The Court of Appeals of Kentucky addressed the issue of whether there is a common law action for retaliatory refusal to hire based on public policy. 134 The court noted that there is a higher level of trust between an employer and his or her employees that does not exist between an employer and a job applicant. 135

While some Kentucky statutes recognize actionable conduct that falls short of termination, 136 no cases have been decided by Kentucky courts recognizing a public policy tort for employer conduct other than termination 137 or conduct constituting constructive discharge. 138

[1] Wymer v. JH Props., Inc., [50 S.W.3d 195](#) , 198 (Ky. 2001) (citations omitted).

[2] Shah v. American Synthetic Rubber Corp., [655 S.W.2d 489](#) , 491 (Ky. 1983).

[3] See Otis & Co. v. Power, 1 Ky. Op. 312 (Ky. 1866).

[4] Putnam v. Producers' Live Stock Mktg. Ass'n, [75 S.W.2d 1075](#) , 1078 (Ky. 1934).

[5] Hunter v. Wehr Constructors, Inc., [875 S.W.2d 899](#) , 901 (Ky. Ct. App. 1993).

[6] Shah , [655 S.W.2d at 491](#) .

[7] Id.

[8] Id.

[9] [170 S.W.3d 354](#) , 362 (Ky. 2005).

[10] Id. at 363.

[11] See Oaks v. 3M Co., [453 F.3d 781](#) , 783 (6th Cir. 2006) (applying Parts Depot).

[12] Norris v. Filson Care Home Ltd., No. 89-CA-0559-MR, 1990 WL 393903 (Ky. Ct. App. Jan. 26, 1990).

[13] Id. at *3.

[14] Hines v. ELF Atochem N. Am., Inc., [813 F. Supp. 550](#) (W.D. Ky. 1993) (analyzing the Shah and Nork opinions).

[15] [738 S.W.2d 824](#) (Ky. Ct. App. 1987).

[16] Id. at 825.

[17] Id. at 826.

[18] Id.

[19] Id. at 827.

- [S.1] See *Oaks v. 3M Co.*, [453 F.3d 781](#) , 783 (6th Cir. 2006) (applying Parts Depot).
- [20] *Humana, Inc. v. Fairchild*, [603 S.W.2d 918](#) , 920 (Ky. Ct. App. 1980).
- [21] *Hammond v. Heritage Commc'ns, Inc.*, [756 S.W.2d 152](#) (Ky. Ct. App. 1980); *Audiovox v. Moody*, [737 S.W.2d 468](#) (Ky. Ct. App. 1987).
- [22] *Hammond* , [756 S.W.2d at 153–55](#) .
- [23] *Id.*
- [24] *Shah v. American Synthetic Rubber Corp.*, [655 S.W.2d 489](#) , 491 (Ky. 1983).
- [25] *Id.*
- [26] [295 S.W.3d 79](#) (Ky. 2009).
- [27] [Ky. Rev. Stat. Ann. §371.010\(7\)](#) .
- [28] *Sawyer*, [295 S.W.3d at 87–88](#) .
- [29] See *Browning v. Clark Cty. Rural Elec. Coop. Corp.*, [329 S.W.2d 205](#) (Ky. 1959).
- [30] See *Wyant v. SCM Corp.*, [692 S.W.2d 814](#) , 816 (Ky. Ct. App. 1985).
- [31] *Firestone Tire & Rubber Co. v. Meadows*, [666 S.W.2d 730](#) , 731 (Ky. 1983).
- [32] *Grzyb v. Evans*, [700 S.W.2d 399](#) , 401 (Ky. 1985).
- [33] See *Brown v. Physicians Mut. Ins. Co.*, [679 S.W.2d 836](#) , 839 (Ky. 1984), overruled on other grounds , *Grzyb* , [700 S.W.2d 401](#) .
- [34] *Grzyb* , [700 S.W.2d 399](#) .
- [35] *Id.* at 402.
- [36] *Id.*
- [37] *Shrout v. TFE Grp.*, [161 S.W.3d 351](#) , 355–56 (Ky. Ct. App. 2005) (no wrongful discharge claim for violation of federal statute); *Greissman v. Rawlings & Assocs., PLLC*, 2017 WL 3567838 (Ky. Ct. App. Aug. 18, 2017) (public policy enunciated in Supreme Court Rules cannot form basis for wrongful discharge suit).
- [38] [898 S.W.2d 66](#) (Ky. 1995).

[39] *Id.* at 69.

[40] *Boykins v. Housing Auth.*, [842 S.W.2d 527](#) , 530 (Ky. 1992).

[41] *Bennett v. Jones*, [851 S.W.2d 494](#) (Ky. Ct. App. 1993).

[42] *Grzyb v. Evans*, [700 S.W.2d 399](#) , 401–02 (Ky. 1985).

[43] *Scrogan v. Kraftco Corp.*, [551 S.W.2d 811](#) , 812 (Ky. Ct. App. 1977).

[44] *Hammond v. Heritage Commc'ns, Inc.*, [756 S.W.2d 152](#) (Ky. Ct. App. 1980).

[45] *Shrout v. TFE Grp.*, [161 S.W.3d 351](#) , 355–56 (Ky. Ct. App. 2005).

[46] *Commonwealth v. Solly*, [253 S.W.3d 537](#) , 542 (Ky. 2008).

[47] *Firestone Tire & Rubber Co. v. Meadows*, [666 S.W.2d 730](#) , 734 (Ky. 1983) (since codified at [Ky. Rev. Stat. Ann. §342.197](#)).

[48] *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, [551 S.W.2d 801](#) , 802 (Ky. 1977).

[49] *Bell v. Ashland Petroleum Co.*, [812 F. Supp. 639](#) (S.D. W. Va. 1993) (a West Virginia federal court applying Kentucky law found that a federal statute can be the basis for a public policy tort but is at variance with the later decision of the Kentucky Court of Appeals holding that only state law can supply the public policy for the wrongful discharge claim). See *Shrout* , [161 S.W.3d 351](#) .

[50] *Northeast Health Mgmt., Inc. v. Cotton*, [56 S.W.3d 440](#) , 446–48 (Ky. Ct. App. 2001).

[51] *Mitchell v. University of Ky.*, [366 S.W.3d 895](#) , 901 (Ky. 2012).

[52] *Foster v. Jennie Stuart Med. Ctr.*, [435 S.W.3d 629](#) , [36 IER Cases \(BNA\) 1337](#) , 2013 Ky. App. LEXIS 138 (Ky. Ct. App. Sept. 20, 2013).

[53] *First Prop. Mgmt. Corp. v. Zarebidaki*, [867 S.W.2d 185](#) , 188 (Ky. 1993); *Noel v. Elk Brand Mfg. Co.*, [53 S.W.3d 95](#) , 100 (Ky. Ct. App. 2000).

[54] *Davies v. Mansbach*, [338 S.W.2d 210](#) , 212 (Ky. 1960).

[55] *Id.*

[56] *Crest Coal Co. v. Bailey*, [602 S.W.2d 425](#) (Ky. 1980).

[57] *Id.* at 426.

- [58] See *Wathen v. General Elec. Co.*, [115 F.3d 400](#) , 408 (6th Cir. 1997) (applying Kentucky law).
- [59] *Noel v. Elk Brand Mfg. Co.*, [53 S.W.3d 95](#) , 99 (Ky. Ct. App. 2000).
- [60] *Firestone Tire & Rubber Co. v. Meadows*, [666 S.W.2d 730](#) , 733 (Ky. 1983).
- [61] *Simpson Cty. Steeplechase Ass'n v. Roberts*, [898 S.W.2d 523](#) , 526 (Ky. Ct. App. 1995).
- [62] [Ky. Rev. Stat. Ann. §344.450](#) .
- [63] *Kentucky Dep't of Corrs. v. McCullough*, [123 S.W.3d 130](#) , 137–40 (Ky. 2003).
- [64] [Ky. Rev. Stat. Ann. §411.184\(3\)](#) .
- [65] *Berrier v. Bizer*, [57 S.W.3d 271](#) , 284 (Ky. 2001).
- [66] *United Parcel Servs. Co. v. Rickert*, [996 S.W.2d 464](#) , 467 (Ky. 1999).
- [67] *Hammond v. Heritage Commc'ns, Inc.*, [756 S.W.2d 152](#) , 154–55 (Ky. Ct. App. 1988).
- [68] *Louisville & Nashville R.R. Co. v. Wells*, [160 S.W.2d 16](#) (Ky. 1942); *Commonwealth v. Ratliff*, [497 S.W.2d 435](#) , 436 (Ky. 1973).
- [69] *Newport Dairy v. Shackelford*, [88 S.W.2d 940](#) , 942 (Ky. 1935).
- [70] *Cherry v. Augustus*, [245 S.W.3d 766](#) , 776 n.15 (Ky. Ct. App. 2006).
- [71] *Id.* at 777.
- [72] *United Parcel Servs. Co. v. Rickert*, [996 S.W.2d 464](#) , 469 (Ky. 1999).
- [73] *Id.*
- [74] Restatement (Second) of Torts §§766B, 767, and 773.
- [75] *National Collegiate Athletic Ass'n v. Hornung*, [754 S.W.2d. 855](#) , 857 (Ky. 1988).
- [76] *Id.* at 858 .
- [77] *Id.*
- [78] *Id.* at 859; Restatement (Second) of Torts §766. For further discussion of this topic, see Brian M. Malsberger, *Tortious Interference in the Employment Context: A State-by-State Survey* (Arlington, Va.: Bloomberg BNA, 5th ed. 2017).

- [79] Columbia Sussex Corp. v. Hay, [627 S.W.2d 270](#) (Ky. Ct. App. 1981).
- [80] Id .
- [81] Stringer v. Wal-Mart Stores, Inc., [151 S.W.3d 781](#) , 792–99 (Ky. 2004).
- [82] Hill v. Kentucky Lottery Corp., [327 S.W.3d 412](#) , 425 (Ky. 2010).
- [83] Id .
- [84] [Ky. Rev. Stat. Ann. §411.225](#) ; Hay , [627 S.W.2d at 275–76](#) ; Toler v. Süd-Chemie, Inc., [458 S.W.3d 276](#) , 284 (Ky. 2014) (employer's qualified privilege may be lost when “ abused”).
- [85] [376 U.S. 254](#) (1964).
- [86] [383 U.S. 53](#) (1966); Gilliam v. Pikeville United Methodist Hosp., [215 S.W.3d 56](#) , 60–61 (Ky. Ct. App. 2006).
- [87] See Hughes v. DHL Worldwide Express, 1995 U.S. App. LEXIS 18445 , at *8 (6th Cir. July 6, 1995) (noting lack of precedent); but see MacGlasshan v. ABS Lincs KY, Inc., [84 F. Supp. 3d 595](#) , 603 (W.D. Ky. 2015) (acknowledging precedent permitting a “ theory of compelled self-publication, albeit under different circumstances.”).
- [88] Craft v. Rice, [671 S.W.2d 247](#) (Ky. 1984).
- [89] Miracle v. Bell Cty. Emergency Med. Servs., [237 S.W.3d 555](#) , 560 (Ky. Ct. App. 2007).
- [90] Stringer v. Wal-Mart Stores, Inc., [151 S.W.3d 781](#) , 791 (Ky. 2004), overruled on other grounds , Toler v. S Süd-Chemie, Inc., [458 S.W.3d 276](#) (Ky. 2014).
- [91] Kroger Co. v. Willgruber, [920 S.W.2d 61](#) , 64–67 (Ky. 1996).
- [92] McDonald's Corp. v. Ogborn, [309 S.W.3d 274](#) , 293–95 (Ky. Ct. App. 2009).
- [93] Id. at 294; Capital Holding Corp. v. Bailey, [873 S.W.2d 187](#) , 196 (Ky. 1994).
- [94] [996 S.W.2d 464](#) (Ky. 1999).
- [95] Ten Broeck du Pont, Inc. v. Brooks, [283 S.W.3d 705](#) (Ky. 2009); Oakley v. Flor-Shin, Inc., [964 S.W.2d 438](#) (Ky. Ct. App. 1998).
- [96] Ten Broeck du Pont , [283 S.W.3d 727-](#) 30.
- [97] McDonald's Corp ., [309 S.W.3d at 291–92](#) .

[98] Turner v. Pendennis Club, [19 S.W.3d 117](#) , 121 (Ky. Ct. App. 2000) (employee alleged race and gender discrimination under [Ky. Rev. Stat. Ann. §344.450](#) and negligent supervision).

[99] Id .

[100] McDonald's Corp. v. Ogborn, [309 S.W.3d 274](#) , 291 (Ky. Ct. App. 2009) (employee filed claims for sexual harassment, false imprisonment, premises liability and negligent supervision arising from strip search and sexual assault).

[101] Grego v. Meijer, Inc., [187 F. Supp. 2d 689](#) , 694 (W.D. Ky. 2001) (“ The tort of negligent supervision is a second tort that derives from a tort committed by the person negligently supervised.”).

[102] McDonald's Corp ., [309 S.W.3d at 291–92](#) .

[103] Booker v. GTE.net LLC, [350 F.3d 515](#) , 517–18 (6th Cir. 2003).

[104] [Ky. Rev. Stat. Ann. §342.690\(1\)](#) ; see Grego v. Meijer, Inc., [239 F. Supp. 2d 676](#) , 682–84 (W.D. Ky. 2002) (negligent supervision claims based on sexual harassment barred by [Ky. Rev. Stat. Ann. §342.690](#)). But see Haggard v. Martin, 2002 WL 753230 (W.D. Ky. 2002) ([Ky. Rev. Stat. Ann. §342.690](#) does not bar tort claims for nonphysical injuries); McDonald's Corp. [309 S.W.3d at 283–85](#) (employer failed to prove that it had secured workers' compensation insurance and the injury did not occur “ in the course and scope of employment”).

[105] [Ky. Rev. Stat. Ann. §342.690](#) .

[106] MV Transp., Inc. v. Allgeier, [433 S.W.3d 324](#) , 336 (Ky. 2014).

[107] Id. at 337.

[108] Grayson Variety Store, Inc. v. Shaffer, [402 S.W.2d 424](#) , 425 (Ky. 1966).

[109] Great Atl. & Pac. Tea Co. v. Billups, [69 S.W.2d 5](#) , 6 (Ky. 1934).

[110] Shaffer , [402 S.W.2d at 425](#) .

[111] White v. Levy Bros., Inc., [306 S.W.2d 829](#) , 830 (Ky. 1957).

[112] [Ky. Rev. Stat. Ann. §342.197\(1\)](#) .

[113] Id. §337.990(9).

[114] Id.

[115] Id. §338.121(3).

[116] Id. §207.150.

[117] Id. §207.135.

[118] Id. §61.102(1).

[119] Id. §38.460.

[120] Id. §29A.160.

[121] Id. §337.415.

[122] Id. §118.035.

[123] Id. §121.310. In *Kentucky Registry of Election Finance v. Blevins*, [57 S.W.3d 289](#) (Ky. 2001), the Kentucky Supreme Court held that the portion of this statute that prohibited any person from giving out or circulating “ any statement or report that employees are expected or have been requested or directed by the employer, or by anyone acting for him, to vote for any person, group of persons or measure” was unconstitutionally overbroad and infringed on the rights of a county clerk.

[124] [Ky. Rev. Stat. Ann. §427.140](#) .

[125] Id. §336.130. This statute is only applicable to employees not subject to the National Labor Relations Act. *Smith v. Excel Maint. Servs., Inc.*, [617 F. Supp. 2d 520](#) (WD. Ky. 2008). See also *Pari-Mutuel Clerks Union v. Kentucky Jockey Club*, [551 S.W.2d 801](#) (Ky. 1977).

[126] [Ky. Rev. Stat. Ann. §344.040\(1\)\(c\)](#) .

[127] Id. §205.8465(3).

[128] Id. §216.541(2).

[129] Id. §216B.165(3).

[130] Id. §311.633.

[131] Id. §311.800(4).

[132] Id. §337.015.

[133] Id. §436.165(4).

[S.2] [Ky. Rev. Stat. Ann. §337.415](#) .

[134] Baker v. Campbell Cty. Bd. of Educ., [180 S.W.3d 479](#) , 484 (Ky. Ct. App. 2005).

[135] Id. at 484.

[136] See, e.g., Meyers v. Chapman Printing, [840 S.W.2d. 814](#) (Ky. 1992).

[137] Conceptually, McDonald's Corp. v. Ogborn, [309 S.W.3d. 274](#) (Ky. Ct. App. 2009), could be stretched to reach that result under the guise of intentional infliction of emotional distress that a public policy tort other than termination exists, but it will require future cases to determine if McDonald's actually expands the tort or is merely confined to the unusual facts of that case.

[138] See Northeast Health Mgmt., Inc. v. Cotton, [56 S.W.3d 440](#) , 446–48 (Ky. Ct. App. 2001) (plaintiffs constructively discharged for refusing to commit perjury).

Copyright © 2018 American Bar Association

The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of the American Bar Association or the Section of Labor and Employment Law. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

