The Color Of Your Shoes And At-Will Employment

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At-will. At-shmill. It bears repeating: *At-will. At-shmill.* (I checked on my decidedly non-lawyer like tendency to deride something by repeating it with "shm-' added. Turns out it's really a thing.) That's what I think to myself when (hypothetically speaking) an employer sued by a recently terminated employee sits down and proclaims some variation of the following: "We can't lose this case because she was an 'at-will' employee." The statement is made as if the presence of a handbook statement and an employee acknowledgement of at-will status represent the ultimate defense to any claim the employee might make. While confirmation of the at-will relationship with non-bargaining unit employees is critical, it is always a good reminder to emphasize that there are limits to the meaning of and are important exceptions to the "at-will" employment doctrine. Generally, "at-will" is understood to mean "in whatever way one pleases." The concept of *"at-will" employment* means the employer and the employee do not have a contract or agreement between them that requires that there be a specific reason, cause or notice for termination of their employment relationship. Put another way, "at-will" is frequently described as meaning the employment relationship may be terminated, by either the employee or the employer, for any reason or for no reason. "Just cause" on the other hand, is the opposite of "at-will." It is a phrase commonly associated with protections given in an employment agreement to executives, or to unionized employees under a Collective Bargaining Agreement. As in, "your employment may only be terminated for just cause." The employment agreement or CBA may go on to define what constitutes "just cause," usually in terms of an employee behaving badly or reaching the end of the line on a progressive discipline spectrum. Maybe my hypothetical employer's misplaced reliance on the altar of "at-will" status is my fault. I sometimes make a tongue-in-cheek statement during training that "at-will" means an employee can be terminated simply because the boss doesn't like the color of his shoes. And while that's technically true, consider how shallow (legally and otherwise) that explanation will sound when a disgruntled, terminated, employee files suit and puts up evidence that the employee was disciplined more harshly, demoted or discharged because the boss didn't like the color of his *skin*. And by the way, if the boss didn't also fire all Caucasian employees who wear the same color shoes as our former employee-turned-plaintiff, then the employer might have more problems. Fact is, "at-will" means employers can sever the employment relationship for any reason, or no reason, but <u>not</u> for an improper or illegal reason. So in a suit for wrongful termination of an employee, an employer still needs to show a legitimate, non-discriminatory/non-retaliatory reason for the firing decision. And it helps if the employer has consistently applied that reasoning with the

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result that other employees (of all skin and shoe colors) have been similarly affected.