



General Assembly of Tennessee
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M E M O R A N D U M

TO: Lieutenant Governor Ron Ramsey
FROM: Karen Garrett and Joel Hayes
RE: Chapter No. 16 of the Public Acts of 2013 and Employment-At-Will

Your Question:

Is legislative action required to clarify that an employee, whose conduct is in compliance with the provisions of Chapter 16, is protected from loss of employment based solely on such conduct?

Answer:

No. In our opinion, courts would likely rule that Chapter 16, as enacted, provides protections to an employee who acts in compliance with that law.

Executive Summary

- The plain and unambiguous language of Tenn. Code Ann. § 39-17-1359 prevents an employer from prohibiting the possession of a firearm by an employee complying with Tenn. Code Ann. § 39-17-1313, and effectively prohibits the employer from discharging an employee for conduct allowed by such section.
- The General Assembly has established a clear public policy of expanding rights and protections of handgun carry permit holders in Tennessee since 1990, and Chapter 16 is consistent with, and in furtherance of, that public policy.
- Tennessee courts have found a public policy exception to the employment-at-will doctrine in holding that an at-will employee generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision.
- Tennessee courts have found implicit public policy exceptions to the employment-at-will doctrine in various provisions of the Tennessee Code, including criminal statutes.
- There have been no reported discharges of employees who are properly complying with the provisions of Tenn. Code Ann. § 39-17-1313, and attorneys specializing in

employment law have publicly cautioned employers concerning liabilities arising from potentially valid wrongful termination claims brought by such employees.

The Plain Language of Chapter 16 Extends Protections to Employees

Through Chapter 16, the General Assembly extends the rights and protections provided over the past fifteen years to handgun carry permit holders, “both at home and on their way *to and from work*,”¹ by amending two sections of the Tennessee Code, § 39-17-1313 and § 39-17-1359.

Tennessee Code Annotated § 39-17-1313(a) allows² a person who holds a valid handgun carry permit to transport and store a firearm or ammunition in the person’s privately-owned motor vehicle in a public or private parking area³ if the firearm or ammunition is kept out of sight and, if the person is not in the motor vehicle, locked up⁴. Subsection (b) exempts business entities, public and private employers, and owners, managers and legal possessors of property from civil liability under certain circumstances.⁵

It is important to note that Tenn. Code Ann. § 39-17-1313(a) only protects a person who complies with its specific provisions. The statute provides no protection to a person who: (1) does not hold a valid permit; (2) does not own the vehicle in which the firearm is stored; (3) allows the firearm to be observed inside or outside the vehicle; (4) does not properly store the firearm; or (5) removes the firearm from the vehicle in the parking area.

With respect to the question of how Chapter 16 affects the employer-employee relationship, the change to Tenn. Code Ann. § 39-17-1359 protects a person complying with the provisions of Tenn. Code Ann. § 39-17-1313 from negative repercussions, including those that are employment related.

Tenn. Code Ann. § 39-17-1359(a)(1) previously stated that “a [business] is authorized to prohibit the possession of weapons by any person who is . . . on property . . . under the control of the [business].”⁶ As a result of Chapter 16, the provision now states that “[e]xcept as provided in § 39-17-1313, a [business] is authorized to prohibit the possession of weapons by any person who is . . . on property . . . under the control of the [business].”⁷ To rephrase, a business is *not* authorized to prohibit the possession of weapons by a person who complies with the provisions of Tenn. Code Ann. § 39-17-1313. The provision is plain and unambiguous, and its most

¹ 2013 Tenn. Pub. Ch. 16.

² Notwithstanding provisions found in TENN. CODE ANN. §§ 39-17-1309, 39-17-1311, and 39-17-1359 and unless otherwise prohibited by federal law; *see* TENN. CODE ANN. § 39-17-1313(a).

³ As long as the vehicle is parked where it is permitted to be except for the grounds or property of a single-family detached residence; *see* TENN. CODE ANN. § 39-17-1313(c)(2).

⁴ TENN. CODE ANN. § 39-17-1313(a)(2)(B).

⁵ TENN. CODE ANN. § 39-17-1313(b).

⁶ TENN. CODE ANN. § 39-17-1359 (2012).

⁷ TENN. CODE ANN. § 39-17-1359 (2013) (emphasis added).

reasonable meaning is that an employer is not authorized to prohibit the possession of a firearm by an employee who complies with Tenn. Code Ann. § 39-17-1313.⁸

When Tenn. Code Ann. § 39-17-1359(a)(1) is considered in the context of the employment-at-will doctrine, it is reasonable to conclude that, because an employer cannot prohibit the possession of a firearm by an employee complying with Tenn. Code Ann. § 39-17-1313, the employer cannot discharge an employee for that same reason and, thereby, effectively prohibit the possession, without being subject to a retaliatory or wrongful discharge cause of action.⁹ To interpret Chapter 16's amending of Tenn. Code Ann. § 39-17-1359 otherwise, would likely render the statutory change "useless" and contrary to well-established rules of statutory construction¹⁰ recognized by the Tennessee Supreme Court.¹¹

Tennessee's Employment-At-Will Doctrine and Public Policy Exceptions

The employment-at-will doctrine has been long established in this state, since the Tennessee Supreme Court's holding in *Payne v. Western & Atlantic Railroad Co* in 1884.¹² The court in *Payne* established that all employers "may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹³

Tennessee's employment-at-will doctrine remained strict for one hundred years, until a public policy exception for worker's compensation law was established by the Tennessee Supreme Court in *Clanton v. Cain-Sloan Co.*¹⁴ In *Clanton*, the court found that although the plaintiff was an at-will employee, the fact that she was discharged after settling a worker's compensation claim violated public policy. Even though there were no express provisions in the Code prohibiting an employer from discharging an employee under such circumstances or

⁸ Note that the opinion provided by the Attorney General and Reporter, Tenn. Op. Att'y Gen. 13-41 (2013), did not address the change to TENN. CODE ANN. § 13-17-1359 when considering the question of whether Chapter 16 prohibits an employer from terminating an at-will employee who brings a firearm or ammunition onto the employer's property.

⁹ *Supra*, note 8.

¹⁰ "It is a well established principle of statutory construction that the law favors rational and sensible construction . . . [and] an interpretation which emasculates a provision of a statute is not preferred." 2A Norman J. Singer, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 45:12 (7th ed. 2007) (also stating that "[a] statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing.").

¹¹ "When a statute's text is clear and unambiguous, the courts need not look beyond the statute itself to ascertain its meaning. . . . The rules of statutory construction permit the courts . . . to presume that the General Assembly did not intend to enact a useless statute, and that the General Assembly did not intend an absurdity." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010) (citing *State v. Jackson*, 60 S.W.3d 738, 742 (Tenn. 2001); *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997)).

¹² 81 Tenn. 507 (1884).

¹³ *Payne*, 81 Tenn. at 519-20; see also *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002); *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 574 (Tenn. 1999).

¹⁴ 677 S.W.2d 441 (Tenn. 1984).

explicitly creating a cause of action for retaliatory discharge, the court determined that retaliatory discharges were *implicitly* prohibited under Tenn. Code Ann. § 50-6-114.¹⁵

Beginning with *Clanton* in 1984, the Tennessee Supreme Court has addressed common law retaliatory or wrongful discharge causes of action in twelve case opinions.¹⁶ Through these cases, the court has established the rule central to the public policy exception to the employment-at-will doctrine: an at-will employee “generally may not be discharged for attempting to exercise a statutory or constitutional right, or for any other reason which violates a clear public policy which is evidenced by an unambiguous constitutional, statutory, or regulatory provision.”¹⁷

Tennessee courts have repeatedly emphasized that the retaliatory discharge exception to the employment-at-will doctrine should be narrowly applied, and “cannot be permitted to consume or eliminate the general rule.”¹⁸ At the same time, however, courts have also recognized that “in limited circumstances, certain well-defined, unambiguous principles of public policy confer upon employees *implicit* rights which must not be circumscribed or chilled by the potential of termination.”¹⁹ As a result, the retaliatory or wrongful discharge cause of action “is available to employees discharged as a consequence of an employer’s violation of a clearly expressed public policy.”²⁰

Four requirements must be met in order for a terminated employee to have a valid retaliatory or wrongful discharge cause of action. The employee must show that: (1) an employment-at-will relationship existed between the employee and employer; (2) the employee was discharged; (3) the employee was discharged for attempting to exercise a statutory or constitutional right or for any other reason that violates a clear public policy; and (4) that the substantial factor in the employer’s decision to discharge the employee was the employee’s exercise of protected rights or compliance with clear public policy.²¹

Courts determine what constitutes a “clear public policy” as a matter of law, and it is important to note that these public policy exceptions to employment-at-will are generally not explicitly stated in the Code.²² Cases in which the Tennessee Supreme Court recognized a claim

¹⁵ *Clanton*, 677 S.W.2d at 445; TENN. CODE ANN. § 50-6-114 (1984) (“No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by [the Worker’s Compensation Law.]”)

¹⁶ *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528 (Tenn. 2002); *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852 (Tenn. 2002); *Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141 (Tenn. 2001); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997); *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326 (Tenn. 1996); *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646 (Tenn. 1995); *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822 (Tenn. 1994); *Anderson v. Standard Register Co.*, 857 S.W.2d 555 (Tenn. 1993); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921 (Tenn. 1990); *Chism v. Mid-South Milling Co.*, 762 S.W.2d 552 (Tenn. 1988); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441 (Tenn. 1984).

¹⁷ *Sullivan*, 995 S.W.2d at 574; *Stein*, 945 S.W.2d at 716-17.

¹⁸ *Harney*, 784 S.W.2d at 923.

¹⁹ *Crews*, 78 S.W.3d at 858; *Stein*, 945 S.W.2d at 716-17 (emphasis added).

²⁰ *Stein*, 945 S.W.2d at 717; see *Reynolds*, 887 S.W.2d at 823; *Hodges*, 833 S.W.2d at 899.

²¹ *Crews*, 78 S.W.3d at 858; *Haynes v. Formac Stables, Inc.*, 2013 Tenn. App. LEXIS 786, at *7 (Tenn. Ct. App. Dec. 4, 2013);

²² *But see* TENN. CODE ANN. § 2-1-106 (voting); TENN. CODE ANN. § 8-50-116 (state employee whistleblowers); TENN. CODE ANN. § 50-1-304 (illegal activities).

of retaliatory or wrongful discharge involved a violation of a clear public policy include, but are not limited to: when an employee was discharged for exercising rights under the worker's compensation statutes;²³ when an employee was discharged for refusing to participate or remain silent about illegal activities;²⁴ and when an employee was discharged for complying with her ethical responsibility to report her supervisor's unauthorized practice of law.²⁵

In 2007, the Tennessee Court of Appeals found a clear public policy exception to the employment-at-will doctrine that was previously unrecognized in this state. In *Little v. Eastgate of Jackson, LLC*,²⁶ a store clerk saw a woman being physically assaulted across the street from the store, left his counter, and intervened, scaring away the assailant.²⁷ The employer discharged the at-will employee two days later for his actions, and the employee filed a claim against the employer for wrongful discharge in violation of Tennessee public policy.²⁸ The court found that public policy encourages citizens to rescue a person reasonably believed to be in imminent danger of death or serious bodily harm, and that a citizen who undertakes such an action is to be protected from negative repercussions.²⁹ To support its holding that there is a clear public policy in favor of encouraging citizens to rescue others, the court analyzed a number of *criminal* statutes³⁰ that did not contain explicit language protecting employees from termination.³¹ The court found that the reading of these statutes together, in-context, evidenced "the unambiguous legislative intent to pronounce the Tennessee public policy of encouraging citizens to rescue a person reasonably believed to be in imminent danger of death or serious bodily harm, and to protect a citizen who undertakes such heroic action from negative repercussions."³²

Given the long-standing concern of Tennessee courts to prevent a public policy exception to the employment-at-will doctrine from consuming or eliminating the general rule, it is important to note that this new "Good Samaritan" doctrine is not applied broadly, but "extends only to situations in which the employee took action to rescue or protect another reasonably believed to be in imminent danger of death or serious bodily harm. Such a narrow public policy exception is unlikely to consume or eliminate the general rule favoring the employment-at-will doctrine."³³

²³ *Clanton*, 677 S.W.2d at 444-45.

²⁴ *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 540 (Tenn. 1989) (but finding that federal law preempted the state law claim).

²⁵ *Crews*, 78 S.W.3d at 864-65.

²⁶ 2007 Tenn. App. LEXIS 242 (Tenn. Ct. App. Apr. 24, 2007).

²⁷ *Little*, 2007 Tenn. App. LEXIS 242, at *2-3.

²⁸ *Little*, 2007 Tenn. App. LEXIS 242, at *3.

²⁹ *Little*, 2007 Tenn. App. LEXIS 242, at *29.

³⁰ TENN. CODE ANN. § 39-11-612 (absolving a person from criminal liability in defense of a third person); § 39-11-504 (2003) (duress); § 39-11-621 (2003) (use of deadly force by a private citizen); and § 39-17-1322 (2003) (defenses to prosecution for an offense against public health, safety, and welfare).

³¹ The fact that Chapter 16 did not explicitly prohibit an employer from discharging an employee complying with Tenn. Code Ann. § 39-17-1313 in a manner similar to the provision used in Tenn. Code Ann. § 50-1-304(e) was discussed in the opinion of the Attorney General and Reporter, Tenn. Op. Att'y Gen. 13-41 (2013). The court in *Little* used criminal statutes that did not contain these provisions either to find a clear public policy exception existed to the employment-at-will doctrine. Also, it should be noted that Chapter 16 did not include language stating that the new law is not to be construed to affect the employment-at-will status of any employee, as found in Tenn. Code Ann. § 5-23-108.

³² *Little*, 2007 Tenn. App. LEXIS 242, at *26.

³³ *Little*, 2007 Tenn. App. LEXIS 242, at *26.

If a court determines it is necessary to find additional support for a claim of retaliatory or wrongful discharge beyond the plain language of Tenn. Code Ann. §§ 39-17-1313 and 39-17-1359, the court’s analytical framework in *Little* provides a reasonable approach to answering this question. The key determination of a court will be whether there is a violation of a “clear public policy” if an employee is discharged for complying with Tenn. Code Ann. § 39-17-1313. Just as the court in *Little* found the narrow “Good Samaritan” public policy evidenced in *criminal* statutes, a court may reasonably view other criminal statutes as evidence that the General Assembly has demonstrated that the rights and protections of gun owners and handgun carry permit holders is a clear public policy in Tennessee. Since 1990, the General Assembly has passed more than ten laws³⁴ expanding and reinforcing these rights and protections including, but not limited to, statutes: (1) permitting a non-student adult to possess a firearm in a private vehicle while on school property;³⁵ (2) authorizing handgun carry permit holders to carry a handgun in parks and on greenways;³⁶ (3) allowing, under certain circumstances, handgun carry permit holders to possess a firearm in certain establishments open to the public where alcoholic beverages or beer are served for consumption on the premises;³⁷ and (4) authorizing the transportation of rifles and shotguns in a vehicle by a handgun permit carry holder.³⁸

The clear public policy of expanding rights and protections of handgun carry permit holders is evidenced by the “unambiguous statutory provision” found in Tenn. Code Ann. § 39-17-1359, which prevents an employer from prohibiting the possession of a firearm by an employee complying with Tenn. Code Ann. § 39-17-1313. Furthermore, this clear public policy exception to Tennessee’s employment-at-will doctrine is narrowly tailored by the plain language

³⁴ See, e.g. 1990 Tenn. Pub. Ch. 1029 (creating defenses to the criminal charge of unlawful carrying of weapons applicable to valid permit holders, hunters and sport shooters, and persons protecting livestock from predatory animals as well exempting firearms stored at a private residence or place of business); 1991 Tenn. Pub. Ch. 510 (permitting a non-student adult to possess a firearm in a private vehicle while on school property); 1994 Tenn. Pub. Ch. 943 (permitting the display or discharge of any handgun used to protect oneself or another from the commission of a crime); 1996 Tenn. Pub. Ch. 905 (establishing a uniform procedure from obtaining a handgun carry permit that preempted local regulations and provided an appeals process for a person wrongfully denied a permit including both administrative and judicial relief); 1997 Tenn. Pub. Ch. 476 (narrowing the ability of the state to revoke a handgun permit to violations of state and federal law, providing false information on an application for a handgun carry permit, or a demonstration that the permit holder poses a material risk of harm to the public while providing administrative and judicial procedures to review a revocation); 2009 Tenn. Pub. Ch. 101 (prohibiting state officials from interrogating handgun carry permit applicants concerning the firearm the applicant brings to state-required training sessions); 2009 Tenn. Pub. Ch. 428 (authorizing handgun carry permit holders to carry their registered handguns in state and federal parks and pre-empted most local laws regulating handguns); 2009 Tenn. Pub. Ch. 431 (exempting handgun carry permit holders from the charge of unlawfully carrying a weapon if the permit holder is transporting an unloaded rifle or shotgun, or if the permit holder loads the rifle or shotgun for the purposes of self-defense); 2009 Tenn. Pub. Ch. 606 (allowing handgun carry permit holders to possess handguns in wildlife refuges, public hunting areas, or wildlife management areas); 2010 Tenn. Pub. Ch. 1009 (allowing handgun carry permit holders to possess a firearm in certain public establishments where alcoholic beverages or beer are served for consumption on the premises); and 2013 Tenn. Pub. Ch. 16 (citing the steady rise of handgun permits issued to “concerned citizens who want to responsibly and legally protect themselves and their families, both at home and on their way to and from work” the General Assembly allowed handgun permit holders to transport their firearm in a locked area of the vehicle and store handguns in their vehicles in any public or private parking area).

³⁵ TENN. CODE ANN. § 39-17-1309(c)(1).

³⁶ TENN. CODE ANN. § 39-17-1311(b)(1).

³⁷ TENN. CODE ANN. § 39-17-1321.

³⁸ TENN. CODE ANN. § 39-17-1307.

of Tenn. Code Ann. § 39-17-1313. As described above, the statute provides no protection, and thereby no cause of action for retaliatory or wrongful discharge, to a person who: (1) does not hold a valid handgun carry permit; (2) does not own the vehicle in which the firearm is stored; (3) allows the firearm to be observed inside or outside the vehicle; (4) does not properly lock up the firearm; or (5) removes the firearm from the vehicle in the parking area.³⁹

Employment Law since Chapter 16 Became Effective

Since Chapter 16 became law on July 1, 2013, it is important to note that despite some questions regarding its impact on Tennessee's employment-at-will doctrine, there have been no reported discharges of employees who are properly complying with the provisions of Tenn. Code Ann. § 39-17-1313. Moreover, this fact is consistent with advice published and provided to clients by attorneys specializing in employment law.

Tennessee's employment lawyers are warning clients that firing an employee who adheres to the requirements of the Tenn. Code Ann. § 39-17-1313 will most likely face a retaliatory action for wrongful termination based on the public policy exemption. Waverly Crenshaw, Jr. of the Waller firm asserts that the General Assembly has "taken from employers the right to discipline employees for bringing guns to work" by giving employees "a new exception to the at-will rule."⁴⁰ Crenshaw recommends that Tennessee employers "not discipline or discharge an employee for exercising his rights" under the law and that employers treat the law as "a new twist to the public policy exception to the employment-at-will rule."⁴¹ Crenshaw is hardly alone in urging caution; lawyers associated with Littler Mendelson argue that enforcing an anti-firearm policy for parking lots "could open an employer to a wrongful discharge claim."⁴² They are counseling employers not to "discipline or discharge employees solely for exercising their rights under the new law."⁴³

Even if termination is not based solely on a weapons infraction, Kara Shea of Butler Snow urges employers to proceed carefully because the law may protect employees who hold a handgun carry permit and "any termination involving [such employees] might potentially involve an allegation that the stated reason for the termination is pre-textual."⁴⁴ Therefore, employers should add permitted gun holders to their "checklist" of liability when "evaluating the risks of any particular termination."⁴⁵ Similarly, lawyers from Burch, Porter & Johnson predict that persons holding valid handgun carry permits will be available to use a policy exemption to the at-will employment doctrine.⁴⁶

³⁹ TENN. CODE ANN. § 39-17-1313.

⁴⁰ Waverly D. Crenshaw, "Tennessee's 'Guns in the Trunk' Law Creates a New Exception to the Employment at Will Rule," at <http://www.wallerlawfirm.com>.

⁴¹ *Id.*

⁴² Lisa Lichterman Leach and Brenda N. Canale, "New Guns in Parking Lots Statute Effective July 1: What Are the Implications for Employers?" at <http://hrprofessionalmagazine.com/new-guns-in-parking-lots-statute-effective-july-1-what-are-the-implications-for-tennessee-employers/>.

⁴³ *Id.*

⁴⁴ Kara E. Shea, "Tennessee Passes Guns in the Trunks Law," at http://butlersnow.com/Tennessee_Passes_Guns_in_Trunks_Law.aspx.

⁴⁵ *Id.*

⁴⁶ Anna Vergos Blair, "Employers Keeping 'Guns in the Trunks' on Your Property: Is Tennessee's New Law an Exception to the Employment-at-Will Doctrine?" at <http://www.bpjlaw.com/page.php?id=28>.

It is clear that employment lawyers and firms are cautioning any employer seeking to fire an employee protected by Tenn. Code Ann. § 39-17-1313 to “conduct a thorough investigation and seek input from experienced employment counsel” before discharging an employee because of the law.⁴⁷ As the law firm Wimberly Lawson Wright Daves & Jones concludes after reviewing the law, “it cannot be deemed certain that employers may safely terminate the employment of employees who violate [a company’s] no weapons policy”⁴⁸

Conclusion

Because Tennessee courts have not ruled on this issue,⁴⁹ it cannot be said with certainty how a court would rule on a claim of wrongful discharge by an employee terminated by an employer while complying with Tenn. Code Ann. § 39-17-1313. However, after interpreting the plain language of Tenn. Code Ann. §§ 39-17-1313 and 39-17-1359 and relevant case law, the better view is that the courts most likely would conclude that Tenn. Code Ann. § 39-17-1359 prevents an employer from prohibiting the possession of a firearm by an employee complying with Tenn. Code Ann. § 39-17-1313, and effectively prohibits the employer from discharging an employee for conduct allowed by such section, without the employer being subject to a retaliatory or wrongful discharge cause of action.

⁴⁷ Herbert E. Gerson and Joshua J. Sidbury, “Legal Alert: Tennessee’s Safe Commute Act may Impact Workplace Weapons Policies,” at <http://fordharrison.com/9237>.

⁴⁸ “TN AG Opinion Clarifies the Scope of ‘Guns in the Trunk’ Law,” at <http://www.wimberlylawson.com/CM/Alerts/Alerts132.asp>.

⁴⁹ *But see, Mitchell v. University of Kentucky*, 366 S.W.3d 895 (Ky. 2012) (finding that an employee’s discharge for possessing a firearm in his vehicle in accordance with Kentucky statutory provisions was contrary to a fundamental and well-defined public policy of the right to bear arms).