EMPLOYMENT AT WILL

GENERAL HISTORICAL RULES

Definition: Historically, the legal doctrine of "employment-at-will" provided that in the absence of a contract to the contrary, neither an employer nor an employee is required to give notice or advance notice of termination or resignation. In addition, neither an employer nor an employee was required to give a reason for separation from employment.

The doctrine of at-will employment in the public sector postulated that an employee could be dismissed at their employer's will, for good cause or no cause at all except where the employees are hired on a fixed term (Battaglio 2010). Typically, public employees were thought to serve at the pleasure of the public employer and thus had no expectation of continued employment. See *Bishop v.* Wood, 426 U.S. 341, 344-47 (1976); *Breeden v. City of Nome*, 628 P.2d 924, 926 (Alaska 1981). With this in place, individual workers lacked equal bargaining power in dealing with their employers, also access to procedural due process rights such as complaints or petition procedures of public workers is either restricted or absolutely eradicated (Condrey and Battaglio 2007).

SUMMARY

- All City of Valdez employees are currently "for just cause"
- All employee's thus have a property interest in their employment and thus the City owes all employees due process in the form of a pre-termination hearing before they can be terminated. This means notice of the reasons why they are to be terminated and an opportunity to confront the City's reasons and to present their defense to the City
- All employees must be treated consistent with the implied covenant of good faith and fair dealing—meaning that: they must be treated as a reasonable person would regard as fair; the City must treat all like cases alike; the City cannot fire any employee in violation of a recognized public policy; the City cannot fire someone so as to deprive them of the benefits of their employment contract, whether that contract is explicit or implied.

If the City Council were to convert employees to "at will"

- Conversion of any employee to at-will would require a re-write of the Charter, Ordinances, and the Personnel Regulations. Amendment of the Charter would require a ballot initiative.
- The City would, likely, not be able to do this for current employees. Because the current employees are "for cause" operating under the implied contracts in City Charter, Code and Personnel Regulations, changing the terms of their City employment in this way may constitute a "taking of property". In that case, The City would have to afford due process before changing the nature of their employment. This would entail notice of the change and the reasons for the change and an opportunity for employees to confront those reasons and to present their case for opposing the change.
- The City must comply with the implied covenant of good faith and fair dealing—meaning that: the City cannot treat or fire employees for reasons and/or in ways that a

reasonable person would regard as unfair; the City must treat all like cases alike; the City cannot fire any employee in violation of a recognized public policy; the City cannot fire someone so as to deprive them of the benefits of their employment contract, whether that contract is explicit or implied.

- The City may not gain much in the way of legal advantage by changing the employment status because it is unavoidable that an employee, even an at-will employee, cannot be fired in a way that violates the implied covenant of good faith and fair dealing.
- Finally, converting Department Directors to at-will status has the potential of making it difficult to attract quality department head level employees in the future if job security is significantly diminished.

ALASKA LAW

Under the Fifth and Fourteenth Amendments to the United States Constitution and Art. I § 7 of the Alaska Constitution, individuals have a right to not be deprived of property without due process of law. Courts, including the Alaska Supreme Court, have held that a public employee has a property interest in their job if they are an employee who can only be terminated "for cause." *See City of North Pole v. Zabek*, 934 P.2d 1292, 1296 (Alaska 1997). As the Alaska Supreme Court held in *Storrs v. Municipality of Anchorage*, "[l]ike the federal constitution, the Alaska constitution affords pre-termination due process protection to public employees who may only be terminated for just cause. 721 P.2d 1146, 1150 (Alaska 1986) (citing *McMillan v. Anchorage Community Hospital,* 646 P.2d 857, 864 (Alaska 1982)). "An essential principle of due process is that a deprivation of . . . property 'be preceded by notice and opportunity for hearting appropriate to the nature of the case.'" *Zabek*, 934 P.2d at 1296 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985)). What this means is that "at a minimum, the employee must receive oral or written notice of the proposed discharge, an explanation of the employer's evidence, and an opportunity to present his position." *Zabek*, 934 P.2d at 1297 (quoting *Storrs*, 721 P.2d at 1149). If a public employee has a property interest in a job, he or she cannot be discharged without due process. Due process requires that the employee be given notice of the reason for being discharged and a fair hearing at which to contest the decision (Chemerinsky 1992). The Alaska Supreme Court recently affirmed this long standing rule in *Thomas v. State, Dept. of Environ. Conserv.*, Case No. S-15371, Opinion No. 7121 (Alaska, August 26, 2016).

In *Thomas*, the Alaska Court reaffirmed its previous rulings, stating, "[p]ublic employees, because of their recognized property interest in continued employment, have a constitutional due process right to a pre-termination hearing." . . . "At a minimum, the employee must receive oral or written notice of proposed discharge, an explanation of the employer's evidence, and an opportunity to present his position." *Id.*

As the Court explained earlier in Zabek, one of the reasons that a pre-termination hearing is required is to give the employee an opportunity to present his defense facts which, if developed, might weigh against his termination. 934 P.2d at 1298. As the Alaska Supreme Court held in Zabek, "[even if it appears almost certain that the employee will be unable to do so, due process requires that she be given the opportunity to try." *Id.*

The Alaska Supreme Court determines whether public employees are "at will" or "for cause" by looking at the governing law and any contracts, express or implied, that exist between the public employer and the employee. See *Witt v. State, Dept. of Corrections*, 75 P.3d 1030, 1033-34

(Alaska 2003). The Court looks to these things in order to determine whether the employee is protected by objective performance standards or whether they served merely at the pleasure of the employer. *Id.* The Alaska Court has determined that public employees are "for cause"—*i.e.*, their employment can be terminated only for just cause—when the governing law or controlling regulations or personnel procedures so provide; when past practice of the employer shows that the employee can be terminated only for failing to meet established objective standards; when their employment is subject to performance evaluations. *See Witt*, 75 P.3d at 1033-34; (Chemerinsky 1992).

Property interest is created when employees are promised, either explicitly or implicitly, that they have a reasonable expectation of continued employment should his or her performance be satisfactory. Employers create such an interest via performance review systems, merit systems, statutes, ordinances or other provisions stating that the employee will be terminated for just cause only. See Witt, 75 P.3d at 1033-34; *Cassel v. State, Dept. of Admin.*, 14 P.3d 278, 283-84 (Alaska 2000). Courts have generally held that once a property interest is established, constitutionally mandated procedures for termination must be followed. The difference between public and private sector employees is that a public employee is employed by a government entity that is constrained by constitutional mandates, and that the public employee retains certain constitutional rights when they enter public service. Procedural due process is one of those rights and is one of those rights upheld by the Alaska Supreme Court.

In the late 1950s the "At-will" doctrine began to be eroded by the court system in the United States when what was called "judicial exception to the at-will doctrine" began to recognize employment as central to a person's source of revenue and welfare. By the 1980s the at-will doctrine was significantly diminished for public employees by applying constitutional law protections against wrongful discharge.

The most widely held judicial exception in these cases prevents termination for reasons that violate a state's public policy. The other widely held exception prohibits termination after an implied contract for employment has been established. These implied contracts are created by instances ranging from oral assertions to expectations created by employee handbooks, personnel regulations, policies or other written assurances. The City of Valdez has created both an explicit and implicit contract as regards employment with the City.

Alaska also recognizes what is called the covenant of good faith and fair dealing, which is implied into every employment contract whether "at will" or "for cause." *Smith v. Anchorage School Dist.*, 240 P.3d 834, 845 (Alaska 2010) (citing *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.2d 751, 760 (Alaska 2008)). So, essentially, "at will" employment is limited in Alaska by the implied covenant of good faith and fair dealing—even though an employee may be "at will", employers cannot terminate "at will" employees for any reason or in any way that violates the implied covenant. The covenant has both a subjective and an objective component. *Id.* An employer violates the subjective component of the covenant when it acts with an improper motive, such as when it discharges an employee for the purpose of depriving him of one of the benefits of the contract. *Id.*; *Pitka v. Interior Regional Hous. Auth*., 54 P.3d 785, 789 (Alaska 2002); *Era Aviation, Inc. v. Seekins*, 973 P.2d 1137, 1139 (Alaska 1999). The subjective element of the covenant is based on the employer's motives, not on the employee's personal feelings—the employee must present proof that the employer's decision to terminate him or her was actually made in bad faith. *Smith*, 240 P.3d at 844; *Pitka*, 54 P.3d at 789. The objective component of the covenant prohibits the employer from dealing with the employee in a manner that a reasonable person would regard as unfair. *Smith*, 240 P.3d at 834; *Mitchell*, 193P.3d at 761. This objective component also requires that an employer treat like employees alike.

Smith, 240 P.3d at 944; *Holland v. Union Oil Co. of Cal., Inc.*, 993 P.2d 1026, 1032 (Alaska 1999). An employer also breaches the objective component of the covenant by terminating the employee on unconstitutional grounds or for other reasons that violate public policy. *Smith*, 240 P.3d at 844; *Charles v. Initerior Reg'l Hous. Auth.*, 55 P.3d 57, 62 (Alaska 2002)
The City of Valdez has by its Charter, by its Ordinances, and by its Personnel Regulations, established "for cause" employment for its employees.

The Valdez City Charter states:

Section 2.12 Removal from Office

(b) City employees and administrative officers shall be protected from arbitrary discharge by Code provision. (10-3-95; Ord. No. 6929, § 2.)

The language in this section of the Charter effectively removes all City employees and administrative officers from "at-will" status and places them in a "for cause" status for discharge. Chapter XIV of the Charter requires approval of the majority of qualified voters voting on the question to change the Charter. However, even if approved by a majority of the voters, the employees and administrative officers (Department Directors) currently employed by the city would be grandfathered under the current section of the charter and would thereby remain "for cause" employees of the City of Valdez. The change would only affect administrative officers (Department Directors) hired after the change to the Charter.

The reference in Section 2.12 (b) of the Charter stating "by Code provision" refers to the Valdez City Code which states:

2.08.040 Regulation of personnel.

A. The city manager shall have the power, subject to council approval, to make or amend rules and regulations relating to hiring and discharge, working conditions, hours and terms of employment, retirement and insurance plans, classification, compensation, leave and the like of all of the employees of the city; except, that no rule or regulation shall contravene the principles that the employment of city personnel shall be on the basis of merit and fitness and that there shall be no discrimination in any manner based on race, color, age, sex, religious creed, national origin, political affiliation, marital status, pregnancy, parenthood, disability or other criteria prohibited by law, except when the essential requirements of the position constitute a bona fide occupational qualification necessary to proper and efficient performance, and such performance cannot be accomplished through reasonable accommodations.

B. <u>These rules and regulations shall be on file and available for inspection in the office of the city clerk and shall also be available in booklet or pamphlet form entitled "City of Valdez—Personnel Regulations."</u> (Ord. 08-03 § 1; prior code § 2-6)

2.08.040 (B) refers to the City of Valdez Personnel Regulations which state:

1.3 Application: City employees are protected from arbitrary discharge.

1.501 "Administrative Officers" or "Officers" or "Executive Officers" are the Department Heads and the Assistant City Manager appointed by the City Manager on the basis of merit and fitness. Officers cannot be arbitrarily discharged from employment. Officers are considered "employees" for purposes of these regulations except as otherwise provided. Officers shall be paid on a salary basis using an executive level pay scale and shall be exempt from overtime compensation.

1.505 "Employees" are those employed by the City, other than the City Manager and City Clerk, hired on the basis of merit and fitness. Employees, other than those classified as Limited Part-Time and Temporary/Limited Seasonal, cannot be arbitrarily discharged from employment. Employees, other than Administrative Officers and those positions classified as exempt, shall be paid an hourly wage and shall be eligible for overtime compensation.

This report has not even begun to touch the following assertions and implications in the Valdez Personnel Regulations:

- Section 3.3- Pay Ranges, Merit Increase and longevity increments and Incentive Program
- Section 8- Disciplinary Actions
- Section 9- Grievance and Arbitration Procedures

In addition, Alaska is one of the states that read an implied covenant of good faith and fair dealing into the employment relationship. Even when no express, written instrument regarding the employment relationship exists the courts have applied the exception to the at-will doctrine when the slightest implied contract is formed between an employer and employee. Thus, when an employer makes even the slightest oral or written representation to an employee regarding job security, those representations may create a contract for employment. This exception is recognized by the Alaska Court system. The final exception is a covenant of good faith and fair dealing which is recognized by only eleven states. Alaska is one of those states. This exception, rather than barring termination based on public policy or an implied contract, reads a covenant of good faith and fair dealing into every employment relationship. This is interpreted to mean that personnel decisions are subject to "just cause" standards or that terminations made in bad faith or malice are prohibited.

Between 1970 and 1989, the overall caseload in federal courts grew 125%. During the same period, the employment discrimination caseload before those courts grew by 2,166%. In 1989, there were 8,993 employment discrimination matters filed in federal courts; in 1997, plaintiffs filed 24,174 cases. Presently, approximately one in every eleven civil cases on federal court dockets involves a question of employment discrimination (Dannin 2007). There are no adequate facts that the at-will doctrine is better for employers. A just-cause system puts employers in a much better position against litigation. Cases will be easier to defend under a just-cause system which will require employers to carefully document the employee's performance, feedbacks, failure to meet expectations, notices, and opportunities to respond. Conversely, lack of documentation only increases the likelihood of inquiring reasons for dismissal and treatment of employees (Dannin 2007).

Common reasons for converting classified employees to at-will is "a desire to get rid of specific employees; frustration with costly and time-consuming personnel rules; a strong felt need for

increased managerial flexibility; and a desire to meet demands for higher pay by trading off employment status" (Green et al. 2006). However, in fact the political and managerial consequences of converting to at-will in the public sector far outweigh the benefits. While the at-will doctrine in the private sector may be effective where employees are motivated by monetary gain, the same cannot be said for the public sector. Removing job security as a motivator in the public sector is a barrier to recruitment, productivity, efficiency and responsiveness. Top level managers would be better served in moving to the private sector where they will likely receive higher compensation for lesser responsibility.

Studies have shown that employees in the public sector are motivated differently than those in the private sector. "Employees in public agencies are devoted to their work, and factors such as challenging nature of the work, career ladders, and good colleagues, bring far more job satisfaction than financial gains "(Green et al. 2006). For public employees there is an obligation to put the public interest first in the performance of their duties. The desire to do this effectively is central to public service motivation. The sense of stability and balance bring more motivation to public sector employees than the fear of losing their job. At-will employment eliminates the potential for public agencies to compete for talent. Talent, in general, tends to shy away from public service and migrate to the private sector since it often offers better pay.

For-cause guarantees are motivators in attracting and retaining talent to the public sector. Whether they are aware of it or not, most people attracted to the public sector are motivated by more altruistic values and needs than those in the private sector. Those values and needs are consistent with the public service mission to promote the general social welfare as well as to protect society and its citizens. The public workforce should reflect those values and needs by attracting employees want opportunities to fulfill higher order needs and altruistic impulses by serving in the public sector. Public sector employees have repeatedly been found to place a lower value on financial rewards and a higher value on helping others (public service) than their private sector counterparts. (Boyne 2002). Public sector employees are there to serve the needs of others. They should be highly motivated to foster and retain that sense of selflessness. The at-will doctrine does not serve to motivate in the public sector in the same way as it might in the private sector.

Finally, there are the political implications of moving public sector employees to at-will status. An at-will bureaucracy has the potential to create a workforce that is more compliant and receptive to administrative and political changes and innovations that may subject the citizenry to inconsistent and subjective rather than objective services. The institutional knowledge base could become subject to the whims of administrative or political motivations that are not in the best interest of the public with the institution of an at-will doctrine for the public sector. That could possibly have a startling outcome on policy disputes or dialogue in public agencies. The focus should be on the protection and fulfillment of the promises made to the public served by public sector employees rather than on serving the political or administrative agenda of the ever changing political landscape filled by elected officials. This is the reason personnel actions are not accorded to elected bodies. In the ever-changing political landscape, the public has a right to expect consistency in service from public employees. The for-cause doctrine both assures that consistency and provides avenue for the removal of public employees who are not working to the standards set for them. The at-will doctrine that may work in the private sector may serve to destabilize the public sector. A sense of obligation is necessary to make and keep government more effective and responsive. An at-will system leaving public employees at the mercy of administration or political will is probably not the best way to fulfill a sense of obligation.

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