

At-Will And For Cause — The Protections And Pitfalls

by Robert H. Greenfield

One of the most debated subjects between employees and employers is the status of the employees. Is the employee at-will, allowing the employer to terminate the employee at any time for any non-discriminatory reason? Conversely, is the employee for cause, allowing the employer to terminate an employee only when there exists good cause for termination? Recently, several cases have addressed the difference of an employee's status particularly in cases of public employees.

For Cause

When an employee is a "for cause" employee, then he or she may only be terminated for good cause. Good cause is generally defined in the employee handbook. Additionally, if the handbook provides for progressive discipline, then the employee may only be terminated for good cause after the exhaustion of progressive discipline.

Under California law, an employee, who is dismissible only for cause, has a property interest in his continued employment, which is protected by the due process clause of the Fourteenth Amendment. *Dorr v. County of Butte*, 795 F.2d 875 (9th Cir. 1986); *Skelly v. State Personnel Board*, 15 Cal. 3d 194 (1975).

The courts look to applicable statutes, employment contracts, personnel rules, and other manuals in assessing whether the plaintiff had a legitimate claim to continued employment within the purview of the due process clause. *McGraw v.*

City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989); *Dorr v. County of Butte*, supra, 795 F.2d 875. In *Roth*, supra, a non-tenured teacher was held not to have a protectable property interest in continued employment where a governing statute did not require a reason to be given for the School Board's not reemploying the teacher. 408 U.S. 564. A probationary regular employee of the sheriff's department was held not to have a property interest in continued employment where the department's personnel rules provided for removal upon a subjective finding that the employee had not satisfactorily performed

federal due process requires that permanent civil service employees receive procedural protection before termination of employment in order to minimize the risk of error in the initial termination decision. This requires, at a minimum, notice of the proposed action; the reasons therefore; a copy of the charges and materials upon which the action is based; and the right to respond, either orally or in writing, to the authority initially imposing the discipline.

Recently, the Appellate Court for the Fourth District expanded the termination requirements for a public "for cause" employee. In

Townsel v. San Diego Metropolitan Transit Development Board (MTDB) the Court has held that a public employee who was subject to discharge only for cause had a constitutionally protected property interest in continued employment for which due process required an evidentiary hearing during the termination process in addition to the Skelly Hearing. The Court held that "it is well

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because the power of the appointing authority, to determine if the probationary employee had adequately performed, was purely subjective. *Dorr*, 795 F.2d at 877-878.

As an employee of a public entity, a "for cause" employee is therefore entitled to a Skelly Hearing. In the case of *Skelly v. Personnel Board* the Court held that state and

settled that a public employee subject to discharge for cause has a constitutionally protected property interest in continued employment that is protected by due process. "A permanent or tenured governmental employee who is discharged for cause has a due process right to a post-termination evidentiary hearing." Since *Townsel* was a tenured

public employee, who could only be discharged for cause, he should have been given an evidentiary hearing to challenge the factual basis for his termination. Gaps in MTDB's regulations did not excuse it from satisfying the constitutional requirement.

The Court's finding is such that not only must there be a Skelly Hearing, but the terminated employee is entitled to a full evidentiary hearing with documents, witnesses, and counsel before the District Board.

At-Will

Public employment in California is pursuant to statute, not contract. *Miller v. State of California*, 18 Cal. 3d 808, 813-814, 135 Cal.Rptr. 386, 557 P. 2d 970 (1977); *Hill v. City of Long Beach*, 33 Cal.App. 4th 1684, 40 Cal.Rptr. 2d 125 (1995). The terms and conditions of public employment are fixed by the governing statutes, rules, or regulations creating it. *Williams v. Department of Water & Power*, 130 Cal.App. 3d 677, 680, 181 Cal.Rptr. 868 (1982). The public entity's charter, civil service rules and regulations, and/or employee handbooks determine the plaintiff's employment rights. *Hill*, supra; see, also, *McGraw v. City of Huntington Beach*, 882 F. 2d 384 (9th Cir. 1989) (interpreting California law).

California Labor Code §2922 provides that an employee, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than a month. Just as an employee may cease labor at his whim or pleasure and what ever may be his reason, good, bad, or indifferent, leaving no one a legal right to complain; so upon the other hand, may the employer discharge and whatever be his reason, good, bad, or indifferent, no one has suffered a legal

wrong. *Union Labor Hospital Association v. Vance Redwood Lumber Company*, 158 Cal. 551.

The first place the Courts will look after the above stated law is the employee handbook. If there is an employee handbook and/or an express "at-will" agreement, these will control the situation. An employee handbook may include progressive discipline at the employer's discretion. Courts will find that the employee made a knowing decision to accept his or her employment on the basis of the written handbook or agreement.

In the recent case of *Halvorsen v. Aramark* (August 5, 1998) the Court held that, when there is an express contract of employment that specifically states the term of the employment is at-will, an implied in fact promise not to terminate except for good cause cannot contradict a contractual at-will provision. Thus, a manager's motives and his communications with an employer in connection with the termination of an at-will employee were absolutely privileged. Even in a case where the manager admitted that he was scapegoating the employee for the manager's error.

Other ways the Courts find guidance on the at-will status of an employee is from the various code sections, which create the public entity. Water Code §22232 provides that an Irrigation District may employ other employees as may be deemed necessary. Water Code §30544 provides that County Water Districts may at any time employ and prescribe the authorities of employees each of whom shall serve at the pleasure of the board. Water Code §34900 provides that California Water Districts' Board shall employ and appoint such employee as may be required, prescribe their duties and fix their salaries, and prescribe other terms and conditions of employment. Water Code §55332 provides that County Waterworks

Districts may appoint or employ employees each of whom shall serve at the pleasure of the board. There are numerous other sections, which are directed at specific Districts which all state that employees serve at the "pleasure of the board." This language creates an "at-will" employment scenario.

Conclusion

If employers wish to keep their employees "for cause", then they need to be keenly aware of the various procedural requirements which must be met before a termination may occur.

If employers wish to be clear that all their employees are "at-will," then the law is certainly on their side. They should make sure their employee handbooks are up to date. Their employment counsel or the JPIA should be able to provide a quick review and make suggestions. When the employees receive their next review or updated employee handbook, the employer should be sure to have each one sign an express at-will employment contract.

The law is on the side of the employer who provides the employees with a non-discriminatory workplace, where all employees are on a level playing field. The law is against the employer, who seeks an unfair advantage over the employees.

Mr. Greenfield is a partner in the firm of Gaffaney, Cudney & Greenfield. He has focused his practice on the representation of public entities, especially in the area of employment law. Mr. Greenfield can be reached at (530) 677-1611 or gcglaw@directcon.net.