

Employee Terminations

“You’re fired.” Not exactly music to one’s ears, but firing an employee may sometimes be necessary. This paper explores a municipality’s ability to terminate an employee, who can terminate, the reasons why a person can—or cannot—be terminated, and the safeguards that should be followed to protect the government’s and the employee’s interests.

The general rule: employment is “at will”

In Washington, many governmental employment relationships are “at will,” that is, a person’s employment continues at the will or pleasure of the employer. Absent the requirements of civil service or collective bargaining agreements, discussed later, a public employee does not have a property interest in his or her employment, and that employment can be terminated without due process, “at will,¹” without notice, statement of cause, or hearing.²

Who can terminate the employee?

Unless delegated, the authority to terminate is vested with the mayor³ in a city or town operating under the mayor-council form of government, or the city manager⁴ in a city or town operating under the council-manager form. In county government, the elected officials make the employment decisions for their own departments.⁵

Upon what grounds may an employee be terminated?

If employment is “at will,” what grounds will support termination? The answer is suggested by a 1984 state supreme court decision:

[T]he rule governing termination of at-will employees is generally that employers [can] discharge employees for no cause, good cause or even cause morally wrong without fear of liability.⁶

On the other hand, if an employee is not “at will,” the reasons that would support his or her termination may be far more restricted. For example, if an employee is covered by civil service, termination may be only “for cause,” such as for incompetency, dishonesty, mental unfitness, or conviction of a felony.⁷ If an employee is covered by a collective bargaining agreement, depending upon the language of the agreement itself, discharge may be permitted only “for cause” and then only after “progressive discipline” has been followed. (“Progressive discipline” envisions that, for less serious offenses, oral and written warnings are given, followed by suspension, before discharge is permitted.) Personnel policies restricting terminations to “for cause only” or placing other restrictions or

limitations on the termination process are legally questionable.⁸ However, if such a policy is adopted and is known to and relied upon by an employee, his or her termination will be restricted by that policy.⁹

What are the some grounds for which an employee may not be terminated?

As indicated above, if an employee is not “at will,” but is instead covered by civil service or a collective bargaining agreement, he or she may be terminated only according to the requirements of the civil service statutes or the applicable labor agreement. However, there are some restrictions that apply across the board, regardless of the employee’s status. The following are some of the more common restrictions placed on employment actions.

The termination may not be based on the employee’s age, sex, marital status, etc.

State law prohibits discrimination in employment, including discrimination as a motivating factor in the discharge of employees. RCW 49.60.180(2) makes it an unfair practice for an employer

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.

Thus, for example, an employer may not discharge a person because he or she has become “too old.”¹⁰ Nor may an employer make an employee’s race¹¹ or sex¹² a determining factor in reaching the decision to terminate.

The state court of appeals has upheld the right of a pregnant employee to sue an employer, both under statute and at common law, if she has had her employment terminated because of her pregnancy.¹³ It is also unlawful to terminate a person based upon his or her physical disability, either under state law¹⁴ or the federal Americans with Disabilities Act (ADA).¹⁵

An employer may not discharge an employee because of union activity.¹⁶ And, since government employees have the statutory right to engage in political activities, it is likely that, in most cases, employees may not be terminated because of political activities.¹⁷

Civil service employees may only be discharged “for cause.”

Civil service employees, typically those employed in police, sheriff, and fire departments, are not “at will” employees. They may only be discharged “for cause,” with a written accusation filed by the appointing authority (mayor, city manager, or sheriff), a citizen, or a taxpayer.¹⁸ The term “for cause” is defined by statute to include: incompetency; dishonesty; immoral conduct; insubordination; mental or physical unfitness; drunkenness or use of habit forming drugs, to the extent it interferes with efficiency; conviction of a felony or a misdemeanor involving moral turpitude; or any other act sufficient to show unsuitableness or unfitness for public employment.¹⁹

In addition to limiting *why* an employee may be terminated, civil service also limits *how* a termi-

nation can be completed. If a civil service employee disagrees with the termination action, he or she may submit a written demand to the civil service commission for an investigation.²⁰ The commission schedules a public hearing for an investigation to determine whether the termination was “for just cause.” After the hearing, the commission may affirm the employment action, allowing the termination to stand, reverse the action and reinstate the employee, or modify the action, such as by suspending or demoting the employee.

Collective bargaining agreements may modify the termination process.

Public employees, at least those employed by cities, towns, and counties, are authorized to organize, designate representatives, and enter into collective bargaining agreements with their employers.²¹ While not required, collective bargaining agreements typically address the justification and process for the discipline and termination of covered employees. In most instances, terminations are only allowed for “just cause,” and, even then, only after progressive discipline²² has been applied. Similar to the civil service process, if a union employee disagrees with an employment action, he or she, or the employee’s union, may “grieve” the action, taking it ultimately to arbitration for decision. An arbiter, like the civil service commission, may sustain or reverse the employment action, or modify the level of action imposed (for example, order a suspension instead of a termination).

Employee policies may alter ability to terminate.

As stated in the introductory paragraphs, an employer’s ability to terminate an employee may be altered and restricted if the employer adopts a policy limiting terminations to, for example, “for cause only,” if the policy is known to and relied upon by the employee.²³

Employer may not retaliate against whistleblower.

A “whistleblower” is an employee who, in good faith, reports alleged improper governmental action.²⁴ An employer may not engage in workplace reprisal or retaliatory action against a whistleblowing employee, such as the dismissal of the person from employment.²⁵

Terminations based on violations of public policy.

The courts have ordered the reinstatement of terminated employees, or have found that an employee has a right of action against the employer, where the terminations violated “public policy.” For example, an employer is prohibited from terminating an employee because he or she refuses to do an illegal act.²⁶ Other examples noted in Washington court decisions,²⁷ but based on cases from other states, include: where the discharge was due to the employee performing a public duty or obligation, such as being absent while serving on jury duty; and where the termination was based on the employee exercising a legal right or privilege, such as by pursuing a worker’s compensation claim. In one case, an armored truck driver was discharged when he left his vehicle to aid a woman being threatened by a bank robber; the court found that the discharge violated the public policy of encouraging heroic conduct.²⁸ It would be a violation of public policy to fire an employee for filing a complaint under the Washington Industrial Safety and Health Act (WISHA); filing a community right-to-know complaint under chapter 49.70 RCW; filing a minimum wage claim under chapter 49.46 RCW; or filing a family leave claim under chapter 49.78 RCW.²⁹ It is also unlawful for an employer to discharge an employee because of certain garnishments³⁰ and wage assignments.³¹

The process of saying “good bye”

Once the decision has been made that an employee should be terminated, and the person

who is authorized to discharge the employee is satisfied that the reason for the termination is not a protected one, what procedural steps should be followed? This section will review some of the major steps that should be followed or considered.

Develop a roadmap that supports the employment decision and plots the course of the action.

If an employee is going to be terminated for poor performance, hopefully his or her personnel file will include performance evaluations or other indications that performance was not satisfactory. If the termination is based on a violation of work rules, are there reports to support that the rules were known to the employee and were violated? If a 60-year-old minority worker with 25 years experience is going to be terminated, does the mayor or city manager have justification for the action that will withstand an allegation that the termination was based on age or race? Whatever the reason for the termination, are there materials or other evidence available to support the decision, in the event a challenge is brought?

The mayor, city manager, commissioners, or other officers vested with authority to terminate should gather and review any employment-related policies, collective bargaining agreements, civil service rules, employee handbooks, and other pertinent information to assure knowledge of the process, if any, that must be followed for the termination. Does the employee have a right to a hearing so that he or she can challenge the termination?

Investigatory interviews and “Weingarten” rights

Sometimes an investigation is required before any final employment action may be taken. For example, if a sexual harassment complaint has been filed, the employer will want to review the allegations and gather information from both the accuser and the employee suspected of the harassment.

If the suspect employee is a union employee,³² he or she has the right to have a union representative present during any investigatory interview, referred to as the *Weingarten* right,³³ if the interview could reasonably lead to discipline or termination. *Weingarten* rights are only available during investigatory interviews. While the employee has the right to have a union representative present during the interview, the employer is not required to inform the employee of this right.

What if the investigation could result in possible criminal action? The “Garrity” Rule.

Historically, employees under investigation for possible criminal behavior were sometimes placed in a difficult legal position: should they cooperate fully and answer all questions asked, thereby possibly providing incriminating evidence, or should they refuse to cooperate, thereby placing their jobs at risk? The United States Supreme Court has helped resolve this dilemma through two cases, *Garrity v. New Jersey*³⁴ and *Gardner v. Brodick*,³⁵ both involving the questioning of police officers.

Under these two court decisions, if a law enforcement officer who is under criminal investigation is not provided with immunity, any statement that he or she makes under the threat of adverse personnel action is deemed to be unconstitutionally coerced (and may not be used in a subsequent criminal prosecution). If the officer is granted immunity but nevertheless refuses to answer questions that are specifically, directly, and narrowly related to his or her official duties, he or she may be terminated.³⁶ If the officer is granted immunity and answers questions specifically, directly, and narrowly related to his or her official duties, the officer may be dismissed if the an-

swers provide cause for dismissal.

Garrity and *Gardner* have been cited in Washington case law, but only for public safety positions. Nevertheless, it is suggested that their principles be applied to any employment investigation, if the employee might be forced during the course of the investigation to provide self-incriminating statements. In such situations, it might be better to wait for the conclusion of the criminal investigation process before pursuing the employment investigation.

The pre-termination “Loudermill” hearing

Employees who are *not* “at will”—civil service employees and those covered by collective bargaining agreements or personnel policies that provide for termination only “for cause”³⁷—have a property interest in their employment and are entitled to a pre-termination or “Loudermill”³⁸ hearing before they may be terminated.³⁹ The right to a hearing is based upon the constitutional principle that no one should be deprived of a property interest without due process of law. In this instance, due process requires that the employee be given notice (oral or written) of the planned termination action, be allowed an opportunity to review the reasons and evidence for the planned termination, and be allowed to present his or her position before any final action is taken. The hearing need not be formal or elaborate; it must only allow the employee a chance to understand the reasons for the planned termination and to comment on those reasons. The hearing is non-adversarial and, while the employee has a right to have an attorney present, the attorney is not entitled to be an advocate.

Termination agreements

Sometimes, if litigation seems probable and the facts surrounding the termination are clouded or in dispute, it may be advantageous to seek a termination agreement with the departing employee. Such an agreement, where both the employer and the employee may make concessions, may help avoid future litigation. Since both parties may be asked to give up rights they might otherwise have, it is incumbent that legal advice be sought by both the employer and the employee. Especially from the employer’s standpoint, it is crucial that the employee being discharged knows and is willing to waive the rights (appeal, damages, etc.) that he or she is giving up. Legal evaluation and assistance at this stage is crucial.

After an employee is terminated

After an employee is terminated, there may still be a few loose ends that will require attention. Obviously the employer must be sure to recover the employee’s work keys and any other government property. There are also some legal issues that need to be taken into consideration; here are a few:

Issuance of the final paycheck

The former employee may believe that he or she should be paid immediately. Immediate payment, however, is not required by law. RCW 49.48.010 requires that when an employee ceases to work for an employer, the wages due him or her on account of the terminated employment be paid at the end of the established pay period. (The above answer may be affected by a collective bargaining agreement or personnel policy that provides otherwise.)

Name-clearing hearings

If the employer has publicly announced the grounds for the employee’s discharge, it may be

necessary to provide a “name clearing hearing.”⁴⁰ A name-clearing hearing can be required when there has been a false, stigmatizing charge publicly made against the employee during the disciplinary or termination process. If a stigmatizing charge has been made, the employee should be given an opportunity to “clear” his or her name at a public hearing. This hearing may occur either before or after the termination. Obviously, the need for such a hearing can be avoided altogether by the employer not making any public statements about the termination. (Of course, if the announced reason for the termination is true, the terminated employee may choose from a privacy standpoint to avoid any further public airing of the reasons for his or her discharge.)

Post termination appeals

Even if all necessary procedural steps have been followed, and there is a defensible reason for the employment action, certain employees, who are not “at will,” may have additional post-termination procedures to pursue. For example, civil service employees may appeal their termination to the civil service commission.⁴¹ Workers covered by collective bargaining agreements typically will have the right to grieve, arbitrate, or otherwise challenge their terminations. And, of course, any employee may, in appropriate circumstances, seek legal redress through the courts.

Exit interviews

Exit interviews often occur when an employee voluntarily leaves the work force. Such interviews, usually conducted by a personnel officer, allow the employer to gain invaluable information on what it is doing right and what it is doing wrong. The interviews also allow the employer to explain the benefits available to the departing employee and answer procedural questions the employee may have, such as when and how the final paycheck will be issued. Following a termination, however, exit interviews may not be possible because of the animosities involved. Nevertheless, it may be beneficial if some sort of communication is attempted, allowing at least for a minimal exchange of information.

Conclusion

Firing an employee is not pleasant, either from the employee’s standpoint or that of the employer. It can take preparation, planning, and hard work. Dangers lurk when procedural safeguards are forgotten or ignored. Unpleasant as it is to fire an employee, it is far worse to have to rehire the employee because of a procedural error. If termination appears inevitable, document and communicate the problems and familiarize yourself with the procedures that will need to be followed. And don’t be afraid to ask questions and seek advice; firing an employee, even if it is necessary for good of the organization, is not easy and the dangers that lurk are very real.

This article only highlights some of the considerations that should be made when contemplating the termination of an employee. Readers are strongly encouraged to contact their legal counsel before beginning the termination process. Questions may also be posed to Municipal Research and Services Center consultants. We are here to help.

¹ *Yantsin v. Aberdeen*, 54 Wn.2d 787, 788, 345 P.2d 178 (1959); *Nostrand v. Little*, 58 Wn.2d 111, 361 P.2d 551 (1961); *Halliburton v. Huntington*, 20 Wn. App. 91, 579 P.2d 379 (1978); and *Gaar v. King County*, 7 Wn. App. 249, 499 P.2d 87 (1972).

² *Gaar v. King County*, *supra*, at 251.

³ See RCW 35.23.021; 35.27.070; and 35A.12.090.

⁴ RCW 35.18.060(2) and 35A.13.080(2).

⁵ See RCW 36.16.070 and *Halliburton v. Huntington*, *supra*.

⁶ *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984).

⁷ See RCW 41.08.080-.090; 41.12.080-.090; 41.14.110-.120.

⁸ Adoption of a restriction is “legally questionable,” it is suggested, as the restriction violates the separation of powers doctrine. For example, if a city council, the legislative branch of a city, adopts a policy limiting terminations to “for cause,” it has arguably circumvented the mayor’s or city manager’s authority to terminate an employee “at will.”

⁹ See *Thompson v. St. Regis Paper Co.*, *supra* at p. 223 and *Bulman v. Safeway, Inc.*, 144 Wn. 2d 335, ___ P.2d ___ (2001).

¹⁰ See, e.g., *Carle v. McChord Credit Union*, 65 Wn. App. 93, 827 P.2d 1070 (1992). Age discrimination is also prohibited under federal law. See Age Discrimination in Employment Act, 29 USC § 621 et seq.

¹¹ See, e.g., *Capers v. Bon Marche*, 91 Wn. App. 138, 955 P.2d 822 (1998).

¹² See, e.g., *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995).

¹³ See RCW 49.60.180(2); WAC § 162-30-050; 42 U.S.C. § 2000(e)(k), and, generally, *United Auto Works v. Johnson Controls*, 499 U.S. 187, 111 S. Ct. 1196, 113 L.Ed.2d 158 (1991).

¹⁴ RCW 49.60.180(2); see *Doe v. Boeing Co.*, 64 Wn. App. 235, 823 P.2d 1159 (1982); but see *Clarke v. Shoreline School Dist.*, 106 Wn.2d 102, 720 P.2d 793 (1986) (no discrimination where employee not able to perform essential functions of job).

¹⁵ 42 U.S.C. § 12112 and 29 C.F.R. § 1630.4(b); see, also, e.g., *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), on remand, 692 F. Supp. 1286 (1988); but see *DePaoli v. Abbott Lab*, 140 F. 3d 368 (7th Cir. 1998) (worker disabled but not “qualified”).

¹⁶ RCW 41.56.140; see *Public Employees v. Community College*, 31 Wn. App. 203, 642 P.2d 1248 (1982).

¹⁷ See RCW 41.06.250(2). Similarly, a government employer is prohibited from taking a negative employment action against a civil service employee if that employee has failed or refused to engage in political activity. See RCW 41.08.160, 41.12.160, and 41.14.190.

¹⁸ RCW 41.08.080-.090; 41.12.080-.090; 41.14.110-.120.

¹⁹ RCW 41.08.080, 41.12.080, and 41.14.110.

²⁰ RCW 41.12.090, 41.14.120, and 41.08.090.

²¹ RCW 41.56.020 and 41.56.040.

²² Progressive discipline usually requires that oral and written reprimands be used before suspension and termination may occur, the idea being that an employee should be given an opportunity to improve his or her job performance before termination occurs.

²³ See footnotes 9-10.

²⁴ RCW 42.40.020(8).

²⁵ RCW 42.40.050(1)(j); see *Wilson v. City of Monroe*, 88 Wn. App. 113, 943 P.2d 1134 (1997); *Bott v. Rockwell Int’l*, 80 Wn. App. 326, 908 P.2d 909 (1996); and, generally, *Bayless v. Community College Dist.*, 84 Wn. App. 309, 927 P.2d 254 (1996).

²⁶ See *Lins v. Children’s Discovery Ctrs.*, 95 Wn. App. 486, 976 P.2d 168 (1999).

²⁷ *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989).

²⁸ *Gardner v. Loomis Armored*, 128 Wn.2d 931, 913 P.2d 377 (1996).

²⁹ *Lins v. Children’s Discovery Ctrs*, *supra* at 491.

³⁰ RCW 6.27.170.

³¹ RCW 9.94A.2005(7), RCW 26.18.110(8), RCW 26.23.080, and RCW 74.20A.230.

³² In a recent National Labor Relations Board decision, *Epilepsy Foundation of Northeast Ohio* (8-CA-28169, 28264; 331 NLRB No. 92, July 10, 2000), the Board held that non-union workers were entitled to co-worker representation in any interview that could lead to discipline or termination.

³³ A right first recognized in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

³⁴ 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967).

³⁵ 392 U.S. 273, 20 L. Ed. 2d 1082, 88 S. Ct. 1913 (1968).

³⁶ See also *Police Officers’ Guild v. Seattle*, 80 Wn.2d 307, 494 P.2d 485 (1972).

³⁷ See, generally, *Ritter v. Board of Commissioners*, 96 Wn.2d 503, 637 P.2d 940 (1981), and *Washington Education Ass’n v. State*, 97 Wn.2d 899, 652 P.2d 1347 (1982).

³⁸ Named after the United States Supreme Court case, *Cleveland Board of Education v. Loudermill*, 430 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

³⁹ See *Danielson v. Seattle*, 108 Wn.2d 788, 742 P.2d 717 (1987); *Payne v. Mount*, 41 Wn. App. 627, 633, 705 P.2d 297, review denied, 104 Wn.2d 1022 (1985), appeal dismissed, 476 U.S. 1154 (1986); *Punton v. Seattle Public Safety Comm’n*, 32 Wn. App. 959, 964, 650 P.2d 1138 (1982); *Deering v. Seattle*, 10 Wn. App. 832, 835, 520 P.2d 638, cert. denied, 419 U.S. 1050 (1974); see also *Ticeson v. Department of Social & Health Services.*, 19 Wn. App. 489, 494, 576 P.2d 78 (1978) (employee’s civil service status constitutionally protected property right); *Helland v. King County Civil Service Comm’n*, 10 Wn. App. 683, 685 n.1, 519 P.2d 258 (1974) (civil servant has due process property right), *rev’d* on other grounds, 84 Wn.2d 858, 529 P.2d 1058 (1975).

⁴⁰ See *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398, reh’g denied, 446 U.S. 993 (1980).

⁴¹ RCW 41.08.090 (city firefighters); RCW 41.12.090 (city police); RCW 41.14.120 (county sheriff’s office).

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