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The Application of the "At Will Employment" Doctrine, to Unprotected Police Agencies in Texas

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by
John J. Schultz

West Tawakoni Police Department
West Tawakoni, Texas
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ABSTRACT

Law enforcement personnel in unprotected police agencies face much more than the usual difficulties associated with the job of protecting and serving the public. In many agencies, the officers must also face the challenge of doing their job with the knowledge that, due to a change of elected officials, administration, or personal feelings toward them, they may be terminated from their position. The situation most commonly occurs in smaller agencies, where civil service or collective bargaining is not an option for the officers or the department. The recruitment of qualified officers, the retention of officers trained by the department, and the morale of the officers employed often suffer because of the "at will employment" doctrine adhered to by many smaller departments and political entities, such as municipal county, and state governments.

The purpose of this paper is to examine the" at will employment" doctrine, and how it is applied to those agencies affected by the doctrine. The history of "at will employment" will be reviewed, along with the possible liabilities that can arise from termination under this doctrine. Some exceptions to the "at will" doctrine will be addressed, along with the responses of some departments, on how they have dealt with employment under this doctrine. Various court rulings (including a recent court appeal) and their effect on "at will employment" will be examined, demonstrating that "at will" may not be the viable doctrine that it was at one time.

The conclusion of this paper will indicate that, although" at will employment" is still recognized in Texas, the doctrine has suffered setbacks, and will, in all probability, continue to see changes, especially in law enforcement. Administrators and political entities will need to change also, in order to avoid the litigation that has continued to plague the implementation of the "at will" doctrine.

INTRODUCTION

Today's law enforcement professionals are faced with increasingly complex issues. Smaller departments, which often lack the legal counsel available to larger departments, must recognize these complexities, and deal with them appropriately. A major concern of administrators is employment practices; especially important is the area of employee termination. Police officers, much like employees in other professions, are becoming increasingly aware of their rights, and are bringing that knowledge to the workplace.

Most officers of larger departments are now working under and are protected by civil service or collective bargaining. There are, however, many departments that are still serving their communities under what is called the "at will employment" doctrine. This doctrine differs from civil service and collective bargaining, in that, absent an express agreement between the officer and employing entity, involuntary termination may, or must, be recognized as a condition of employment. The "at will employment" doctrine crosses all barriers of rank and seniority. Administrators (especially those in smaller agencies) that are concerned about retaining their officers need to be aware and familiar with this doctrine. This system becomes paramount, considering the frequently changing winds of the political arenas in smaller municipalities, and the effect that these changes have upon employment and employment practices.

The importance of this issue focuses on tit1e ability of an officer to function credibly, without the guarantee of continued employment. The writer will also explore whether an officer's continued employment should be jeopardized without due cause. The intended outcome of this paper will be to examine whether an officer employed "at will" can adequately perform his or her job, how the

doctrine affects departmental policy, and whether the doctrine's continued use is valid in law enforcement employment. An increased incidence of litigation concerning "at will" has also made the issue relevant to administrators from smaller agencies, whose legal foundation may be nothing more than their city's personnel manual.

The intended audience for this paper will be administrators from smaller agencies, police officers working under the "at will" doctrine, policy developers, and interested political entities. Moreover, smaller departments, made aware of recent case law, may be able to adequately adjust their policies to protect both their officers and their departments.

The information to be used will come from several sources. Case law on the subject will be examined, as well as the recent rulings on police agencies. Information from smaller agencies will be studied to see how departments are addressing the issue. Information from various articles and journals will also be included.

Historical and Legal Context

Currently, a large number of police officers in the State of Texas are employed under a system called employment at will. The classic rule of employment at will is that "an employer may discharge an employee for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong" (FarnswOl1h and Young 433). The model for this system was adopted in the mid-nineteenth century, following a period of the "English rule," which set time periods of employment. Under the "English rule," a laborer's term of employment was presumed to be for a year, and the "master" could not "put away his servant" except for "reasonable cause" (Covington and Decker 222). While early American courts adopted the "English rule" it was obvious by the 1850's that "at will" was gaining momentum in the United States. By the beginning of the twentieth century, the prevailing doctrine was "employment at will" (Farnsworth and Young 433). The shift away from set terms of employment began in 1851, when a Maryland man was hired but never called to work. During the suit that followed, the Court ruled that" An infirmity in this contract is, that it fixed no time during which the plaintiffs services should be rendered to the defendant. Suppose the plaintiff had gone to Hallowell (work), and tendered his services. There was nothing to prevent the defendant from discharging him at the end of a single day. fu such a contract there is no value". (Covington and Decker 223).

Various court rulings followed the Maryland case, resulting in further deterioration of the "English rule" in American employment. The rule became that an employee was expendable, unless the "employer's right to termination has been restricted by agreement or law" (Aaron 53). fu recent years, "at will" has been challenged in both state and federal courts. Aaron states that "courts have recently begun to make exceptions to the former rule that an employer could discharge an employee

"at will" (53). There have been modifications to the law in many states, including Texas, with further changes imminent, as courts grant more rights to the employee. Opposition to such changes, especially in the public sector, however, remains strong. The Texas Municipal League adopted a resolution at their 1996 convention that would "Oppose legislation that would...provide that peace officers...may not be disciplined 'without good cause' or only with 'sufficient evidence', or that would, in any other way, erode the employment-at-will doctrine" (Vining 30). Such opposition coming from public employers, however, is facing renewed efforts from employee groups, and a growing number of state legislatures. Several bills were presented this year at the Texas legislative session, supporting stronger employee protections. Although none have been approved at this time, the number of bills continues to grow. Even without statutory relief, "at will" is suffering losses which is costing employer's time and money in litigation, brought about by unfair discharge claims. In the last several years, the movement has been away from "at will" and toward protection for the employee (Aaron 53).

There are several exceptions to "at will," which are currently enforced by the courts. Implied contracts, public policy, duty of good faith and fair dealing, along with federal protection under the Fourteenth Amendment are a partial list of the exceptions (Schmidt 31; Covington and Decker 238). Other cases have included retaliation and rights of privacy (Schmidt 31; Brightman 487). In some instances, courts have found in favor of discharged employees, because the discharge was without statutory authorization, such as an employee refusing to commit an illegal act (Del Carmen and Moore 206). Although this paper will explore the effects of "at will employment", and some of the doctrine's exceptions, it should be noted that each circumstance will remain unique, until the Texas Legislature enacts specific laws protecting the worker. The complexities of the issue, as well

the constantly evolving ramifications of "at will" in both state and federal courts, should make this issue noteworthy to those law enforcement agencies serving their communities under this doctrine. While current policies may have survived for the last decade, rapid changes will bring necessary realignment to many employment and termination practices. A more lengthy explanation of the exceptions, court rulings, and liabilities that affect "at will" is beyond the scope of this paper. It should be enough, however, for political entities and law enforcement agencies to understand the changes that are occurring, and the changes needed in employment practices. Although employers have generally opposed statutory actions that would limit their practices, or impose liabilities for adverse action against employees, some may support wrongful termination legislation if it would provide orderly review and limit remedies (Covington and Decker 243).

Review of Practice

Police agencies, overall, have the protection of civil service or collective bargaining. However, many agencies still operate under the "employment at will" doctrine. Officers working under that doctrine are placed in a position of unguarded and unprotected employment. Recent cases have alleviated some of the concerns of officers afraid of wrongful termination, but the effects upon the officer have proven emotionally upsetting, and financially expensive for the employer. Personnel policies, employee handbooks, and/or manuals, are increasingly becoming the target for suits concerning termination. Several courts have ruled that handbooks cannot contain conflicting policies. Aaron states that "The importance of administrative personnel policies is perhaps one of the most important aspects of human resource risk management in today's legal and working environments. The substantive and procedural provisions set forth in personnel policy can be the first step in creating or limiting civil liability... " (60). While exceptions abound concerning the "at will employment" doctrine, the employee handbook or manual stands out as the greatest challenge to

employment at will. While police agencies, or the political entities that control them, continuously revise their manuals to avoid liability, court cases continue to hold the policies against the employer. Double standards cannot exist in employment agreements, whether they are actual contractual agreements, or "at will" agreements. When employers violate their own policies or procedures, " the due process guarantees of the Fourteenth Amendment may be implicated..." (Aaron 56).

The City of West Tawakoni, seeking to remove all implications of contractual agreement, has added several provisions to it's personnel policies. Even before the introduction of the policy manual it is stated that "This manual is not to be interpreted as a legal document or an employment contract, nor should it be relied upon as a contractual agreement" (City of West Tawakoni 6). Also included in the manual is the "employment at will" disclaimer, stating that "the right of the employee or the city to terminate the employment relationship 'at will' is recognized and affirmed as a condition of employment"(City of West Tawakoni 7). Like most manuals, however, West Tawakoni's policy lists "just cause" as the reason for discipline. "The department head may take disciplinary action against an employee for just cause, while the city administrator may take such disciplinary actions against department heads. Just cause shall be related to the job involved... (City of West Tawakoni 30). Personnel or policy manuals often offer ambiguous statements concerning "at will" vs. good or just cause. Del Carmen and Moore state that in some jurisdictions, a disclaimer will not protect an employer's right to terminate "at will", if the manual provides elsewhere that employees will be terminate only for cause. They further state that courts are now showing a willingness to inquire into personnel handbooks, further eroding the strict common law doctrine of "at will" employment (Del Carmen and Moore 211).

Public policy rulings have also given public employees (police officers) a greater measure of security, especially as it relates to their ability to perform their jobs. Fear of retaliation in "at will"

departments often establishes an elite group of untouchables. Many courts have found that unacceptable, and have ruled in favor of employees terminated in violation of public policy. A majority of states now hold that an employee has a cause of action if discharged for a reason that is an infringement on a specific public policy interest. "This exception to at will employment embodies a principal that employees whose actions enhance or promote clearly expressed public policies should be protected" (Covington and Decker 227). Public policy was the first and most widely accepted exception to "at will." Society has an interest to protect employees when their termination is not from job dissatisfaction, but from unjust causes. Some causes of public policy include refusing to commit an unlawful act, questioning whether an act is unlawful, reporting an unlawful act, and refusing to act in a manner that would be contrary to the public good (Covington and Decker 228). While this list is far from complete, the intent of the many rulings concerning public policy should be clear.

Another exception to the "at will" doctrine which is gaining momentum is the good faith and fair dealing exception. While there is great disparity among court decisions concerning this exception, there have been rulings which indicate that employers are being held accountable for their actions toward their employees. Whether an employee is terminated because of an employer's racism, or because of an argument over a bet, there remains a question if the termination was due to dissatisfaction of job performance, or because of "bad faith" on the part of the employer (Covington and Decker 243). While this question remains unanswered before many courts, it is being raised on a more frequent basis, and appears to have made an impact on employee and employer relationships.

Employees are also seeking relief from wrongful termination in the federal court system, primarily under the Fourteenth Amendment of the Constitution. "Today, wrongful termination

lawsuits abound, and public employers are particularly vulnerable" (Brough and Simmons 1). One of the leading causes for these suits, according to Brough and Simmons, is a violation of the employee's due process rights (1). Causes for action under the Fourteenth Amendment can become complicated, but each employer needs to be mindful of their employee's rights, under both federal and state statute. The complexity of such causes, especially since most involve more than one exception, discourages an exhaustive review of case law. The information here, though, should give rise to the fact that employees are gaining ground in their employment rights, and that employers need to take note.

DISCUSSION OF RELEVANT ISSUES

Since the implementation of the "employment at will" doctrine, employees have faced the prospect of termination for any cause. There are several relevant issues that are of concern to those individuals that are affected by this doctrine. One of them is the contention between employees and "at will" employers, which often leads to litigation over possible violations of due process and wrongful termination. In the case of public employees, the ability to adequately perform their job is relevant because of the tear of retaliation by their employers. Political entities continue to argue for an unchanging "at will" doctrine (Vining 30), while police officers, firefighters, and other public employees seek expanded rights and protection. These matters are often settled through the courts, and recently through legislative action. Personnel manuals and policies are also being brought under closer scrutiny, and are often the basis of litigation. Exceptions to the "at will" doctrine, from court rulings and legislative action, are also issues that are relevant to the application of "at will" employment.

As the courts continue to grant exceptions to "at will," state legislators will take note and respond to the court's actions. Covington and Decker presume that "Statutory action occurs when

political power favors change" (243). Whether the changes come about by judicial or legislative decree, effective change in the "at will" doctrine appears imminent." In June, 1995, a Texas jury awarded a former city employee over $1,600,00 for damages resulting from his termination after he reported violations regarding the city's water hygiene" (Brough and Simons 1). Our state's courts have not eliminated employers' rights in "at will," but they have tempered them. Whether upcoming legislation will bring about protection for "at will" employees is uncertain. What is certain is that juries have made their feelings known through the awards they have handed down in wrongful termination suits. An Oklahoma jury recently awarded $1,272,000 to a former police officer for violations of due process (Schmidt 31). It is becoming increasingly necessary for police administrators and political leaders to understand the changes that are occurring in this doctrine, and the ramifications of these changes.

Many agencies have been granted concessions in employment, by consent of the political entity that is their employer. Even with disclaimers, advising the employee of their "at will" status, due process has been incorporated into the disciplinary and termination process. The Roanoke Police Department has been allowed an internal review process since March 1996 (Riley 1997). The Caddo Mills Police Department has an appeals process that is internal, but also allows the employee to appeal to the city council and mayor, if he or she is not satisfied with the decision reached in the department (Bost 1997). There are still concerns, though, whether officers can adequately perform their jobs, working" at will." One Chief interviewed feels that an officer's ability to function credibly under "at will" is seriously handicapped. "From a law enforcement standpoint, the police department can't truly enforce the law if they are in fear for their job. Should an officer be terminated...because he arrested or wrote a ticket to an influential citizen? I think not (Lynch 1997). The public good

appears to be hindered when officers make choices based on job retention, rather than on what is light.

As more administrators show suppol1 for due process over" at will," it must be questioned whether this doctrine's continued use is viable in the law enforcement sector. Regarding the "at will" doctrine, this author contacted the Chief of Police of Brookside Village, and he said "I don't feel that "at will" is viable in today's police. A policy with specific rights and a path for disputes through hearings and an appeals process, gives the employee a much improved attitude. It make him feel he is a valued part of the city, instead of a disposable accessory" (Evans 1997).

Another question relating to the viability of "at will" is the cost associated with the increasing litigation brought about by wrongful termination lawsuits. An officer from a small Illinois town arrested the mayor of the town for battery. On his release from jail, the mayor fired the officer. The jury award in the suit that followed was $50,000, plus lost wages (Schmidt 31). This amount does not include the cost to the city in attorney and other related fees, nor does it account for the time spent dealing with this matter. In Globe City, Arizona, a probationary police officer was terminated for telling the city judge that the arrest of a vagrant was illegal. The Appellate Court of Arizona ruled in favor of the officer, who sued for wrongful discharge (Farnsworth and Young 430). Again, the cost to the city in awards, back wages, and other fees was certainly staggering. Employers may need to re-evaluate their policies and procedures concerning "at will" employment. "Rather than being reluctant to guarantee fair treatment to employees, employers might find it beneficial to offer employment security as one of the rewards associated with productive job performance" (Koys, Briggs and Grenig 574-575).

In Valarie Brown v. Montgomery County Hospital District, the appeals court returned the case to the lower court on several counts. This appeal for wrongful termination is lengthy and

complex. It does, however, exemplify the need for employers to carefully examine their procedures for discipline and termination. While a detailed examination of this case is beyond the scope of this paper, the claims of the appellant, Brown, are noteworthy:

> "Brown asserted the following causes of action in her lawsuit; 1) violations of her due process rights under the US Constitution and under the Texas Constitution, Article 1 Sec.19; 2) violation of the Appellant's First Amendment rights under the US Constitution and under the Texas Constitution, Article 1 Sec.8; 3) breach of contract based on the Hospital's...failing to follow its own written procedures...; 4) violation of Appellant's liberty interests... " *(Brown* par.1 #1).

It should be noted that the Montgomery County Hospital District is an "at will" employer, and that the writ was granted by the Court of Appeals of Texas.

CONCLUSION

The purpose of this paper was to examine the "at will employment" doctrine, and its effect on unprotected police agencies in Texas. Various exceptions to the doctrine have been explored, along with case law. The matter of retaining officers in an "at will" department has become a complicated issue, in respect to both civil and legal liabilities.

Overall, it is estimated that 200, 000 employees are unjustly terminated from employment in the United States each year (Workers Rights). The laws governing the field of employment are changing, however, especially in employee termination (Del Carmen and Moore 212). Administrators and public employers from all sectors will need to educate themselves on these changes, and to gain an awareness of the rights being gained by employees. The issues examined in this paper are neither exhaustive or complete, since "...courts are constantly expanding employee

rights, and these decisions are usually retroactive" (Schmidt 32). Even the policies and procedures of "at will" employers are being scrutinized, both by employees and the courts. Del Carmen and Moore believe "It is better not to have any procedures than to have prescribed procedures that are breached" (212). A balance will need to be struck between employers and employees (Schwoerer and Rosen 655). Due process and a sense of fair dealing can only benefit both parties. Schmidt sums up what appears to be the evolution of the "at will" doctrine:

> "In the long run, you will never go wrong by having an exaggerated respect for due process. If you err, let it be a claim that you acted with an overabundance of caution and from excessive attention to the fairness of the disciplinary process and the due process rights of subordinate employees" (32).

In conclusion, while "at will" is still a dominate factor in public employment, it is easily seen that the challenges, and the time and money expended in defending this doctrine, may not warrant its continued. Change comes slowly, but if the rights of the employer and employee can both be protected, perhaps the time for change has come. The change must represent a willingness of the employer to substantially reduce the effect of the "at will" doctrine on disciplinary actions and termination, or to remove it completely as a condition of employment.

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