Municipal Employees

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Municipal Employees are Employees at Will

In Wisconsin, municipal employees are generally classified as "at will" employees. In the absence of a civil service ordinance or law, or a contract or collective bargaining agreement stating otherwise, "at will" employees may be terminated with or without cause, with or without notice by the employer. See *Vorwald v. School District*, 167 Wis.2d 549, 482 N.W.2d 93, 96 (1992); *State ex rel. Epping v. City of Neillsville*, 218 Wis.2d 516, 581 N.W.2d 548, 552; (Ct. App. 1998). However, a municipal employee may not be discharged for discriminatory reasons (e.g., based on race, gender, age, or national origin.)

Today, employment contracts, state law, and/or local ordinances have altered the landscape to the municipal "at will" employee. For example, under Wis. Stat. sec. 66.0509, all municipal employers must offer some sort of grievance procedure to its employees, regardless of whether the employees are represented by a union. Thus, non represented employees, even though at-will employees, have procedural protections over discipline under state law. If the municipality and an employee enter into an express or implied contract, any discharge must be done pursuant to the terms of the contract. Certain municipal employees are protected from being fired at the will of the municipality by state laws. For example, municipalities must comply with certain due process procedures specified in the statutes when seeking to terminate a police officer. See secs. 62.13(5), 62.13(6m), 61.65(1)(am) and 60.56(1)(am). Finally, public employees may not be deprived of liberty or property interests without due process of the law under the Fifth and Fourteenth Amendments. Therefore, a pre-termination hearing may be required to ensure due process. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

1. Public Policy Exception to Employment at Will

Wisconsin courts have held that an employment at-will relationship does not create an implied obligation of good faith and fair dealing with respect to discipline and termination decisions, even in the presence of a written employment contract. *Kaste v. Amery Regional Medical Center, Inc.*, 2016 WI App 75; *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); *Holloway v. K-Mart Corp.*, 113 Wis. 2d 143, 34 N.W.2d 570 (Ct. App. 1983); *Brockmeier v. Dunn & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). However, courts have found an exception to the employment at-will doctrine when a termination is a result of an employee refusing to violate fundamental public policy as expressed in the constitution or statutes, or appropriately promulgated regulations. For instance in *Hausman v. St. Croix Care Center*, 13 IER Cases 995 (Wis. 1997), a nursing home employee was allegedly discharged for reporting suspected abuse of patients to the State Ombudsman. State law imposes an affirmative obligation on employees to report such abuse and failure to make a report could subject an employee to criminal prosecution. According to the court, applying the public policy exception to the employment at-will doctrine relieves employees of the burden of choosing between reporting abuse and being terminated for failing to report such conduct at risk of being prosecuted. The court drew a distinction between this and an employee's mere compliance with a legal command, to which the exception would not apply.

In *Bushko v. Miller Brewing Company*, 134 Wis.2d 136, 396 N.W. 2d 167, Wis. 1986, this was defined as a narrow exception, related only to a failure of an

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employee to violate a fundamental and well-defined public policy after being ordered to do so, and was discharged for his refusal. However, in *Winkelman v. Beloit Memorial Hospital*, 483 N.W. 2d 211 (Wis. 1992), the Supreme Court expanded the scope to include a wrongful discharge as related to the employee's refusal to violate an administrative rule.

2. Implied Contracts and Employee Handbooks and Collective Bargaining Agreements with Unions

Employee handbooks summarizing benefits do not generally impose a contractual obligation. *Young v. Oak Electro-Netics Corp.*, 45 Wis.2d 197, 199, 172 N.W.2d 685 (1969); Kaste, 2016 WI App 75. An employee handbook generally constitutes general employment guidelines rather than a binding contract. *Bantz v. Montgomery Estates, Inc.*, 163 Wis.2d 973, 473 N.W.2d 506 (Ct. App. 1991). Further, in *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401 (7th Cir. 1994), the Seventh Circuit held that, under Wisconsin law, policies in an employee handbook were not binding on the municipality, despite contrary representations by municipal officials, because the officials had no authority to create a contractual relationship.

Municipalities should be careful, however, when drafting employee handbooks. There have been a few cases in which Wisconsin Courts have found contracts hidden in employment handbooks. See *Clay v. Horton Manufacturing Company*, 172 Wis.2d 349, 493 N.W. 2d 379 (Wis. Ct. App. 1992), where the employee claimed he was told by supervisors that he had to obey the handbook, as did the company, and the company and employee were bound by the seniority provisions related to the handbook. The court found that the oral statements combined with the handbook could have the effect of modifying the terms of the employment relationship from an at-will relationship to a contractual one. This is not surprising since as early as 1985, in *Ferraro v. Kloelsch*, 124 Wis.2d 154, the court held that a contract had been created when the employee accepted the handbook that set forth the conditions upon which employees could be terminated, incorporating a just cause standard.

To be certain that an employee handbook does not create a binding contract, it should contain a specific disclaimer stating that employment is at-will and not for any definite period unless otherwise specified or provided by statute. *Holloway*, 113 Wis. 2d at 145.

Of course, a very broad exception to employment-at-will is employment pursuant to a union collective bargaining agreement, which very often provides that employees may only be terminated for cause. In the case of a union-represented employee, there may be several explicit provisions that would have an impact upon the employee/employer relationship such as a progressive discipline policy, adoption of explicit rules of conduct, as well as a statement that employees can only be terminated for cause, all subject to an arbitrator's review. Moreover, municipal employees will generally have access to, and the employer will be responsible for following, any civil service ordinance or grievance procedure implemented by the municipality. Wis. Stat. sec. 66.0509.

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Luis' practice also includes traditional employment and labor cases, for both public and private sector clients, regarding race, age, sex, national origin, disability claims, workers' compensation claims, and unemployment compensation matters. He served as a Judicial Intern to Judge Jon P. Wilcox at the Wisconsin Supreme Court during law school at the University of Wisconsin-Madison. Contact Luis at liarroyo@michaelbest.com