Establishing Enforceable Policies for Municipal Employees

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A. THE AT-WILL PRESUMPTION

The traditional English common law followed the feudal notion that a master had the responsibility for his servant's welfare. The English master-servant rule followed the feudal law established by the Statute of Labourers[1] that was enacted as a response to a labor shortage caused by the Black Death. The statute set maximum wages for certain classes of workers. In response, the English common law, in an effort to protect agrarian workers, presumed a year-to-year contract, and held an employer liable for breach of contract for discharging an employee without cause at any time during the year.[2]

In America, as the Industrial Revolution mushroomed and America's ports began to swell with immigrants, the English feudal system gave way to *laissez-faire* economics, with capital concentrated in the relative few. The English common law rule "evolved to the point where it eventually allowed employers to 'dismiss their employees at-will . . . for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong.'"[3] The American rule was affirmed by the Utah Supreme Court in the 1909 decision, *Price v. Western Loan & Savings Co.*,[4] and later clarified and popularized as the *Bihlmaier* rule.[5]

1. Exceptions to Employment-at-Will

Despite the existence of the at-will presumption, it is subject to some substantial limitations. The first and most obvious exception to the employment-at-will doctrine is

[1] 5 Eliz. C. 4 (1562), reprinted in 6 Pickering's Statutes 159-60 (1763).
[2] J. Derek Dahlstrom, Note, Berube v. Fashion Centre, Ltd*.: Utah's Exceptions to the Employment-At-Will Doctrine*. 16 J. CONTEMP. L. 77, 78 (1990)
[3] *Id.* at 78-79 (quoting *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-520 (1884).
[4] 100 P. 677 (Utah 1909).
[5] *Bihlmaier v. Carson*, 603 P.2d 790 (Utah 1979).

statutory restrictions on an employer's right to terminate employment. These restrictions are primarily found in federal, state, and local laws prohibiting termination for a statutorily prohibited discriminatory reason, such as sex, age, race, national origin, disability, veteran status, sexual orientation, etc. These statutes include Title VII of the Civil Rights Act of 1964,[6] Section 1983 of the Civil Rights Act,[7] the Age Discrimination in Employment Act,[8] the Americans with Disabilities Act,[9] the Fair Credit Reporting Act,[10] the Immigration Reform and Control Act,[11] the Rehabilitation Act of 1973,[12] the Vietnam Era Veteran's Readjustment Assistance Act,[13] the Utah Antidiscrimination Act,[14] and the Utah State Personnel Management Act,[15] to name just a few.

Moreover, in 1989,[16] a plurality of the Utah Supreme Court recognized three additional exceptions to the Employment-at-Will Doctrine: (1) an exception for a discharge that violates "substantial and important" public policies,[17] (2) an exception for an implied or express contract,[18] and (3) an exception for the breach of the implied covenant of good faith and fair dealing.[19]

In construing the public policy exception, the court held, "Where an employee is discharged for a reason or in a manner that contravenes sound principles of established and substantial public policy, the employee may typically bring a tort cause of action against his employer," but observed that it would construe public policies narrowly and only apply "those principles which are so substantial and fundamental that there can be virtually no question as to their importance for promotion of the public good."[20]

The exception for an implied or express contract is not really an exception at all, but merely a rule of contract construction. "The rule creates a presumption that any employment contract which has no specified term of duration is an at-will relationship. This presumption can be overcome by an affirmative showing by the plaintiff that the parties expressly or impliedly intended a specified term or agreed to terminate the relationship for cause alone."[21]

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[6] 42 U.S.C. § 2000e-2(a)(1).
[7] 42 U.S.C. § 1981.
[8] 29 U.S.C. § 623(a)(1).
[9] 42 U.S.C. § 12112(a)
[10] 15 U.S.C. § 1681b.
[11] 8 U.S.C. § 1324a.
[12] 29 U.S.C. § 971
[13] 38 U.S.C. § 4212
[14] Utah Code Ann. §§ 34A-5-101 to -108
[15] Utah Code Ann. §§ 67-19-1 to -42.
[16] 771 P.2d 1033 (Utah 1989).
[17] *Id.* at 1042-1043.
[18] *Id.* at 1044.
[19] *Id.* at 1046.
[20] *Id.* at 1042, 1043. The Court also observed that a cause of action for dismissal in violation of public policy would lie for both at-will employees and employees for a specified term. The Court mused, "It would make little sense for at-will employees to enjoy the protection of substantial public policies while employees for term were denied them. *Berube*, 771 P.2d at 1043, n.10.
[21] *Id.* at 1044.

The Court urged caution in applying the exception for a breach of the implied duty of good faith and fair dealing: "The concept of good faith and fair dealing is not susceptible to bright-line definitions and tests. It should therefore be used sparingly and with caution. Where true injustice has occurred, relief should be provided. Care must be exercised to avoid eclipsing the rule by expanding the exception."[22]

B. EMPLOYMENT CONTRACTS

With the at-will presumption as background, Utah law provides that employers and employees are free to enter into contractual relationships with each other. Although the at-will presumption informs the duration and termination of employment contracts, ordinary contract law determines the other terms of the contract.[23] Most employment contracts are unwritten unilateral contracts which can be changed at the whim of either side so long as the other party continues to perform.[24]

1. Implied Contracts – The Problem with Employee Manuals

As one can image, the informality of unilateral contractual relationships can create significant problems—particularly when one considers implied-in-fact contract terms. "An implied contract may arise from a variety of sources including personnel policies or provisions of an employment manual."[25] This is so because "'employees may reasonably rely on the document's provisions and may expect the employer to conform to the procedures it outlines.'"[26] Whether a handbook provision or any other policy or procedure announced by an employer becomes part of the contract depends entirely upon whether the employer manifested its intent to its employees that it intended to be contractually bound by the manual or policy or procedure it announces.[27]

To counteract the problems of contract creation, most employers place a disclaimer in their handbooks and policies that specifically disclaims the intent to be bound as a matter of contract to the terms of the policies. However, the Utah Supreme Court looks to the plain language of the disclaimer, and, if the disclaimer does not generally apply to all

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[22] *Id.* at 1047.
[23] *Cook v. Zions First Nat'l Bank*, 919 P.2d 56, 60 (Utah Ct. App. 1996) ("An at-will employment relationship does not mean that there is no contract between employer and employee.")
[24] *See Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1001-02 (Utah 1991) ("In the case of unilateral contract for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employment supplies the necessary consideration for the offer.")
[25] *Cabaness v. Thomas*, 2010 UT 23, ¶55, 232 P.3d 486 (citing *Canfield v. Layton City*, 2005 UT 60, ¶17, 122 P.3d 622); *see also Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1000 (Utah 1991); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 54 (Utah 1991); *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483, 485 (Utah 1989).
[26] *Cabaness*, 2010 UT 23, ¶55 (citing *Canfield*, 2005 UT 60, ¶17).
[27] *Id.*

policies, the Utah Supreme Court will not generally apply it to all policies.[28] Additionally, if language in the policy "rise to the level of promises," an employer would be loathe to rely on a general disclaimer found elsewhere in a handbook to disclaim the promise.[29]

Accordingly, an employer must be very careful in crafting the language of its employee manuals in disclaiming any intent to contract and making explicit promises to perform some act.

2. Collective Bargaining and Municipalities

Recently, collective bargaining has become a significant focus of governmental employees. It bears noting that employees of local government entities in this state, with few exceptions, have no right to collectively bargain.

Federal law requiring collective bargaining does not apply to local political subdivisions. Although "Congress intended to grant the NLRB the broadest possible jurisdiction permitted by the Constitution," the NLRB "may exercise jurisdiction over all employers except those expressly excluded by the Act, *e.g.*, the United States, states or *political subdivisions*, 29 U.S.C. § 152(2) . . . ."[30] The National Labor Relations Act defines a political subdivision to include "entities that are either . . . created directly by the state, so as to constitute departments or administrative arms of the government, or . . . . administered by individuals who are responsible to public officials or to the general electorate."[31]

Like many states, Utah has adopted a "Little Norris-La Guardia Act" and other similar labor statutes.[32] Additionally, like many states, Utah explicitly exempted political subdivisions from the scope of those statutes.[33] Additionally, the Utah State Supreme Court has declared, on more than one occasion, that "public employees are not covered by the state's labor laws."[34] "In the absence of explicit legislative language, statutes governing labor relations between employers and employees apply only to private industry and not to the sovereign or its political subdivisions."[35] This also means that "municipal employees do not have a statutory right to bargain collectively" and political subdivisions have no obligation to collectively bargain over any issue. [36]

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[28] *Id.* ¶58
[29] *Id.* ¶59.
[30] *Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB*, 752 F.2d 345, 348 (8th Cir. 1985) (emphasis added). *Accord Jefferson County School District No. R-1 v. Shorey*, 826 P.2d 830, 837 (Colo. 1992); *Buhl Education Assoc. v. Joint School District No. 412*, 607 P.2d 1070, 1071 (Idaho 1980); *Weiner v. Beatty*, 116 P.3d 829, 832 (Nev. 2005); *Park City Education Assoc. v. Board of Education*, 879 P.2d 267, 272 (Utah Ct. App. 1994).
[31] 29 U.S.C. § 142(3).
[32] *See* Utah Code Ann. §§ 34-19-1 to -13; 34-20-1 to -13.
[33] *See* Utah Code Ann. § 34-20-2(5)(b) ("'Employer' includes a person acting in the interest of an employer, directly or indirectly, but does not include . . . a state or political subdivision of a state.")
[34] *Park City Education Ass'n v. Board of Education*, 879 P.2d 267, 272 (Utah Ct. App. 1994).
[35] *Westly v. Board of City Comm'rs*, 573 P.2d 1279, 1280 (Utah 1978).
[36] *Park City Education Ass'n*, 879 P.2d at 272; *see also Pratt v. City Council*, 639 P.2d 172, 174 (Utah 1981)

C. STATUTORY LIMITATIONS AND REQUIREMENTS UNIQUE TO MUNICIPALITIES

Although the concepts discussed above are applicable in general to municipalities, there are important and significant statutory modifications to these general rules unique to municipalities. Some of the most significant restrictions are on termination of municipal employees, requirements related to pay and salaries, requirements related to retirement, and requirements related to conflicts of interest.

1. Termination of Municipal Employees

Utah statutes provide that no employee can be discharged, suspended for more than two days, or involuntarily transferred to a position "with less remuneration" unless he or she is given the opportunity to appeal the decision to a board established for that purpose.[37] The standard of review that the board must apply in evaluating the termination must "be prescribed by the governing body of each municipality by ordinance."[38]

The statute specifically exempts from the reach of this statute, the following job classifications:

- an officer appointed by the mayor or other person or body exercising executive power in the municipality;
- a member of the municipality's police department or fire department who is a member of the classified civil service in a first or second class city;
- a police chief of the municipality;
- a deputy police chief of the municipality;
- a fire chief of the municipality;
- a deputy or assistant fire chief of the municipality;
- a head of a municipal department;
- a deputy of a head of a municipal department;
- a superintendent;
- a probationary employee of the municipality;
- a part-time employee of the municipality; or
- a seasonal employee of the municipality.[39]

("The allegation under subparagraph (a) suggesting that defendant has refused to bargain collectively is without merit in view of the fact that public employees in this state generally have no collective bargaining rights.")

[37] Utah Code Ann. § 10-3-1105, -1106
[38] Utah Code Ann. § 10-3-1106(7)(a).
[39] Utah Code Ann. § 10-3-1105(2).

2. Pay and Salaries

Utah stature provides that the governing body of a municipality "may review or consider the compensation of any officer or officers of the municipality or a salary schedule applicable" to them only after a noticed public hearing.[40]

3. Conflicts of Interest and Ethics Rules

In addition to being subject to the Utah Public Officers' and Employees' Ethics Act,[41] municipal employees are subject to the restrictions found in the Municipal Officers' and Employees' Ethics Act.[42] The purpose of the act is "to establish standards of conduct for municipal officers and employees and to require these persons to disclose actual or potential conflicts of interests between their public duties and their personal interests."[43] Among the behaviors that are restricted are compensations for assisting in a transaction with the employing municipality, having an interest in a business entity that works with the municipality, investing in projects doing business with the city, and inducing others to violate the act.

4. Drug Testing

Although most employers in Utah are governed by the Drug and Alcohol Testing Act,[44] municipalities are governed by the Local Governmental Entity Drug-Free Workplace Policies Act.[45] Although similar in many respects to the Drug and Alcohol Testing Act, the local government act effectively requires that any drug test be taken by a urine sample before disciplinary action can be taken against a violating employee,[46] even though the act seems to allow testing by any reliable scientific method.[47] The act also does not include the same immunities found in the Drug and Alcohol Testing Act.[48]

5. Employee Personnel Files

Employees of private employers in this state have no right to access or copy their personnel files. However, municipal employees have the right to review their records subject to limitations found in GRAMA.[49]

[40] Utah Code Ann. § 10-3-818(2).
[41] Utah Code Ann. § 67-16-1 to -14.
[42] Utah Code Ann. § 10-3-1301 to -1312.
[43] Utah Code Ann. § 10-3-1302.
[44] Utah Code Ann. § 34-38-1 to -15.
[45] Utah Code Ann. § 34-41-101 to 107.
[46] *See* Utah Code Ann. § 34-41-103(5) ("In addition to the test results of the 30 ml urine sample, the test results of the 15 ml urine sample shall be considered at any subsequent disciplinary hearing. . . .")
[47] Utah Code Ann. § 34-41-101(2), (11).
[48] Utah Code Ann. §§ 34-38-9 to -15.
[49] Utah Code Ann. § 67-18-1 to -5.

6. General Whistleblowing

Employees of private employers are generally not protected from retaliation for general whistleblowing about an employer's wasteful practices or, in most cases, violation of laws.[50] That is not true for municipal employees. They are specifically protected against retaliation for general whistleblowing if the employee "communicates in good faith the existence of any waste of public funds, property, or manpower, or a violation or suspected violation of a law, rule, or regulation"[51] by the Utah Protection of Public Employees Act.[52]

[50] All employees are protected against retaliation for whistleblowing if a specific prohibition is found in the act in question. For instance, employees are protected against retaliation by specific provisions in Title VII, the ADA, the ADEA, the FLSA, and other similar statutes. However, as a general matter, employees are not protected against retaliation for whistleblowing in most instances. There are significant exceptions that this presentation is not intended to cover.

[51] Utah Code Ann. § 67-21-3(1)(a).

[52] *Id.* §§ 67-21-1 to -9.

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D. Scott Crook represents both private and public sector employers and employees in most areas of employment law, including creation and negotiation of employment-related documents, including personnel policies, employee handbooks, employment agreements, severance agreements, and non-competition agreements. He has successfully handled employment contract claims, labor disputes, and discrimination claims in administrative agencies and courts at all levels, including the Equal Employment Opportunity Commission, Utah Anti-Discrimination and Labor Division, Merit Systems Protection Board, and the National Labor Relations Board.

Mr. Crook also has an active litigation and appellate practice, recently serving as chair of the Appellate Practice Section of the Utah State Bar. He has represented clients in state courts in Utah and Idaho, the Utah federal District Court, the Utah Court of Appeals, Tenth Circuit Court of Appeals, and Utah Supreme Court. He has lectured or written on employment law, constitutional matters, appellate practice, real property, and jury selection procedures.