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Human Services Legal Basics
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Five Employment Law Basics

The paragraphs that follow discuss five basic issues in the law of public employment:

- The difference between "employment at will" and "right to work"
- Legal limitations on firing employees who are employed at-will
- Using criminal history information in making employment decisions
- Encouraging bad employees to resign

"Employment at Will" vs. "Right to Work"

Here are two terms that people get mixed up all the time: "employment at will" and "right to work." Is North Carolina an employment-at-will state? Yes. Is North Carolina a right-to-work state? Yes. But those two terms do not mean the same thing. And for state and local governmental employers in North Carolina, one term is very meaningful and the other has no practical consequence.

Let's look first at the one with no practical consequence: right to work.

That term is applicable only where the workforce is unionized and the employer and the union have entered into a collective bargaining agreement. Suppose a person who is not a member of the union is hired into a job there. The benefits of the collective bargaining agreement—pay structure, health insurance, grievance procedure, etc.—will apply to this newly hired employee. Does he or she have to join the union or at least pay some of the fees that union members pay? The answer to that question depends entirely on state law. In a small minority of states, the law will require that the newly hired person join the union (this arrangement is commonly known as a "union shop" arrangement). In other states, the law does not require that the newly hired person join the union but does require that he pay to the union an amount equal to union dues (the "agency shop" arrangement) or a portion of the dues that might be thought to reflect the cost to the union of negotiating and administering the collective bargaining agreement (the "fair share" arrangement). And in still other states (about 20 or so), the newly hired employee does not have to join the union and does not have to pay the union any fees at all (the "right to work" arrangement). States which impose no obligation on employees to join the union

or even pay a portion of the union dues are right-to-work states. North Carolina is a right-to-work state.

Why is that of no practical consequence to governmental employers in North Carolina? It's because North Carolina law prohibits units of government from engaging in collective bargaining with their employees. The concept of "right to work" simply does not apply where there is no collective bargaining agreement in place.

Federal law—the National Labor Relations Act (NLRA), enforced by the National Labor Relations Board (NLRB)—governs unionization in private employment and allows states to choose whether to be right-to-work states. Private employers in North Carolina are bound by the federal law when it comes to the obligation to recognize unions and engage in collective bargaining, but they are bound by the state law that makes North Carolina a right-to-work state. Federal law does not govern unionization in governmental employment. The NLRA and the NLRB have no jurisdiction over governmental employment. Instead, states are free to design their own laws for the state government as employer and for local governmental units as employers regarding the recognition of unions and the obligation to engage in collective bargaining. North Carolina has chosen to ban collective bargaining in governmental employment altogether.

Now let's look at the other term: employment at will. It means a lot for North Carolina governmental employers.

Employment at will is the basic rule of the relationship between employer and employee in North Carolina. Under it, any employer, private or governmental, is free to decide among all job applicants which one to hire and to reject all others, for any reason that suits the employer. Similarly, the employer is free to decide at any time to dismiss any employee already working for the employer, for any reason or for no reason at all (except for a handful of reasons made unlawful under federal law, such as race, sex, or age discrimination). The employer is free to demote, suspend, or transfer the employee and to raise or lower his or her pay. On the other side of the coin, an applicant is perfectly free to decline an offer of employment, and an employee is free simply to walk off the job. In essence, the employment relationship lasts only so long as both the employer and the employee desire it. If either loses the will, the relationship is terminated.

The North Carolina Supreme Court summarized the legal principle of employment at will in 1971: "Nothing else appearing," the court said, employment "is terminable at the will of either party irrespective of the quality of performance by the other party." *Still v. Lance*, 279 N.C. 254, 259. That is, no matter how well the employee is working, he or she is subject to being fired, "nothing else appearing." Unless something "else" protects the employee, his or her status is "at will."

Sometimes in governmental employment, there is something "else" that appears, that takes particular employees out of the status of at will.

One example is the State Human Resources Act. After employees who are covered by the act (that is, most state employees and most employees in county social services and public health departments) have finished a probationary period, from that point forward they can be dismissed only for "just cause," as the act provides. Because they can be fired only for cause, they are no longer at will.

Other examples can be found in numerous personnel ordinances enacted by county boards of commissioners or city councils. County boards and city councils have the authority under North Carolina law to enact ordinances that give their employee protection in the same way that the State Personnel Act does for state employees. These county and city ordinances provide that once a covered employee has completed a probationary period he or she may be dismissed only for "good cause" or "just cause" or some comparable term. Those employees then are no longer employed at will.

Public school teachers who achieved tenure as teachers under the state's teacher tenure law before a certain date in 2013 can be dismissed only for one of 15 reasons set out in the statute. They are not employed at will.

Most local government employees in North Carolina are employed as at-will employees. They do not have any special protection. Their county commissioners or city councils have not enacted "just cause" protection and they are not covered by the State Personnel Act.

"Employment at will" is a very meaningful term for North Carolina public employers. "Right to work" is not.

Firing At-Will Employees: Legal Limitations

If you go to work for someone else, the odds are great that you are an employee at will. That's the basic rule in North Carolina, as it is almost everywhere in the United States. In North Carolina, it applies whether you go to work for an individual or a private business or a unit of government.

So what? What does it mean to be an employee at will? It means that you can be fired at any time, for any reason or no reason, with notice or without notice. It means, as a legal matter, that your job hangs by the barest thread, subject to being snipped at any moment, with no recourse. It means, as a practical matter, that the employer holds all the cards in the employment arrangement.

But there is one more element to the law of employment at will: yes, it's true that an at-will employee may be fired for any reason or no reason. But even an employee at will may not be fired for an *unlawful* reason. The law puts in place some protections against dismissal even for at-will employees.

This blog post lists the unlawful reasons. If an employer, private or governmental, fires an employee for any reason not listed here, the law of employment at will prevails, and the employee is out of luck. But if one of these reasons is behind the dismissal, the employer has acted unlawfully and the employee may have legal protection.

Protections under federal statutes

Federal statutes provide protections to at-will employees, both in the private sector—businesses and non-profits above a minimum number of employees—and in government.

Race. Under Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.), it is unlawful for an employer to dismiss you (or to discriminate otherwise, such as in hiring, promotions, or compensation) because of your race. This protection applies fully to at-will employees. You can go to the Equal Employment Opportunity Commission and file a charge of discrimination. The EEOC will investigate your claim and, perhaps, make an effort on your behalf to reach an accommodation between you and your employer. If that effort fails, you will be issued a right to sue letter and you can take the employer to court. The effort and expense may be too great, but the legal remedy is there if you can take advantage of it.

Sex. Title VII protects you against dismissal—or other discrimination—on account of your sex just as it does on account of your race. The statute uses the term "sex." In common usage today, however, the term of choice is usually "gender." For this purpose, the terms are equivalent.

Religion. Title VII protects you against discrimination on account of your religion. If you can't work on Saturday because of religious beliefs, the employer is required to make an effort (but not go to great expense) to accommodate your religious need rather than simply fire you.

National origin. Title VII does not use the term "ethnicity," but it gets at the same notion by protecting you against dismissal on account of your national origin.

Color. The fifth, and final, protected characteristic under Title VII is "color." It correlates closely with race, of course, but it is not the same thing. The protection could apply, for example, if a light-skinned African American employer discriminates against a dark-skinned African American employee because of that employee's color.

Age. Three years after enacting Title VII, Congress passed the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq... It prohibits dismissal—or other discrimination—on account of a person's age, once that person reaches 40. It is not unlawful to dismiss an employee who is 35 because that employee is too old, but it is unlawful to dismiss someone who is 41 for being too old. Go figure. When the ADEA was first passed, its protections ended at age 65, and employees were often subject to mandatory retirement at that age. After a few years the age limit was raised to 70, and then the upper limit was removed altogether. It is not unlawful to fire an older worker because she can no longer adequately

perform the job, but it is unlawful to fire her just because of her age. The ADEA is administered through the EEOC, as Title VII is.

Disability. In 1990, Congress passed the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq. The ADA covers many kinds of situations in addition to employment, but its application to employment is its main feature. You may not be fired because of an impairment—mental or physical—that substantially limits you in a major life activity. And the ADA requires an employer to make an effort to accommodate your disability (perhaps at substantial expense). It is unlawful to dismiss you because of your disability or because the employer doesn't want to make the accommodation. The ADA is administered through the EEOC.

Genetic information. The most recent federal statute is the Genetic Information Discrimination Act, 42 U.S.C. 2000ff et seq. It prohibits discrimination against you because of genetic information about you or information about your family medical history. See the Coates' Canons blog here.

Military service. With some limitations, your employer cannot fire you because you enter military service. The Uniformed Services Employment and Reemployment Rights Act, 39 U.S.C. §§ 4301 et seq., so provides, and also requires that, within limitations, the employer must hold a job for you when you get back from service.

Federal constitutional protections

Protections that stem directly from the United States Constitution apply only to employees of the government—state or local—and not to employees in the private sector. How come? Because the Constitution acts to constrain how government acts. That is, it describes the relationship between citizen and government. It does not directly control how private entities act. When the government becomes an employer and hires you to work for it, you don't stop being a citizen. Two relationships exist at once—employer/employee and government/citizen. When the government acts against you in the way that any employer might act—say, by firing you—the protections that you enjoy as a citizen may affect the legality of the employer's action. Employees in the private sector do not have these protections.

Free speech. When you go to work for the government, one protection that follows you as a citizen is the right to free speech embedded in the First Amendment. That right is not absolute, but if you believe you were fired because of what you said on a matter of public concern, you can pursue the matter with a lawsuit. The court will balance your interests in speaking out against the governmental employer's interest in getting the job done without unreasonable disruption.

Religion (again). The First Amendment also protects individuals in the free expression of their religion. When you go to work for the government you have the full protection of Title VII, described above, but you also have this constitutional protection and, if you believe your

dismissal was based on their religion, you may sue directly under the constitution, in addition to pursuing your Title VII remedy.

Unreasonable searches. The Fourth Amendment protects individuals against unreasonable searches and seizures. If a governmental employer looks through your desk drawers or computer-usage records, or demands urine or blood for a drug test, and fires you for what it finds (or because you refuse to go along with the search), the possibility exists that you may sue under the Fourth Amendment.

Protections under North Carolina statutes

The North Carolina Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et seq., pulls together provisions scattered throughout the state General Statutes to protect employees against dismissal in particular circumstances. An employee with a claim under REDA goes first to the N.C. Department of Labor with a complaint and then may bring a lawsuit.

Workers' compensation, wage and hour, and mine safety claims. Under REDA, it is unlawful for your employer to fire (or otherwise to adversely treat) you because you file a workers' compensation claim or testify with respect to the claim of another employee. The same is true with respect to wage and hour claims under state law and to claims under the state's mine safety law.

Sickle cell. Under REDA, you may not be fired (or otherwise adversely treated) you because you possesses the sickle cell trait or hemoglobin C trait.

National guard service. Under REDA, you may not be fired (or otherwise adversely treated) you because you serve in the National Guard.

Genetic information (again). Under REDA, as under GINA, discussed above, you may not be fired because of genetic information about you or a family member.

Pesticide use. Under REDA, you may not be fired because you pursue your rights under the state statute on the regulation of the use of pesticides or testify with respect to the claim of another employee.

Drug paraphernalia sales. Under REDA, you may not be fired because you refuse to sell certain products banned by the state statute controlling sales of drug usage products.

Juvenile order compliance. Under REDA, you may not be fired because you attend a court proceeding or take other actions that a court may order in cases where your child is under the jurisdiction of the juvenile court for delinquency.

Domestic violence protection. Under REDA, you may not be fired if, with reasonable notice to the employer, you have to take time off work to obtain, through the judicial system, a domestic violation protection order or civil no-contact order. See G.S. 95-270.

How you vote. This prohibition is not in REDA–and it is the only crime in the bunch! G.S. 163-274(a)(6) makes it misdemeanor "to discharge or threaten to discharge from employment . . . any legally qualified voter on account of any vote such voter may cast or

consider or intend to cast, or not to cast, or which he may have failed to cast." You can't be fired for how you vote. Another provision applies only to units of government. It is found at G.S. 163-271. If you work for the government, it says, you may not be fired for how you cast your vote.

Serving on election day. This prohibition is also not in REDA, but is found at G.S. 163-41.2 As long as you give proper notice to your employer that you will be absent, you may not be fired because you agree to serve as a precinct official, appointed by the county board of elections, on election day.

Whistleblowing. The North Carolina Whistleblower's Protection Act, found at G.S. 126-84 et seq., protects employees of the state, of community colleges, and public schools from dismissal for reporting violations of law, fraud, misappropriation of resources, specific dangers, and gross mismanagement by their employers. It does not apply to other governmental employees or to employees in the private sector.

Refusing to perform abortions. You can't be fired, if you are a health care provider, because you refuse to participate in an abortion procedure for moral, ethical, or religious reasons. G.S. 14-45.1(e).

North Carolina common law protection

The vaguest, and oddest, of the legal provisions restricting the firing of employees is actually not a statute. It is instead a common law provision. That is, it was not developed by the legislature but by the courts, originally in *Sides v. Duke Hospital*, 74 N.C. App. 331 (1985). And it is not an outright prohibition on firing. Instead, it creates the possibility of a monetary recovery in court by someone who has been fired.

The public policy wrongful discharge tort. The *Sides* case and the many that have followed it have created this exception to employment at will: if I, the employer, fire you, my employee, because you refuse to do something that would violate the public policy of the state, I have committed the tort of wrongful discharge and you can sue me. If you win, you don't get your job back, you get money from me to compensate you for your lost job. Here is an example: I fire you because you testify against me in court, truthfully, in response to a subpoena. It is the public policy of this state that everyone is to tell the truth in court. I can't get away with firing you because you won't lie in court.

State constitutional protection. A rare protection is found under the North Carolina Constitution. Our courts have said, starting with *Corum v. University of North Carolina*, 330 N.C. 761 (1992), that where protections are laid out in the state constitution and are violated by a governmental employer, as in the dismissal of an employee for the legitimate exercise of free speech, the employee may sue directly in state court to remedy the violation, but only if no other provision of law gives the chance at a remedy. There have not been many successful employee lawsuits brought this way.

"Hey, Job Applicant: Have You Ever Been Arrested or Convicted?"

Is it lawful for a governmental employer in North Carolina to ask a job applicant about arrests and convictions? Is it lawful for the employer to do a criminal background check on job applicants? The answer to both questions is Yes, but the potential exists for liability under Title VII of the Civil Rights Act of 1964.

Guidance from the EEOC

In 2012, the Equal Employment Opportunity Commission issued a Guidance on the use of criminal history information in employment decisions.

The Guidance does, at root, one simple thing. It provides a path to a defense against a charge of unlawful employment discrimination filed with the EEOC under Title VII based on the use of criminal history information and alleging discrimination on account of race or national origin. The Guidance tells employers how they can collect and use criminal history information in a way that would likely lead the EEOC to a finding "no reasonable cause" to believe that such a charge is true.

The Guidance acts more broadly, however, to incorporate the EEOC's view of the law as it has developed on the question and, presumably, to provide a groundwork for courts to use in adjudicating these kinds of employment discrimination claims.

Getting criminal history on applicants

Employers get criminal history information about job applicants in two chief ways.

First, they often ask the applicants directly, sometimes right on the face of the application form. The Guidance does not prohibit such question:

- "Have you ever been convicted of or pleaded nolo contendere (no contest) to any violation of the law other than minor traffic tickets?"
- "Do you have any criminal charges or procedures pending?"

Second, employers contract with commercial vendors that acquire, package, and sell criminal history information. The Guidance does not prohibit this practice either, but employers using these companies must comply with the requirements of the Fair Credit Reporting Act.

Disparate impact discrimination

Title VII does not prevent an employer from getting criminal history information about applicants. But the careless use of that information can lead to liability under Title VII.

A 1971 U.S. Supreme Court decision (in the early days of Title VII litigation) arising from North Carolina created a kind of employment discrimination claim under Title VII—the "disparate impact"—that, unlike the most common kinds of Title VII claims, does not require a showing that the employer intended to discriminate. *Griggs v. Duke Power Company*, 401 U.S. 424. The mere fact that a practice screens out one group identifiable by race, color, religion, sex or national origin can lead to liability. In 1991, Congress amended Title VII to codify the disparate impact claim originated in *Griggs*.

There are many examples of disparate impact resulting from facially neutral practices. In the *Griggs* case, the employer required a high school diploma for applicants for all jobs. At that time at that place in North Carolina, a greater proportion of black North Carolinians were without their high school diploma than were whites. The NC highway patrol enforced a minimum height requirement for troopers. A much small proportion of women met the requirement than did men. Employers sometimes require the ability to lift a certain weight, with a disparate impact on women.

The use of arrest and conviction information to screen out applicants for employment can similarly have a disparate impact by race and national origin. Statistics cited in the Guidance show that African American and Hispanic people are arrested and convicted at much higher rates than are white people. For example, the Guidance says that while African Americans make up 14% of the U.S. population, in 2010 28% of all arrests were of African Americans. Thus, a ban on hiring individuals who have ever been arrested would screen out African American people at twice the rate that it would screen out white people.

So, does the mere fact that an employer's practice (such as an educational requirement, a physical requirement, or a criminal record requirement) has a disparate impact mean that the employer is liable under Title VII for unlawful discrimination?

No.

The key is whether the practice is "job related" and "consistent with business necessity." If it is, then the employer is not liable. If it is not, the employer is liable. Here's how Title VII phrases it:

An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin ***and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . .***42 U.S.C. § 2000e-2(k)(1)(A)(i)

The main thrust of the Guidance is to provide the EEOC's view of how an employer demonstrates that its use of criminal history information to screen out an applicant (or adversely treat a current employee) is job related and consistent with business necessity.

Use of arrest information vs. use of conviction information

When an employer uses a commercial vendor to supply criminal history information, the employer is virtually certain to obtain not merely records of convictions for crimes but also records of arrests. Most times the record of arrest will be accompanied with a record of some sort of disposition—dismissal or something else—but sometimes the arrest will stand alone, with no record of disposition. That may happen because the arrest was recent enough that no disposition has yet taken place. But it also may happen because the database is incomplete—the disposition information was simply never matched up with the arrest information.

The Guidance emphasizes the difference between arrest and conviction information: the fact of a criminal *conviction* can generally be taken as a firm indication that the underlying criminal conduct did in fact occur. The individual really did steal the car or commit the assault or sell the drugs. The fact of an arrest, however, does not establish that any underlying criminal conduct has occurred. Many arrests do not result in criminal prosecutions and even in the case of a prosecution, the accused is presumed innocent until proven guilty.

Where there is arrest information but no indication of conviction, the employer may, in the words of the Guidance, "make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes."

So, before an employer uses arrest information to disqualify an applicant, the employer should investigate the circumstances behind the arrest and make a determination as to what conduct actually occurred. It can then use its reasonable belief as to the conduct to make an employment decision, with the same considerations related to disparate impact that accompany the use of conviction information.

Defensible use of criminal history information

Since the use of criminal history information likely has a disparate impact on African Americans and Hispanics, an employer must be concerned about the possibility of disparate impact liability under Title VII if the employer uses such information to screen out applicants (or adversely treat employees). The employer can avoid disparate impact liability if it can show that its use of the information was "job related" and "consistent with business necessity."

According to the Guidance, an employer makes that showing if it can "effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."

To make that link, the Guidance says, the employer must develop a "targeted screen." A targeted screen considers, with respect to any particular criminal conduct and any particular job, three factors, based largely on the 1977 Eighth Circuit decision in *Green v. Missouri Pacific Railroad*, 549 F. 2ds 1158:

- the nature of the crime
- the time that has elapsed since the crime or the end of the sentence
- the nature of the job

plus a fourth:

- individualized assessment

With respect to the first three, the Guidance says this: "An employer policy or practice of excluding individuals from particular positions for specified criminal conduct within a defined time period, as guided by the *Green* factors, is a targeted exclusion. Targeted exclusions are tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs

involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies."

With respect to the fourth, the Guidance says this: "Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity."

When to ask about criminal history

The Guidance does not prohibit asking, on a job application, whether the applicant has been convicted of crimes. There is no prohibition. The greatest risk is the risk of a challenge under the disparate impact theory of liability under Title VII. In light of the Guidance, however, and no doubt for other considerations, many employers have stopped asking this kind of question on the job application, but are waiting until later in the selection process before asking. That is consistent with the EEOC's recommendation in the Guidance:

"As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity."

Bad Employee? Suggest He Resign?

This guy is a bad employee. His work is poor. His conduct around other people is objectionable. You (that is, the city or the county or other public employer) would be better off without him.

You could just fire him. Grounds for dismissal seem reasonably clear. But firing someone is so distasteful. And it can be time consuming and awkward. Will there be a hearing? And maybe an appeal? No, you think, it would be better not just for you but for him, too, if he would simply resign. After all, who wants a record of dismissal in their personnel file?

Why not call him into your office and try to talk him into it?

Whoa. That very kind of thinking recently cost a North Carolina school system $680,000.

Here's how it happened—viewing the evidence as the jury must have. Mr. L was a tenured teacher with a good record. At the beginning of a new school year, at a new school, several female students complained that Mr. L had inappropriately touched them. The principal talked to Mr. L about it and Mr. L apologized to the girls. Then, some months later, other girls voiced similar complaints. This was trouble, especially considering that the school system had

recently received bad publicity related to its handling of very inappropriate conduct by another teacher in another school.

The school's HR person questioned Mr. L right away. Mr. L acknowledged a little bit of the alleged conduct, and the HR person told him that his admitted conduct violated school policy. He had only three options, she said. He could do nothing. In that case, he would be suspended immediately and would face an investigation by law enforcement. He would almost certainly be dismissed after the investigation. Or he could resign effective immediately. Or he could resign effective at the end of the school year. A resignation would be "in lieu" of a criminal investigation and his record would not show that he was terminated for cause. Everybody would win.

The HR person gave Mr. L a resignation form. He filled it out, resigning effective at the end of the school year.

On the spot, Mr. L began to regret his decision. Even before he left the office, he told the HR person he had changed his mind. Too late, she said. He had offered his resignation and she, with the appropriate authority to do so, had accepted it. Mr. L was escorted off the property, never to work for the school system again. He did get paid for the rest of the school year. The police were called in. It turned out that the resignation was not in fact "in lieu" of an investigation. There was a resignation and an investigation. Mr. L was criminally charged and tried. He was eventually acquitted.

Two years later, Mr. L sued the school system. He based his lawsuit on a kind of claim that only an employee of the government can bring—a claim of a denial of due process. No private employee can sue his employer for denial of due process, because private entities have no obligation to provide due process. That obligation attaches to governments, through the Fourteenth Amendment to the U.S. Constitution. Government may not deprive individuals of property without due process of law.

Here, Mr. L said, he had property—his job was his property because the government (that is, his school system employer) had given him teacher tenure. The law is clear on that point. When the government gives an employee job protection like tenure (as when a city or county passes an ordinance giving employees "just cause" protection against termination), the employee gains a property interest in his employment.

And, Mr. L said, he had been deprived of his property—his job—without due process.

No, said the school system. Mr. L was not "deprived" of his property. He freely gave it away with his resignation. First the judge (in a summary judgment decision, 2011 WL 1499747) and then the jury disagreed.

Sure, a governmental employee who has tenure or other property interest in his employment can decide to resign. It happens all the time. People change jobs. Employees retire. A voluntary resignation gives up the property interest and no due process is required. There is no "deprivation."

But where a resignation is involuntary, that is the equivalent of getting fired. An involuntary resignation is a deprivation of a tenured employee's property. What makes a resignation involuntary? Two things, both laid out clearly by our federal court of appeals in *Stone v. Univ. of Maryland Med. Sys*., 855 F.3d 167 (4th Cir. 1988).

First, a resignation is not voluntary if it is forced through duress or coercion. It's not enough that the employee is in a hard place, put to a hard choice—resign or get fired. It's got to be more than that, some kind of genuine unreasonable compulsion. This was not really Mr. L's argument.

Second, a resignation is not voluntary if the employer obtains the resignation through misrepresentation or deception. This was what carried the day for Mr. L. He believed that he was being told that if he resigned there would be no law enforcement investigation and his record would remain clean. Instead, there was in fact an investigation and it led to a criminal prosecution.

The jury agreed. The HR person had the authority to accept resignations, it found, and she was responsible for Mr. L's involuntary resignation. He lost his job involuntarily, without due process. For that violation of his constitutional rights, the jury, in February 2012, ordered the school system to pay him $1,121,560. A short time later, the parties brought the matter to a final conclusion by agreeing to a payment of $680,000 and an end to the litigation.
What's the lesson?

A governmental employer must take care in how—and whether—it raises the idea of a resignation with a bad employee. Don't press for an immediate resignation. Give the employee time to consult with a lawyer if he chooses. Don't make promises about the benefits of a resignation until you have cleared those promises with your attorney. And in any conversation in which resignation may be discussed, have a witness present.

The jury award in Mr. L's case was compensation to him for the deprivation of his due process rights, rights that were his because of his tenure. But what about a governmental employee who does not have tenure? What about a regular old at-will employee who, because of his at-will status, has no property interest in his employment and can be fired without due process? Such an employee would not have the same due process claim available. But the possibility of a governmental employer being held liable on some other basis when such an employee resigns still exists. A forced resignation can constitute a constructive discharge and serve as the basis for a claim of unlawful discrimination, for example. So, the advice with respect to resignations is the same: don't press; give the employee time; don't make unauthorized promises; and have a witness.