

## Employment at Will and Its Exceptions

### THE COMMON LAW RULE OF EMPLOYMENT AT WILL

**Absent a statute, ordinance or employment contract that confers some sort of right to continued employment, all employment in North Carolina is “employment at will.”** The term “employment at will” is a shorthand way of saying that employment may be ended at the will of either the employer or the employee. An employer can fire an employee for any reason or for no reason at all. An employee can quit for any reason or for no reason at all.<sup>1</sup> The at-will rule also applies to disciplinary actions that fall short of termination. An employer who can fire employees at will may refuse to hire any given applicant, may set the terms of employees’ work, may raise and lower their pay, and may demote, suspend or transfer them, all at will.

The employment at-will rule is what is called a “common law” rule, that is, law developed in the courts, as opposed to laws found in statutes passed by legislatures or rules promulgated by agencies. Common law is case law, created by judges as they apply legal principles to various facts. This is in contrast to statutory law, which is created by the United State Congress or the North Carolina General Assembly. The employment at-will rule applies to both public and private sector employment in North Carolina, and in every other state in the United States except Montana. In the public sector in North Carolina, the at-will status of employees is, in some instances, explicitly stated in the General Statutes. For example, G.S. § 160A-147 states that a city manager is appointed by the council “to serve at its pleasure.” Similarly, G.S. § 153A-103(2) provides that sheriff’s deputies “serve at the pleasure of the appointing officer.”<sup>2</sup> But even where the at-will status of a particular position or group of employees is not expressly stated, the presumption is that employment at-will applies unless it is stated otherwise.<sup>3</sup>

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<sup>1</sup>See *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331 (1997) (“This Court has repeatedly held that in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party”); *Soles v. City of Raleigh Civil Serv. Comm'n*, 345 N.C. 443, 446 (1997).

<sup>2</sup>See also G.S. § 160A-147 (authorizing a city council to appoint a city manager to serve at its pleasure); G.S. § 160A-173 (the city council appoints the city attorney, who serves at its pleasure); G.S. § 153A-81(1) (authorizing a county board of commissioners to hire a county manager to serve at its pleasure); G.S. §§ 153A-111 and 153A-114 (the county clerk and the county attorney respectively are appointed by the board of commissioners and serve at its pleasure).

<sup>3</sup>See, e.g., *Cannon v. Town of Long View*, 1989 WL 117820 (4th Cir. 1989) (holding that the plain language of G.S. 159-24, which provides that “each local government and public authority shall appoint a finance officer to hold office at the pleasure of the appointing board or official,” made the plaintiff finance officer an employee at will). See also *Blair v. Randolph County Bd. of Educ.*, 2011 WL 2206690 (2011) (unpublished disposition) (plaintiff was employee at will in absence of any policy or document to the contrary); *Roberson v. City of Goldsboro*, 564 F.

In the hiring context, the employment at-will rule means that employers may generally hire whomever they please. There is no legal requirement that the person be the most qualified applicant, that they have relevant experience or that they even meet the minimum stated qualifications. The decision about whom to hire is completely within the employer's discretion. To put it starkly, where the at-will rule applies, employers may hire whomever they please, even if the person selected is unqualified, a "bozo," or has unspeakable body odor.

The notion that "the decision about whom to hire is completely within the employer's discretion" is, however, qualified by the employment at-will rule's status as a common law rule. Common law is made by the courts one decision at a time, each decision building on decisions that came before it. At any time, however, a legislature may overrule a rule of common law by passing a statute to the contrary. The employment at-will rule is thus subject to a number of exceptions that have been created by federal and state statutes. It is therefore more correct to say that under the employment at-will rule, an employer may hire and fire employees for any reason or no reason at all – just not for a reason made unlawful by federal or state law.

Those sections of the North Carolina General Statutes that set forth who has the authority to hire in North Carolina local government and community colleges sometimes accord employees at-will status and other times make it lawful only to hire persons with certain credentials or by following certain procedures. These same statutes sometimes allow employers to hire at-will, but only permit termination of employees for good cause. The statutory sections applicable to each kind of local government and community college employer must be read carefully.

## **EXCEPTIONS TO THE RULE OF EMPLOYMENT AT WILL**

There are three broad categories of exceptions to the employment-at-will rule: statutory exceptions, common-law exceptions, and constitutional exceptions.

### **Statutory Exceptions to Employment at Will**

Statutory exceptions are restrictions of an employer's right to hire and discharge whomever they please that have been enacted either by the U.S. Congress or the North Carolina General Assembly. Federal anti-discrimination laws put the most significant limitations on the way in

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Supp. 2d 526, 530 (E.D.N.C. 2008) (same); *Wuchte v. McNeil*, 130 N.C. App. 738, 740 (1998) (same); *Woods v. City of Wilmington*, 125 N.C. App. 226, 229 (1997) (same).

which North Carolina public employers may hire and fire employees. Five federal statutes prohibit discrimination in public and private employment on nine different bases. Four state statutes prohibit discrimination in public and private employment on those same nine bases.

### ***Federal Anti-Discrimination Statutes***

**Title VII of the Civil Rights Act of 1964** prohibits discrimination on the basis of race, color, gender, religion and national origin. Codified at 42 U.S.C. § 2000e-2, it provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Title VII applies to all employers with 15 or more employees.

The categories of race, color, gender, religion, and national origin are referred to as “protected classes.” When an employer fails to hire or discharges someone because of their race, for example, employment lawyers say that the employer is discriminating against them because of their membership in a protected class or in the protected class of African-Americans, Caucasians or Asians, as the case may be.

Passed three years after Title VII and amended several times since, **the Age Discrimination in Employment Act (ADEA)** prohibits employers from refusing to hire, from discharging and from otherwise discriminating against a person in the terms and conditions of employment on the basis of age. The statute currently protects persons 40 years of age and older.<sup>4</sup> Sometimes, more than one applicant may be over 40, and the ADEA does not prohibit an employer from favoring an older individual over a younger individual, even if the younger individual is 40 or over.<sup>5</sup>

**The Americans with Disabilities Act (the ADA)** prohibits employers from discriminating on the basis of disability against a qualified individual with respect to job application procedures, the hiring, advancement and/or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.<sup>6</sup> The ADA may be the most complex of the federal anti-discrimination statutes in that it is the only statute that requires employers to take certain actions in addition to abstaining from other actions: the

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<sup>4</sup>See 29 U.S.C. §§ 623(a), 631(a).

<sup>5</sup>See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 599 -600 (2004). See also 29 CFR § 1625.2.

<sup>6</sup>The employment provisions of the ADA are codified at 42 U.S.C. §§12111-12213. The EEOC's ADA regulations may be found at 29 CFR Part 1630.

ADA requires employers to provide a reasonable accommodation to the known physical or mental limitations of applicants and employees, unless doing so would impose an undue hardship on the employer's operations. The obligation to make reasonable accommodation is a form of non-discrimination.<sup>7</sup> Each situation is based on an individual assessment of the applicant or employee's disability with respect to the position in question.

Title II of the **Genetic Information Nondiscrimination Act of 2008 (GINA)** prohibits employers from discriminating on the basis of genetic information and medical history.<sup>8</sup> An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work. Although the two statutes are related, GINA is distinct from the ADA in that the ADA prohibits discrimination on the basis of manifested conditions that meet the ADA's definition of disability, while GINA prohibits discrimination based on genetic information that may indicate that a condition may manifest itself in the future. GINA applies to employers with 15 or more employees.

The **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** was enacted to prohibit employment discrimination against those who serve in the United States armed forces and to make it easier for people to perform non-career service in the armed forces by minimizing the disruption to their civilian careers.<sup>9</sup> USERRA protects any person serving in the United States Army, Navy, Air Force, Marine Corps, and Coast Guard and their reserve units, as well as persons serving in the Army National Guard and Air National Guard, the commissioned corps of the Public Health Service, and "any other category of persons designated by the President in time of war or national emergency."<sup>10</sup>

### *North Carolina Anti-Discrimination Statutes*

There are several parallel state statutes that prohibit discrimination in employment. The North Carolina Equal Employment Practices Act, found at General Statutes §§ 143-422.1 through 143-422.3, declares that it is the public policy of the state to "protect and safeguard the right and opportunity of all persons to see, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more persons." In 1985, prior to the passage of the federal Americans with Disabilities Act, the North Carolina General Assembly enacted the North Carolina Persons with Disabilities Protection Act.<sup>11</sup> The Persons with Disabilities Protection Act applies to any employer with 15 or more full-time employees. The act makes it a discriminatory

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<sup>7</sup>See 29 CFR Part 1630, App. 1630.9.

<sup>8</sup>GINA is codified at 42 U.S.C. §§ 2000ff – 2000ff-11. The EEOC's GINA regulations are at 29 CFR Part 1635.

<sup>9</sup>USERRA is codified at 39 U.S.C. §§ 4301 – 4333. The U.S. Department of Labor's administrative rules implementing USERRA may be found at 20 C.F.R. §§ 1002.1 – 1002.314.

<sup>10</sup>See 38 U.S.C. §§ 4303 (13), (16).

<sup>11</sup>See G.S. §§ 168A-1 – 168A-11.

practice to “discriminate against a qualified person with a disability on the basis of a disabling condition with respect to compensation or the terms, conditions, or privileges of employment.” Like GINA, North Carolina General Statutes § 95-28.1A prohibits employers from denying employment to or refusing to hire someone on the basis of genetic information that concerns that person or a member of their family. G.S. § 95-28.1A applies to all state agencies and to all local government employers, regardless of size.

North Carolina General Statutes §§ 127B-12 and 127B-14 also prohibit discrimination in employment against military personnel by public entities. Specifically, the General Statutes enjoin an “officer or employee of the State, or of any county, city and county, municipal corporation, school district, water district, or other district” from discriminating against members of the Armed Forces “with respect to their employment, appointment, position or status” and from denying, disqualifying or discharging them “from their employment or position by virtue of their membership or service in the military forces of this State or of the United States.” These provisions do not, however, provide persons serving in the armed forces or reserves any greater rights in employment than does USERRA. Violations of these provisions of the General Statutes constitute Class 2 misdemeanors. In addition, G.S. § 127A-202.1 prohibits discrimination in employment on the basis that an applicant is a member of the North Carolina National Guard or has performed, applies to perform or has an obligation perform service in the National Guard.

While the General Statutes require state agencies and institutions to observe a veteran preference in employment, they do not require local government employers to do so.<sup>12</sup> Local government employers and community colleges are free to adopt such a policy.<sup>13</sup>

**The North Carolina Retaliatory Employment Discrimination Act (REDA)**, G.S. §§ 95-240 – 95-254 is probably the most important of North Carolina’s employment discrimination statutes. REDA essentially combines a number of previously existing statutory provisions in a new article in one place. The act covers all employees, including those of the state, a city, a town, a county, a municipality, a local agency, or another entity of government. It defines retaliatory action broadly to include discharge, suspension, demotion, retaliatory relocation of an employee, or other adverse employment action taken against an employee in the terms, the conditions, the privileges, and the benefits of employment. Thus, an employee need not be fired to assert a cause of action claiming retaliatory discrimination; rather, the employee need show only some action taken that changes some aspect of his or her employment or working conditions. Here are some of the protections provided by REDA:

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<sup>12</sup>See G.S. §§ 126-82 and 128-15.

<sup>13</sup>23 NCAC 02C .0210(a)(30) makes clear that community colleges are not considered state institutions for the purposes of the veterans’ preference and that each community college has the authority to adopt its own policy on veterans.

*Workers' compensation claims.* Under REDA, it is unlawful for an employer to fire (or otherwise to adversely treat) an employee because they file a workers' compensation claim or testify with respect to the claim of another employee.

*Sickle cell.* Under REDA, an employee may not be fired (or otherwise adversely treated) because they possess the sickle cell trait or hemoglobin C trait.

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

*Domestic violence protection.* Under REDA, an employee may not be fired if, with reasonable notice to their employer, they have to take time off work to obtain, through the judicial system, a domestic violation protection order or civil no-contact order.<sup>14</sup>

*How an employee votes.* This provision applies only to units of government. It is found at G.S. 163-271. If a person works for the government, it says, they may not be fired for how they cast their vote.

### ***Some Other Exceptions to Employment at Will Found in the General Statutes***

*Serving on election day.* This prohibition is also not in REDA, but is found at G.S. § 163-41.2 As long as an employee gives proper notice to their employer that they will be absent, the employee may not be fired because they 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 – 126-88, 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 local government employees or to employees in the private sector.

## **COMMON LAW EXCEPTIONS TO EMPLOYMENT AT WILL**

In addition to statutory exceptions, judicially created exceptions to the rule of employment at will restrict an employer's right to fire employees. These common-law exceptions include breach of contract and the tort of wrongful discharge. They arise when the court finds either that the parties themselves, through their actions, have created a contractual exception to the employment-at-will rule or that the employer's motive in dismissing an employee violates some principle of public policy.

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<sup>14</sup>See G.S. § 95-270.

## Employment Contracts

Imagine that you tell the kid down the street that you will give him \$18 to mow your lawn. You tell him that you need it done by Friday evening at the latest, that you do not want him to cut it as close as he cut Mr. Thompson's next door, and that you want him to bag all the clippings and put them in a pile on the curb. He says OK. You and he have entered a contract, because you have satisfied all the basic elements in the creation of a contract.

### *Explicit Employment Agreements*

Whenever an individual begins work for an employer, there is a contract. It may merely be oral—in fact, in the work world generally, most people work without written contracts. It may be rudimentary, with the explicit understanding between the employer and the employee covering only pay, hours, location of work, and general idea of duties, and perhaps not even all of these. In addition to whatever is explicitly understood, the law will add to the agreement the notion of employment at will, unless the parties agree differently.<sup>15</sup> There are two ways the parties might agree differently: by entering an explicit agreement that employment at will does not apply (as by agreeing that the employment is for a particular period of time) or by implicitly agreeing that employment at will does not apply.

Employment contracts, to be enforceable, must meet the basic requirements for the formation of contracts generally. Courts are generally not willing, however, in the case of a breach of contract, to order an employee to fulfill his obligations under the contract—known in the law as ordering specific performance. That seems too much like involuntary servitude.

But dismissal of the employee by the employer before the end of the contract term will usually open the possibility of a lawsuit for breach of contract. If the parties agree to employment for a particular period of time, it is a breach of the contract for the employer to dismiss the employee without cause before the term is up.<sup>16</sup>

**Employment contracts are not routinely used in local government employment.** They are, however, *common in other public employment settings, such as community colleges, universities and public schools.*

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<sup>15</sup>Unless, of course, the law itself explicitly provides otherwise, as many statutes granting employment protections to public employees do.

<sup>16</sup>See *Smith v. North Carolina*, 289 N.C. 303, 222 S.E.2d 412 (1976). See also *Jones v. Carolina Power & Light Co.*, 206 N.C. 862, 175 S.E. 167 (1934) (street car operator induced to come to Asheville to operate street cars on the promise of a job for ten years was entitled to damages for breach of contract when he was dismissed without cause after five).

### ***Implied Employment Agreements***

Formal written contracts are not the only manner in which an employment agreement might be made. Some courts have found that an employment contract has been created by implication, either by representations made at the time of hiring or by statements contained in personnel handbooks.

### ***Wrongful Discharge in Violation of Public Policy***

Courts in a number of states, including North Carolina, have recognized an exception to the employment-at-will rule based on the tort of wrongful discharge. In its narrowest form this theory holds that an employer may not dismiss an employee in violation of a public policy contained in a statute. In its broadest form the theory holds that an employer may not dismiss an employee for reasons of malice, bad faith, or retaliation because to do so contravenes public policy. In between are many possible formulations.

North Carolina courts have taken a narrow view of wrongful discharge in violation of public policy. The approach that our courts take is typified by the decision of the North Carolina Court of Appeals in the case *Sides v. Duke University*. The plaintiff, a nurse, brought a wrongful discharge action against the hospital alleging that she had been dismissed in retaliation for her refusal to commit perjury in a medical malpractice trial. The court agreed that such a dismissal was a wrongful discharge, stating the following:

[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. . . . We hold, therefore, that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case, as plaintiff alleges happened here.<sup>17</sup>

The public policy that the employer violated is that which requires persons under oath in court proceedings to tell the truth.

So it is fair to say that the wrongful discharge in violation of public policy exception to the employment at will rule applies when the employer's motive in dismissing an employee violates some principle of public policy. For example, in *Coman v. Thomas Manufacturing Co.*,<sup>18</sup> the North Carolina Supreme Court heard a claim in which an employee alleged that he had been fired for refusing to drive his truck longer than the time allowed under United States Department of

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<sup>17</sup>See *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, rev. denied, 314 N.C. 331, 333 S.E.2d 490 (1985).

<sup>18</sup>See *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172 (1989).



Transportation regulations and for refusing to falsify the logs required to be maintained by the department to ensure compliance with the law. The court held that the employee had stated a cause of action for wrongful discharge, stating “[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.”<sup>19</sup> Other circumstances under which the courts have recognized the tort of wrongful discharge in violation of public policy include terminations based on a deputy sheriff’s reporting of perjury and falsification of evidence by another deputy,<sup>20</sup> employees’ complaints that their pay was below the state’s minimum wage,<sup>21</sup> truthful testimony at an unemployment compensation hearing,<sup>22</sup> an employee’s refusal to give in to sexual advances of his or her supervisor,<sup>23</sup> an employee’s report of possible patient abuse to the State Bureau of Investigation and State Department of Human Resources,<sup>24</sup> and a nurse’s compliance with the state statutes and administrative code provisions regulating the practice of nursing.<sup>25</sup>

## CONSTITUTIONAL EXCEPTIONS

Private employers, while fully subject to the statutory and common law constraints discussed in this Introduction to Public Employment Law course, are subject to the constitutional constraints that will be discussed in this section. The additional level of control to which governmental employers are subject—the controls derived directly from the Constitution—is a primary reason that public employers face in general a more difficult human resources administration challenge than their private counterparts do.

If you recall from your previous reading on sources of employment law, the United States Constitution and the guarantees of fundamental freedoms found in the Bill of Rights stands at the top of the hierarchy of laws. Where the U.S. Constitution speaks, it is supreme over any other law. No statute passed by a legislature (whether the U.S. Congress or the General Assembly), no regulation adopted by an executive agency (whether it’s a federal agency such as the Equal Employment Opportunity Commission or a state agency), no ruling of a court (whether from a U.S. Court of Appeals or a trial-level state court) can be enforced if it violates a provision of the Constitution.

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<sup>19</sup>See *Coman*, 325 N.C. at 176 (1989) (quoting *Sides*, 74 N.C. App. 331, 342 (1985)).

<sup>20</sup>See *Hill v. Meford*, 357 N.C. 650 (2003).

<sup>21</sup>See *Amos v. Oakdale Knitting Co.*, 331 N.C. 348 (1992).

<sup>22</sup>See *Williams v. Hillhaven Corp.*, 91 N.C. App. 35 (1988).

<sup>23</sup>See *Harrison v. Edison Bros. Apparel Stores*, 924 F.2d 530 (4th Cir. 1991).

<sup>24</sup>See *Lenzer v. Flaherty*, 106 N.C. App. 496 (1992).

<sup>25</sup>See *Deerman v. Beverly Cal. Corp.*, 135 N.C. App. 1 (1999).

Most significantly for purposes of public human resources administration, no action by a governmental employer with respect to its employees can stand if it violates a provision of the Constitution.

### **Public Employers as Part of the Government**

The government is a special employer. With the people it hires, it stands not only in an employer-employee relationship but also in a government-citizen relationship. A chief reason that our Constitution sets out the powers and privileges of government is the need to protect citizens from the overbearing power of the government. Against governmental power, the individual citizen is weak. While the authors of the Bill of Rights could not have foreseen that a fired school custodian might use its protections to get his or her job back, that custodian is a citizen and is entitled to the protections of the Bill of Rights and the entire Constitution.

When the government becomes an employer, it does not stop being the government. It is constrained in its treatment of its employees in the same ways that it is constrained in its treatment of citizens generally. When citizens become public employees, they do not stop being citizens. They relinquish none of their rights, although the nature of the employment relationship may temper the absolute exercise of those rights.

When the government becomes an employer, therefore, it bears burdens that private employers do not bear, related to the First Amendment's guarantee of freedom of speech, the Fourteenth Amendment's guarantee of due process of law in the protection of property and liberty, the Fourteenth Amendment's guarantee of the equal protection of the laws, and the Fourth Amendment's protection against unreasonable searches and seizures. The task for the courts in case after case is to determine the scope of that protection in the context of the workplace.

### **The First Amendment Right to Freedom of Speech**

If a public employee is forced to choose between keeping his or her job and exercising his or her free speech rights, the government has done to the employee indirectly what it may not do directly: denied freedom of speech. It has put the employee to such a hard choice that it has deprived him or her of a constitutionally protected right. The courts, led by the United States Supreme Court, have made it clear that indirect deprivation is just as unconstitutional as direct.<sup>26</sup>

The analysis of whether an employer has violated an employee's First Amendment right to free speech has three parts, which we will discuss in greater detail later this week.

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<sup>26</sup>See *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152 (4th Cir. 1992).

*First, was the employee speaking as part of their job duties?* If so, the speech is simply not protected by the First Amendment. Why is this true? Because the U.S. Supreme Court has said so. Its 2006 decision, *Garcetti v. Ceballos*, 547 U.S. 410, the Court says that if a government employee is speaking as part of her job duties, she is speaking as an *employee* doing the work she is paid to do, and not as a *citizen* exercising constitutionally-protected rights. This restriction makes it much harder for public employees to win free speech cases.

*Second, were did any of the employee’s comments constitute speech on a matter of public concern?* If no, they are not protected. The U.S. Supreme Court has made this clear over the years. Comments by a government employee that are of *personal* concern (“My supervisor’s husband is a real slime ball”), not of interest to the community at large, are simply beyond the protection of the First Amendment, and the public employer may discipline the employee if it chooses. The initial Supreme Court case in this line of thinking was *Connick v. Myers*, 461 U.S. 138 (1983).

*Third, in weighing the balance of interests, whose interests are more important, the employee’s or the employer’s?* The Supreme Court first articulated this balancing requirement in 1968: The challenge, it said, “is to arrive at a balance of the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it provides through its employees.”<sup>27</sup>

## **The First Amendment Right to Freedom of Religion**

Issues related to freedom of religion are of critical importance in areas related to public education and public higher education—the rights of students and employees regarding prayer in schools is widely debated in the courts, in legislatures, and in everyday conversations.

The issue springs up less frequently in the context of employment, but it does arise. In public employment, it arises in the context of the constitution, and in both public and private employment it arises in the context of Title VII of the Civil Rights Act of 1965.

## **The Fourth Amendment Right to Freedom from Unreasonable Searches**

The Fourth Amendment to the United States Constitution provides, in part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated.” In the context of public employment, this

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<sup>27</sup>See *Pickering v. Board of Education*, 391 U.S. 563.

constitutional protection against unreasonable searches comes up in two contexts: drug testing and searches of employees' workstations.

**Workstation Searches.** Striking the balance between the interests of the government as employer and the employee as citizen is also at the heart of cases involving searches of employees' workstations. The United States Supreme Court has held that public employees have a reasonable expectation of privacy in desks and file cabinets from which others are routinely excluded.<sup>28</sup> If the employer wishes to go into the desk or file cabinet to look for evidence of job misconduct<sup>29</sup> or personal misconduct,<sup>30</sup> the employer's reasons must outweigh the employee's legitimate expectation of privacy. In that balance, the courts will consider the seriousness of the suspicions against the employee, evidence in support of those suspicions, and the nature of the place searched. If that place contains materials open to anyone other than the individual employee, the protection of the expectation of privacy is greatly reduced.<sup>31</sup>

**Drug Testing.** The constitutional (and statutory) issues involved in drug testing of applicants and employees follows from the same principles as those involved in the analysis of workplace searches and will be discussed later in the Introduction to Public Employment Law course.

### **The Fourteenth Amendment Property Right Exception to Employment at Will**

Another exception to the employment-at-will rule found only in public-sector employment is the vesting of a "property right" to employment. The Fourteenth Amendment's guarantee that no person may be deprived of property without due process has been construed to extend to a property interest in employment.<sup>32</sup> A property interest arises when a public employee can demonstrate a reasonable expectation of continued employment because the employer has established a binding policy that dismissal will occur only for stated reasons. For example, county employees subject to the State Human Resources Act may be fired only for "just cause" (G.S. 126-35).

The effect of this language that says dismissal is limited to "just cause" or "good cause" is to create a property right in employment that may be taken away from the employee only after the constitutional requirements of substantive and procedural due process have been met. Whether a city or county's personnel policies confer a property right in employment depends not only on the wording of the policies but also on the form in which those policies were adopted by the city council or board of county commissioners. In *Pittman v. Wilson County*,<sup>33</sup> the court held that personnel policies adopted by resolution, not by ordinance, by the Board of County

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<sup>28</sup>See *O'Connor v. Ortega*, 480 U.S. 709 (1987).

<sup>29</sup>As in *O'Connor* and in *Diaz Camacho v. Lopez Rivera*, 699 F. Supp. 1020 (D.P.R. 1988).

<sup>30</sup>As in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987) (pornography stored).

<sup>31</sup>See *Diaz Camacho*, 699 F. Supp. 1020.

<sup>32</sup>See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985).

<sup>33</sup>See *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988).

Commissioners of Wilson County were not sufficient to vest county employees with a property right. Instead the court held that because the restrictions were set forth only in a resolution, not in an ordinance or a statute, they were not binding. The court said:

T]he resolution is a part of a manual that describes itself as merely a “WELCOME TO ALL EMPLOYEES OF WILSON COUNTY.” . . . The language simply is not typical of that used in an ordinance or statute having the effect of law. Moreover, the subject matter of the personnel resolution is administrative in nature. It supplies internal guidelines to County officials for the administration of the County’s employment positions, including the disciplining and discharge of employees.<sup>34</sup>

Having found no basis for the plaintiff’s claim that she was other than an at-will employee, the court concluded that she was not entitled to due process in the termination of her employment.

### **The Fourteenth Amendment Protection of an Employee’s Liberty Interest**

In addition to protecting property, the Fourteenth Amendment also provides that the government may not “deprive any person of . . . liberty . . . without due process of law.” “Liberty,” like “property,” has a broad meaning. It means more than simply staying out of jail.

*Liberty Interest in Engaging in Life’s Ordinary Occupations.* The term “liberty” includes the right “to engage in the common occupations of life, unfettered by unreasonable restrictions” imposed by the government.<sup>35</sup> That right is abridged when the government “unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities.” In one particular case, a veteran dining room manager alleged that her liberty interest was violated when the her supervisor publicly disclosed his belief that the manager was supplying liquor to painters at work in the building for them to drink on the premises. That public statement by the supervisor, made in connection with the dismissal of the manager, would, if left unrefuted, apply a stigma to the manager, making it difficult for her to obtain employment.

The procedural protections of due process apply, a state supreme court said in another case, if the accuracy of the charge is contested, there is some public disclosure of the charge, and it is made in connection with the termination of employment or other adverse employment action.<sup>36</sup> The public nature of the disclosure is crucial. A federal appeals court held that a South

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<sup>34</sup>See *Pittman*, 839 F.2d at 229.

<sup>35</sup>See *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979), (internal quotation marks and citation omitted). See also *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

<sup>36</sup>See *Crump v. Bd. of Educ.*, 326 N.C. 603, 614 (1990). See also *Williams v. Johnston County Bd. of Educ.*, No. 5:95-CV-621-B02 (E.D.N.C., 1996).

Carolina public employee had no liberty interest claim when the only disclosure of adverse performance evaluations came by the employee herself in filing her lawsuit.

**Notice and Hearing.** When a governmental employer damages a person's reputation through accusations that amount to such a stigma, due process requires notice and a hearing.

## The Equal Protection Clause of the United States Constitution

What happens when applicants for public employment feel they are being treated unfairly because the employer has a residency requirement? Or when law enforcement officers are fired because they sport tattoos? Can a county prohibit its employees from cohabiting with convicted felons? Government employers have been challenged over policies like these by applicants and employees through lawsuits alleging that the employers' actions violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>37</sup> The Equal Protection Clause provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' This means that neither the federal government, nor a state or political subdivision of a state, shall intentionally and arbitrarily discriminate against anyone through the terms of a statute or other legislative enactment or through the application of the terms of the statute by an officer or employee of the government.<sup>38</sup> Most laws do, in fact, differentiate in some way between groups of persons. The Equal Protection Clause does not prohibit this. What the Equal Protection Clause requires is that government not treat any differently persons who are in all relevant respects alike and that it refrain for using invidious classification schemes like those based on race or gender.<sup>39</sup> In the hypotheticals set forth at the beginning of the above paragraph, a plaintiff's claims would be that

- the government employer created a classification based on residency that violated the Equal Protection Clause by treating residents of one place as eligible for government employment, while treating residents of other places as ineligible;

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<sup>37</sup>Public employees are entitled to bring lawsuits alleging that the action of a government employer has violated the Equal Protection Clause. See *Booth v. Maryland*, 327 F.3d 377, 382–83 (4th Cir. 2003); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 566 (4th Cir. 2011). For instances of equal protection challenges similar to the above hypotheticals, see *Lewis v. City of Kinston*, 127 N.C.App. 274 (1997)(residency requirement); *Inturri v. City of Hartford, Conn.*, 365 F. Supp. 2d 240 (D. Conn. 2005) *aff'd sub nom. Inturri v. City of Hartford*, 165 F. App'x 66 (2d Cir. 2006) (tattoos); *Via v. Taylor*, 224 F. Supp. 2d 753, 761-62 (D. Del. 2002) (cohabiting with felon).

<sup>38</sup>See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Yan-Min Wang v. UNC-CH Sch. of Med.*, 2011 WL 4552300 (N.C.App. 2011) (finding that plaintiff did not identify any classification upon which she was denied equal protection).

<sup>39</sup>See *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

- the government employer violated the Equal Protection Clause by treating people with tattoos differently than people without them;
- the government employer burdened its employees' fundamental First Amendment right to free association in violation of the Equal Protection Clause by prohibiting them from residing with convicted felons, while other citizens who do not work for the government employer are free to do so.

The reality is that laws do make distinctions among people. The Supreme Court has held that it will uphold the legislative classification so long as it bears a rational relation to some legitimate end, provided that the law making the classification neither burdens a fundamental right, such as voting or marrying, nor targets a protected or "suspect" class such as race or gender.<sup>40</sup> There is no fundamental right to public employment, so applicant and employee equal protection claims must be based on their employer's burdening of some other right (like the right of free association) or on the employer's classifying them in an impermissible manner.<sup>41</sup> The rational relation test or – as it is more commonly referred to -- rational basis test gives great deference "to legislative determinations as to the desirability of particular statutory discriminations."<sup>42</sup> Under rational basis review, is not the court's role to second-guess the government or to determine whether the desired goal is actually served by the challenged statute or regulation. Rather, the court need only determine whether the legislature "rationally might have believed ... that the desired end might be served."<sup>43</sup>

In contrast to rational basis review, which is referred to as regular scrutiny, any classification that does burden a fundamental right or creates a classification along the lines of race or national origin lines (race and national origin being deemed "suspect" classes) will be subject to strict scrutiny, passing constitutional muster only if it is narrowly tailored to serve a compelling state interest.<sup>44</sup> Classifications that are created along gender lines are considered "quasi-suspect" and are subject to intermediate scrutiny by the courts. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.<sup>45</sup>

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<sup>40</sup>See *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

<sup>41</sup>See *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 219 (1984) (holding that there is no fundamental right to government employment for purposes of the Equal Protection Clause); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding that governmental employment is not per se a fundamental right requiring strict scrutiny on an equal protection challenge).

<sup>42</sup>See *McCool v. City of Philadelphia*, 494 F. Supp. 2d at 317, quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>43</sup>See *McCool v. City of Philadelphia*, 494 F. Supp. 2d at 321.

<sup>44</sup>See *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Clark v. Jeter*, 486 U.S. at 461.

<sup>45</sup>See *Clark v. Jeter*, 486 U.S. at 461; *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724, and n. 9 (1982).

## **CONCLUSION**

To state that an employee in North Carolina may be discharged for “good cause, for no cause, or even for cause morally wrong” is not quite correct. Exceptions to the employment at-will rule, created by state and federal law, by cases finding a public policy exception, and by the application of the Constitution to public employment issues, substantially reduce the latitude seemingly granted to government employers in dismissals. Those who have responsibility for discharging employees or advising on employee discipline and discharge must stay up to date on this constantly evolving area of the law.