

HANDLING EMPLOYMENT MATTERS
HIRING AND FIRING AS A PUBLIC ENTITY

**Mississippi Association of Supervisors Mid Winter
Legislative conference**

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GOALS

- Familiarize you with basic terms and concepts.
- Discuss state and federal laws to be aware of.
- Discuss protections from liability.

BASIC EMPLOYMENT CONCEPTS

SYSTEM OF GOVERNMENT BEAT & UNIT

- 82 Counties in Mississippi
 - 38 – Beat System
 - 44 – Unit System

- Impacts personnel decisions.

BEAT & UNIT

- Unit System
 - Must have a County Administrator to deal with all personnel issues.
 - Must adopt formal, written personnel policies.
- Beat System
 - Individual Supervisors may hire, discipline and fire their own employees.
 - Not required to formally adopt written personnel policies.
 - Notice I said there that they are “not required.”
 - I did not say you should not adopt them anyway.

MISS. CODE. ANN. § 19-2-9 **UNIT SYSTEM**

- Personnel system shall be implemented and administered by the county administrator.
- Personnel system may include, but not be limited to, policies which address:
 - hiring and termination of employees;
 - appeal and grievance procedures;
 - leave and holidays;
 - Compensation,
 - job classification,
 - training,
 - performance evaluation and
 - maintenance of records.

MISS. CODE. ANN. § 19-2-9

- The existence and use of the countywide personnel system is one of the items the State Auditor's office will review to determine whether Counties in the Unit System are
 - abiding by the law; and
 - are entitled to state funds.

QUICK ASIDE...

- Some departments within County may adopt their own policies:
 - Sheriff's Department
 - Circuit Clerk
 - Chancery Clerk
 - Coroner
 - Tax collector
- Otherwise, the BOS policies are applicable.

BEAT SYSTEM

- Miss. Code. Ann. § 19-4-1
 - The board of supervisors of any county is authorized, in its discretion, to employ a county administrator.
 - Discretionary
 - Otherwise, Supervisors makes personnel decisions for his district.

AT-WILL EMPLOYMENT

- State Law
 - Mississippi is an at-will employment state.
 - If an employee does not have a written contract for employment for a specific term, that employee can be fired for a good reason, a bad reason, or no reason at all.
 - This does not apply to employees who have a written contract.

AT-WILL EMPLOYMENT

- Written Contract
 - Must follow dictates of contract
- At-Will
 - Free to fire.

AT-WILL EMPLOYMENT

- Written Contract:
 - MSSC has held that a **personnel manual** can amount to a written contract under certain circumstances.
 - [W]hen an employer ***publishes and disseminates to its employees a manual setting forth the proceedings which will be followed*** in the event of an employee's infraction of rules, and there is nothing in the employment contract to the contrary, then the employer will be ***required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual.*** *Gray v. Town of Terry*, 196 So. 3d 211, 218–19 (Miss. Ct.App. 2016).

AT-WILL EMPLOYMENT

- What this means?
 - Your written personnel manual can become a written employment contract which negates the at-will employment doctrine.
- What do you do?
 - You must put a disclaimer in you personnel manual that specifically states the manual is not part of any employment contract and does not negate any employee's at-will employment.

Employment-at-Will Policy and Disclaimer

This handbook is for information and guidance only and contains no guarantees, regardless of the wording which may be used in a particular provision. As such, neither this handbook, nor any other documents or oral statements, constitute an express or implied contract for any purpose, regardless of the wording used therein. Similarly, the County's policies and practices with respect to any matter are not to be considered as creating any contractual obligation on the County's part or as stating in any way that termination will occur only "for cause." Statements of specific grounds for termination set forth in this manual as in any other documents are examples only, not all-inclusive lists, and are not intended to restrict the County's right to terminate employment at-will.

Neither this handbook, nor any other documents or oral statements, constitute an express or implied contract for employment. As such, your employment is "AT-WILL" – for no definite or specified time period, regardless of the date of payment of wages or salary, and both the employee and the employer have the unilateral right to terminate the employment relationship at any time, with or without cause or notice. Furthermore, this handbook does not modify your at-will status and provide for any particular disciplinary process or ladder.

This handbook may be modified at any time by the employer, without notice or a written revision thereof.

EMPLOYEE NAME

SIGNATURE

GIBBS V. PORTERVILLE WATER ASS'N BD. OF DIRECTORS, 203 SO. 3D 661, 666 (MISS. CT. APP. 2016)

- Employment manual **MUST** include a disclaimer regarding “at-will” employment.
- If the employer publishes a disclaimer within the employee manual advising that “nothing in the manual affects the employer’s right to terminate the employee, then the employee’s at-will status remains intact.” *Senseney v. Miss. Power Co.*, 914 So.2d 1225, 1229 (¶ 9) (Miss. Ct.App. 2005)

EXCEPTIONS TO AT-WILL EMPLOYMENT

- State Law
 - This does not mean you can violate federal law.
 - Still cannot fire because of race, sex per Federal law.
 - Exception under State Law:
 - *McArn v. Allied-Bruce Terminix Co., Inc*, 626 So.2d 603 (Miss. 1993).
 - According to *McCarn*, an at-will employee cannot be fired for:
 - Refusing to engage in illegal conduct;
 - Reporting illegal conduct.

PANDORA'S BOX

- *Swindol v. Aurora Flight Scis. Corp.*, 194 So. 3d 847, 848 (Miss. 2016)

***SWINDOL V. AURORA FLIGHT SCIS. CORP., 194 SO.
3D 847, 848 (MISS. 2016)***

- Swindol worked for Aurora Flight Sciences Corporation in Mississippi.
- Parked his car in Aurora's parking lot with a firearm locked inside.
- Aurora's managers learned about the firearm and fired Swindol later the same day for violating a company policy forbidding firearms on company property.
- Swindol sued Aurora in Federal Court and alleged state-law claims for wrongful discharge and defamation.
 - HE WAS AN AT-WILL EMPLOYEE

***SWINDOL V. AURORA FLIGHT SCIS. CORP.*, 194 SO.
3D 847, 848 (MISS. 2016)**

- No doubt Aurora could fire an at-will employee under prior case law.
- BUT—Not so fast.

**SWINDOL V. AURORA FLIGHT SCIS. CORP., 194 SO.
3D 847, 848 (MISS. 2016)**

- Matter worked its way to the MSSC who found:
 - Mississippi Constitution grants citizens the right to keep and bear arms, and it provides that that right “shall not be called in question.” Miss. Const. art. 3, § 12.
 - Section 97–37–1(2) specifically declares that the act of carrying a firearm within a motor vehicle is not a crime under the concealed-carry law.
 - Section 45–9–55 specifically precludes employers from “establish[ing], maintain[ing], or enforc[ing] any policy or rule that has the effect of prohibiting a person from transporting or storing a firearm in a locked vehicle...”

**SWINDOL V. AURORA FLIGHT SCIS.
CORP., 194 SO. 3D 847, 848 (MISS.
2016)**

- MSSC
 - These three provisions establish the “express legislative action” and the “state law prohibitions” envisioned by this Court in *Kelly* and *McArn*.
 - And, as this Court also wrote in *McArn*, “an employee may be discharged at the employer’s will for good reason, bad reason, or no reason at all, *excepting only reasons independently declared legally impermissible.*” *McArn*, 626 So.2d at 606.
 - The Legislature has “independently declared” via Section 45–9–55 that terminating an employee for having a firearm inside his locked vehicle is “legally impermissible.”
 - **Put simply, “an employee is wrongfully discharged if terminated for an act specifically allowed by Mississippi law, the prohibition of which is specifically disallowed by ... statutory law.”**

***SWINDOL V. AURORA FLIGHT SCIS.
CORP., 194 SO. 3D 847, 848 (MISS.
2016)***

- MORE TO FOLLOW

STATE LAW LIABILITY PERSONNEL DECISIONS

- What is your personal exposure?
 - Any claim for money damages under State Law against a County is exclusively governed by the Mississippi Tort Claims Act, Miss. Code § 11-46-1 *et seq.*
 - Does not apply to injunctive relief or breach of express contract.
 - For hundreds of years, political subdivisions had complete immunity *i.e.* sovereign immunity.
 - MTCA was enacted in the 1990s and was a general waiver of sovereign immunity.
 - BUT—it retained a number of restrictions, limitations and immunities.

STATE LAW LIABILITY PERSONNEL DECISIONS

- The MTCA is your best friend—it provides protection.
 - Notice of Claim
 - One year Statute of Limitations
 - Caps for damages
 - No punitive damages available

STATE LAW LIABILITY PERSONNEL DECISIONS

- The MTCA is your best friend—it provides protection.
 - No attorneys fees
 - No pre-judgement interest
 - Bench Trial
 - Immunities
 - No Individual Liability

STATE LAW INDIVIDUAL LIABILITY

- Miss. Code Ann. § 11-46-7
 - no employee shall be held **personally liable** for acts or omissions occurring *within the course and scope of the employee's duties.*
 - There is a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.
- Course and Scope?
 - Must be about employers business.

STATE LAW LIABILITY PERSONNEL DECISIONS

- Many personnel decisions will fall under one or more exemptions from liability (“immunities”) of the MTCA.
 - Most notable is the discretionary function exemption. Miss. Code Ann. 11-46-9(1)(d).
 - (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
 - d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused; Miss. Code. Ann. § 11-46-9.

STATE LAW LIABILITY PERSONNEL DECISIONS

- Summary of MTCA
 - No jury
 - No individual liability
 - No punitives
 - No attorney's fees

RISK MANAGEMENT

- I NEED PAPER
- Be sure to document in writing any disciplinary problems:
 - Who had decision making power?
 - What does handbook say about disciplinary action/termination?
 - Considerations
 - Documented Absenteeism
 - Documented Work rule violations
 - Documented Accidents

FEDERAL LAW

TITLE VII RACE

- Title VII protects in
 - Recruiting, hiring and advancement
 - Compensation
- Prohibits harassment, retaliation and disparate treatment based on race or sex.

TITLE VII RACE

- To demonstrate a straight racial discrimination in employment, Plaintiff must show
 - They are a member of a protected group
 - Were qualified for his position; and
 - Was subjected to an adverse employment action

TITLE VII RACE

- To demonstrate racial harassment, Plaintiff must show harassment
 - so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment.”
 - The totality of the circumstances are considered in this inquiry, including
 - frequency of the discriminatory conduct;
 - its severity;
 - whether it is physically threatening or humiliating, or a mere offensive utterance and
 - whether it unreasonably interferes with an employee's work performance.” Id. at 270-71.

TITLE VII RACE

- Supreme Court has further explained that the harassment must be “severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive.”
- Simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment.”

*MARVIN BROWN v. COCA-COLA BOTTLING COMPANY
UNITED, INC.*, No. CV31900096BAJEWWD, 2019 WL 6702422, at *4
(M.D. La. Dec. 9, 2019)

TITLE VII SEX DISCRIMINATION

- Prohibits employers from discriminating against any individual with respect to “compensation, terms, conditions, or privileges of employment,” because of such individual's sex. 42 U.S.C. § 2000e-2(a)(1).

TITLE VII SEX DISCRIMINATION

- Unwelcome sexual harassment comes in two forms:
 - hostile work environment.
 - quid pro quo
 - *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002).

TITLE VII SEX DISCRIMINATION

- Hostile work environment
 - When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 328 (5th Cir. 2009).

TITLE VII SEX DISCRIMINATION

- To state a claim for quid pro quo harassment, Plaintiff must establish that:
 - (1) he suffered a tangible employment action that
 - (2) resulted from his acceptance or rejection of a supervisor's alleged sexual advances.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 753-54 (1998).

ADEA

- Age Discrimination in Employment Act.
 - Protects workers over 40 from age discrimination.
- To establish discriminatory treatment based on age,
 - Plaintiff is within the protected class;
 - Qualified for the position;
 - Suffered an adverse employment decision; and
 - Was replaced by someone younger or treated less favorably than similarly situated younger employees (*Leal v. McHugh*, 731 F.3d 405, 410–11 (5th Cir. 2013)(citing *Smith v. City of Jackson, Miss.*, 351 F.3d 183, 196 (5th Cir. 2003)).

RISK MANAGEMENT

- You must have an equal employment policy in place.
 - Should designate who a person harassed/discriminated against is to contact.
 - Provide backup in case her supervisor is assaulter.
- Must investigate thoroughly and should include written findings regarding outcome.
- Be cognizant of race, sex and age when taking employment action to ensure consistency.
- Disciplinary action is necessary if true.
- Pre-Employment—be careful what you ask.

SECTION 1983

- Every person who, **under color of any statute**, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or **causes to be subjected, any citizen of the United States** or other person within the jurisdiction thereof to the **deprivation of any rights**, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress
- Provides for liability for Constitutional violations.
 - Primarily see this in employment decisions:
 - Equal protection/discrimination based on race or sex
 - First Amendment
 - Due Process

1983 & MTCA

- Very different than MTCA
 - Individual Liability
 - Punitive Damages available.
 - Jury Trial

FIRST AMENDMENT

- Public employees are citizens who may have concerns as a citizen while also performing public duties.
- Public employees do not “renounce their citizenship” or relinquish their constitutional rights, but statements made pursuant to official duties are simply not protected by the First Amendment. *Lane v. Franks*, 573 U.S. at 237.T

FIRST AMENDMENT

- A public employee asserting a § 1983 claim for First Amendment retaliation must show:
 - (1) he suffered an adverse employment action;
 - (2) he spoke as a citizen on a matter of public concern;
 - (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and
 - (4) the speech precipitated the adverse employment action.

Norman v. City of Big Sandy, No. 6:18-CV-0256-KNM, 2019 WL 4747852, at *4 (E.D. Tex. Sept. 30, 2019)

FIRST AMENDMENT EXAMPLES

- Supporting or refusing to support a candidate.
- Running against you for office.
- Complaining about racial discrimination outside chain of employment.
- Retaliation for speaking out about matters of public concern.

FIRST AMENDMENT

- Limitation
 - Courts have “acknowledged that public employees' exercise of certain First Amendment rights **may legitimately be restrained where it could lead to an inability of elected officials to get their jobs done on behalf of the public.**” *Gentry v. Lowndes County*, 337 F.3d 481, 485 (5th Cir. 2003).

RISK MANAGEMENT

- It should be extremely unusual for you to fire someone for speech.
 - Any question you must err on the side of First Amendment protection.
- Questions to ask:
 - Is this a matter of public concern?
 - Is the speech within chain of command?
 - Does the speech severely disrupt the function of office?

EQUAL PROTECTION

- A § 1983 plaintiff may plead an Equal Protection Clause violation by alleging that a state actor intentionally discriminated against him because of his membership in a protected class. *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999).
- To plead such a claim, plaintiff typically alleges that he received treatment different from that received by ***similarly situated individuals*** and that the unequal treatment stemmed from a discriminatory intent.

Lefebure v. Boeker, 390 F. Supp. 3d 729, 747 (M.D. La. 2019)

EQUAL PROTECTION

- You cannot fire or demote a minority for conduct that non-minority employees have engaged in without repercussions.
- You cannot fire or demote a female for conduct that male's engaged in.

RISK MANAGEMENT

- Consistency
- Consistency
- Consistency