

THE BASICS

MUNICIPAL EMPLOYMENT LAW



City Attorney's
Office

Riley Fletcher Basic Municipal Law Seminar

Maleshia B. McGinnis, City Attorney, North Richland Hills
February 10, 2022

Let's Talk About the Workplace



WHAT ARE WE GOING TO COVER?

- Who Can Cities Hire?
- Employment at Will Doctrine
- Exceptions to Employment at Will
 - Employment Contracts
 - Collective bargaining agreements
 - Personnel policies
- Federal, State & Local Anti-Discrimination Laws
- Prohibited Conduct

WHO CAN CITIES HIRE?



- **No dual office holding** - City officials cannot hold two public offices at the same time (Art XVI, Sect 40, TX Constitution)
- **Nepotism** - Prohibition against hiring relatives of a public official within a certain degree (TX Gov't Code 573.041)
- **No discriminatory intent** (race, religion, age, gender, disability or other protected class)

EMPLOYMENT “AT WILL” DOCTRINE



- The general rule is that all employment in Texas is “at will” and can be terminated by either the employer or the employee at anytime and without cause.
- Texas courts have long held that employees who are not hired for any specific period of time, absent a statute, public policy, or contract that limits the employer’s discretion, may be discharged at any time, for any reason, or for no reason at all. *East Line and R.R.R. Co. v. Scott*, 10 S.W. 99, 102 (Tex. 1888); *Maus v. National Living Centers, Inc.*, 633 S.W.2d 674 (Tex. App. -- Austin 1982, writ ref'd n.r.e.).

EXCEPTIONS TO EMPLOYMENT AT WILL



- **Written Agreements or Policies**
 - Employment Contracts
 - Collective Bargaining Agreements
 - City Charter Provisions
 - Personnel Policies

EXCEPTIONS TO EMPLOYMENT AT WILL



- **Employment Contracts**
 - Personal Services Contracts - Appointed officials (City Manager, City Attorney, City Secretary, etc)
- **Collective Bargaining Agreements**
Police and Fire Departments
 - Chapter 142 TX Local Gov't Code - Meet and Confer
 - Chapter 143 TX Local Gov't Code - Civil Service (cities must adopt chapter 143)
- **City Charter** provides Civil Service Protection
- **Personnel Policies**

EXCEPTIONS TO EMPLOYMENT AT WILL

Laws Against Discrimination

- Discrimination defined:
 - The unjust or unequal treatment of an individual (or group) based on certain protected categories
 - Discrimination laws are based on the basic principle that similarly situated employees should be treated the same



CATEGORIES OF DISCRIMINATION

- Pregnancy
- Race/Color
- Religion
- Retaliation
- Gender (Sex - male or female)
- Sexual Harassment
- Sexual Orientation / Gender Identity

EXCEPTIONS TO EMPLOYMENT AT WILL

- **Federal Laws Against Discrimination**

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Fair Labor Standards Act (FLSA)
- Family and Medical Leave Act (FMLA)
- 42 USC Sec. 1983

- **City Ordinances**



EXCEPTIONS TO EMPLOYMENT AT WILL

State Laws/Regulations Against Discrimination

- Texas Commission On Human Rights Act (TCHRA)
- Texas Workforce Commission
- Texas Workers' Compensation Act
- Texas Whistleblower Act
- Retaliation



STATE LAWS / REGULATIONS

- **Texas Commission on Human Rights Act (TCHRA)**
 - Prohibits discrimination against employees and applicants
- An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age, the employer:
 - (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions or privileges of employment; or
 - (2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.
- TX Labor Code Sec. 21.051

STATE LAWS / REGULATIONS



- **Texas Workforce Commission:**
 - Administers the TCHRA through its Civil Rights Division
 - Has the power to enforce remedies for violations of the TCHRA
 - State equivalent to the federal EEOC
 - Often utilized as the state deferral agency under federal law

STATE LAWS / REGULATIONS



- **Texas Workers' Compensation Act** - An employer is prohibited from discharging or discriminating against an employee because the employee files a workers' comp claim
- A person may not discharge or in any other manner discriminate against an employee because the employee has:
 - (1) filed a workers' compensation claim in good faith
 - (2) hired a lawyer to represent the employee in a claim;
 - (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
 - (4) testified or is about to testify in a proceeding under Subtitle A
- TX Labor Code Sec. 451.001

STATE LAWS / REGULATIONS



- **Texas Whistleblower Act** - Prohibits a city or state from taking adverse employment action against an employee for reporting violation of the law in good faith.
 - A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.
- TX Gov't Code Sec. 554.002

STATE LAWS / REGULATIONS



- **Retaliation** - Retaliation against an employee who opposes a discriminatory practice is prohibited
 - An employer, labor union, or employment agency commits an unlawful employment practice if the employer, labor union, or employment agency retaliates or discriminates against a person who, under this chapter:
 - (1) opposes a discriminatory practice;
 - (2) makes or files a charge;
 - (3) files a complaint; or
 - (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing
- TX Labor Code Sec. 21.055

STATE LAWS / REGULATIONS



- **Texas Military Leave Act**
- It is an unlawful employment practice to terminate or take an otherwise adverse employment action against an employee who is called to military duty
 - An employer may not terminate the employment of an employee who is a member of the state military forces of this state or any other state because the employee is ordered to authorized training or duty by a proper authority. The employee is entitled to return to the same employment held when ordered to training or duty and may not be subjected to loss of time, efficiency rating, vacation time, or any benefit of employment during or because of the absence.
- Employee can file a complaint with the TWC
- TX Gov't Code Sec. 437.204

FEDERAL LAWS



- **Title VII of the Civil Rights Act of 1964**
 - Prohibits discrimination based on race, color, religion, sex or national origin
- **Pregnancy Discrimination Act**
 - Prohibits discrimination on the basis of pregnancy, childbirth, or related medication conditions - 42 USC Sec. 2000e
- **Equal Pay Act**
 - The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal.

FEDERAL LAWS



• Americans With Disabilities Act (ADA)

- Prohibits discrimination against qualified individuals with a disability - protects employees and applicants for employment - 42 USC 126, Sec. 12101 et seq.
- **Who is a Qualified Individual?** - An individual with a disability who can perform the essential functions of the job with or without a reasonable accommodation
- **When does an individual have a disability?**
 - (1) The individual has a physical or mental impairment that substantially limits one or more major life activities (walking , talking, seeing, hearing or learning)
 - (2) The individual has a record of such impairment; or
 - (3) The individual is regarded as having a disability

FEDERAL LAWS



- **Americans With Disabilities Act (ADA) - Reasonable Accommodation**
 - A reasonable accommodation is assistance or changes to a position or workplace that will enable an employee to do his or her job despite having a disability.
 - Employers are required to provide reasonable accommodations to qualified employees with disabilities, unless doing so would pose an undue hardship.
 - Employee must request the accommodation

FEDERAL LAWS



• Age Discrimination in Employment Act (ADEA)

- Prohibits employment discrimination against persons who are 40 years of age or older
- 29 USC Sec. 623

- An employee must establish that:
 - (1) he or she is in the protected age class;
 - (2) his or her job performance was satisfactory;
 - (3) adverse job action was taken against him or her; and
 - (4) similarly situated substantially younger employees were treated more favorably

FEDERAL LAWS



Fair Labor Standards Act (FLSA)

- Establishes minimum wage, overtime pay, record keeping and child labor standards - 29 USC Ch. 8, 201, et seq.
 - Federal minimum wage = \$7.25 p/hr
 - Overtime Pay - non-exempt employees must be paid 1.5 times their regular rate for hours worked over 40 in a work week
 - Public employers can pay “compensatory time off” (“comp time”) in lieu of overtime pay
 - Limits on accrual (480 public safety; 240 for all other employees)

FEDERAL LAWS



Fair Labor Standards Act (FLSA) - Exempt Employees

- Executive, administrative, and professional employees are exempt from both overtime pay and minimum wage if they meet the salary test and the job duties test
- Salaried Employee - Employee receives the same hours week to week regardless of hours worked; earns a minimum of \$684/week or \$35,568 annually
- Job duties - high level, supervisory, managerial, etc
- A public employer can choose to pay exempt employees either overtime pay or comp time

FEDERAL LAWS



Fair Labor Standards Act (FLSA)

- 207(k) exemption for peace officers and fire fighters
 - 29 USC Sec. 207(k)
- Allows public employers to base overtime pay for law enforcement and fire fighters on a work period that may be from 7 consecutive days to 28 consecutive days (as opposed to all hours after 40 in a workweek).
 - This 207(k) exemption may not apply for some cities for non-exempt police officers (See Local Government Code 142.0015(f))
- Fire fighters must meet the definition of employees properly engaged in fire protection activities under 29 USC Sec 203(y).
 - 207(k) exemption does not apply to medics who are not trained as fire fighters

FEDERAL LAWS



- **Family and Medical Leave Act (FMLA)**
- Provides eligible employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires that their group health benefits be maintained during the leave
- 29 USC Chapter 8, Sec. 2601 et seq.
- **Eligible Employees:**
 - Employees are eligible for FMLA leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles of the work site

FEDERAL LAWS



- Family and Medical Leave Act (FMLA) -
- Qualifying Events:
 - Birth and care of the newborn child of an employee;
 - Placement with the employee of a child for adoption or foster care;
 - To care for an immediate family member (i.e., spouse, child, or parent) with a serious health condition;
 - To take medical leave when the employee is unable to work because of a serious health condition; or
 - Qualified military emergencies if employee's spouse, parent or child is a covered military member on active duty

FEDERAL LAWS



- **Family and Medical Leave Act (FMLA)**

- Leave can be used on intermittent on a reduced schedule basis
- Employee must be restored to original or equivalent job with equivalent pay, benefits and terms of employment
- Employer or employee may substitute other accrued leave to cover some or all of the FMLA leave period

FEDERAL LAWS



- 42 USC 1983 - Civil Rights Violations
- The Government as an Employer
 - The Government as an Employer -provides an individual the right to sue government, its employees and others acting "under color of state law" for violations of Constitutional rights
 - (1) First Amendment
 - (2) Fourth Amendment
 - (3) Fifth Amendment

FEDERAL LAWS



- **42 USC 1983 - Civil Rights Violations - The Government as an Employer - First Amendment**
 - **Freedom of Expression**
 - Cities generally cannot take adverse action against an employee simply for a statement an employee made on social media about the workplace. It is however a balancing test. The City is more likely to have discipline upheld if the employee's statement was made during work hours, on a City computer, was offensive, obscene, misleading or untruthful, and not related to working conditions. These instances have to be viewed on a case-by-case basis.
 - **Free exercise of Religion**
 - Cities will generally not restrict personal religious expression by employees in the workplace except where the employee's interest in the expression is outweighed by the government's interest in promoting the efficiency of public service, or where the expression intrudes upon the legitimate rights of other employees.
 - Very high burden on the employer

FEDERAL LAWS



- 42 USC 1983 - Civil Rights Violations - The Government as an Employer - Fourth Amendment
 - Drug testing generally allowed:
 - Pre-employment
 - Post-accident
 - Reasonable suspicion (obvious signs of impairment)
 - Return-to-duty
 - Promotion to certain positions where drugs are involved or employee is required to carry a firearm

FEDERAL LAWS



- **42 USC 1983 - Civil Rights Violations - The Government as an Employer - Fourth Amendment**
 - **Random drug testing only for safety-sensitive positions:**
 - Authorized when there exists potential for concrete harm or an immediate threat to public safety if the employee does his/her job under the influence of drugs
 - Employee has direct involvement in drug interdiction or enforcement of related laws
 - Employee carries a firearm
- National Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 665 (1989)
- Employees with commercial licenses regulated by Department of Transportation (CFR Title 49 Part 40)

FEDERAL LAWS



- 42 USC 1983 - Civil Rights Violations -
- The Government as an Employer - Fifth Amendment
- Garrity Warning
 - Right of a public employee not to be compelled to incriminate themselves by their employer
 - Garrity v. New Jersey, 385 U.S. 493 (1967)
- Practice Tip: Have a standard form for employees to sign acknowledging their Constitutional rights prior to the employee making any statements

“What type of discrimination might this be?”



WHEN CAN DISCRIMINATION OCCUR?



- Application and Recruitment Process
- Job Postings
- Hiring
- Promotions
- Employment References
- Pre-employment Inquiries

WHEN CAN DISCRIMINATION OCCUR?



- Job Referrals
- Pay and Benefits
- Discipline
- Termination
- Reasonable Accommodation of Disability / Religion
- Dress Code

DISCRIMINATION - What Conduct is Prohibited?



Intentional (Disparate Treatment) - Intentionally discriminating against an employee because of a protected class.

- Example - employer gives a test to all female applicants for a job but none of the male applicants
- Defense - religion, sex, national origin or age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the City's business
- Race should never be a BFOQ

DISCRIMINATION - What Conduct is Prohibited?



Unintentional (Disparate Impact)

Policies and practices that apply to everyone, but will have the effect of a disproportionate, adverse impact on a protected class

- Example - Job applicants for a certain job are tested on their reaction times, and only people with a high score are hired. This test could discriminate against older workers, who are less likely to have fast reaction times.
- Defense - Legitimate non-discriminatory business necessity for the different treatment

HARASSMENT IN THE WORKPLACE



- A form of discrimination that involves behavior that is *unwelcome, unwarranted, and unsolicited* where the recipient regards the behavior as offensive
 - Can be (1) Verbal, (2) Physical, or (3) Visual
 - Based on a person's race, color, religion, national origin, age, sex, disability or marital status
 - Must be severe and pervasive enough that a reasonable person would be offended by the conduct

HARASSMENT



- Unreasonably interferes with an individual's work performance
- Must affect a term or condition of the individual's employment
- Focuses on the *impact* of the behavior, not the *intent*

TWO CATEGORIES OF HARASSMENT



- **QUID PRO QUO**
 - Employment benefits are granted or withheld based on submission to or rejection of unwelcome requests or conduct - “one thing in exchange for something else”
- **HOSTILE WORK ENVIRONMENT**
 - Where the working environment is **intimidating, hostile or oppressive** to members of a particular group because of the actions of co-workers, supervisors, vendors or customers

SEXUAL HARASSMENT

#MeToo



SEXUAL HARASSMENT IN AMERICA

6,822 Sexual harassment claims were filed with the EEOC in 2015

17.1% Of charges were filed by males

SEXUAL HARASSMENT CHARGES BY STATE STATES WITH HIGHEST PERCENTAGE OF OVERALL CLAIMS:

TEXAS:	11%
FLORIDA:	7.9%
CALIFORNIA:	6.6%
GEORGIA:	6.1%
ILLINOIS:	5%

SOURCE | U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2015

abc NEWS

AMERICANS SAYING SEXUAL HARASSMENT IS
A MAJOR PROBLEM

1998

50%

2017

69%

GALLUP



42

SEXUAL HARASSMENT - “Quid Pro Quo”



- Unwelcome sexual advances, requests for sexual favors, or verbal or physical acts of a sexual or sex-based nature where:
 - Submission to the conduct is made an explicit or implicit term or condition of employment
 - Submission to or rejection of the conduct is used as the basis for an employment decision; or
 - The conduct unreasonably interferes with an individual’s work performance, or creates an intimidating, hostile, or offensive working environment

SEXUAL HARASSMENT - “Hostile Work Environment”



Totality of the Circumstances: “Frequency & Severity”

- Was the harassment physically threatening, humiliating or merely an offensive utterance?
- Did the conduct interfere with the person’s work performance?
- Was the alleged harasser a supervisor or a co-worker?
- Did others join in perpetrating the harassment?
- Was the harassment directed at more than one individual?

SEXUAL HARASSMENT



- Sexual harassment is not limited to acts by one sex toward another; same-sex sexual harassment is also actionable
- The person complaining of harassment does not have to be the person at whom the offensive conduct is directed
- Anyone can be affected by harassing conduct
- Includes harassing conduct consisting of a sexual nature or innuendo

PENALTIES FOR EMPLOYER FOR DISCRIMINATORY ACTIONS



Cases are generally handled by the EEOC or local agency

- Differ from case to case
- Civil penalties range from \$50,000 up to \$300,000 depending on the number of employees
- Liquidated damages can be recovered in limited cases if the employer's conduct is found to have been malicious or a reckless act of discrimination
- Damage to City's reputation
- Negative impact on future ability to hire quality candidates

PRACTICE TIPS



- Review your Employee Personnel Manual and General Orders regularly (rule of thumb: review after every legislative session)
- Policies and procedures establish patterns and practices, due process, and cover matters that might not be covered under the law
- Treat similarly situated employees the same (i.e. be consistent in the method and amount of discipline for employees in the same or similar positions and situations with similar violations)
- Some laws for private entities are different for public entities

HELPFUL RESOURCES



- TML Employment Law Manual for Texas Cities (Updated Feb 2020)
 - https://www.tml.org/DocumentCenter/View/1510/EMPLOYMENT_LAW_MANUAL_FOR_TEXAS_CITIES-2019_020620-UPDATE
- Texas Workforce Commission
 - <https://www.twc.texas.gov/>
- US Department of Labor
 - <https://www.dol.gov/>
- Equal Employment Opportunity Commission
 - <https://www.eeoc.gov/>
- Texas Municipal Human Resources Association
 - <https://tmhra.org/>

WE ALL DESERVE A HARASSMENT FREE WORKPLACE



*the time is
always right
to do what is
right.*
martin luther king



When in doubt...
call your City Attorney!

QUESTIONS?



Maleshia B. McGinnis
City Attorney

mmcginnis@nrhtx.com