Coates' Canons Blog: “Employment at Will” vs. “Right to Work”

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Article: https://canons.sog.unc.edu/employment-at-will-vs-right-to-work/

This entry was posted on January 08, 2013 and is filed under Discipline & Discharge, Employment, Recruitment & Selection

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 Personnel 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.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=95-98