

# Public Employment Issues in Alabama Courts

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## *At Will Employment v. Due Process for Public Employees*

In Alabama, an employment relationship is ordinarily **at will**, terminable by either party at any time and for any reason.<sup>1</sup>

However, **employment is not deemed to be “at will” if the employee has a property interest in his or her continued employment.** A property interest exists where the employer’s discretion to discharge the employee is somehow fettered.<sup>2</sup>

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<sup>1</sup> *Ex parte Michelin N. Am., Inc.*, 795 So. 2d 674, 677 (Ala. 2001).

<sup>2</sup> *Nicholson v. City of Daphne*, 2009 WL 4667382, at \*5 (S.D. Ala. Nov. 25, 2009) (citing *Green v. City of Hamilton Housing Auth.*, 937 F.2d 1561, 1564 (11th Cir. 1991)).

- Put another way, **an employee has no property interest in at-will employment.**<sup>3</sup>
- This is true whether relying upon the due process guaranteed under the United States Constitution or the same guarantees under the Alabama Constitution of 1901.<sup>4</sup>

The difference between at-will employment and a property interest in employment is crucial when it comes to **termination procedures.**

- Under both the federal and state constitutions, a person may not be deprived of a property interest without due process of law.
- Therefore, **due process** for an employee with such a property interest requires a “**pretermination opportunity to respond** to the employer’s charges” via a hearing, but at times “**adequate post-termination administrative procedures**” can be sufficient.<sup>5</sup>
  - In addition to termination procedures, such a hearing may be required under some circumstances if an employee is transferred or his hours are reduced.<sup>6</sup>
- By contrast, **at-will employment “is not a property interest that requires due process before removal.”**<sup>7</sup> An at-will employee may be terminated or transferred at any time, for any reason.<sup>8</sup> Moreover, an at-will employee’s hours may be reduced without triggering the need for any hearing.<sup>9</sup>

A **property right** will exist if:

- **Law or policy** prohibits the termination of the employee except “**for cause.**”<sup>10</sup>
- An **employment contract** abrogates the at-will nature of employment for that position.<sup>11</sup>
  - An employment contract can create a property interest in employment where (1) there is a **clear and unequivocal** offer of **lifetime or permanent employment or employment of a definite duration**; (2) the hiring agent had **authority** to bind the principal to a permanent employment contract; and (3) the employee provided **substantial consideration** for the contract separate from the services to be rendered.<sup>12</sup>

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<sup>3</sup> *Davis v. Mobile Consortium of CETA*, 857 F.2d 737, 741 (11th Cir. 1988); *Williams v. Walker*, 526 So. 2d 576, 577 (Ala. 1988).

<sup>4</sup> *Ala. State Personnel Bd. v. Garner*, 4 So. 3d 545, 550 n.2 (Ala. Civ. App. 2008) (Alabama due process rights are “coextensive” with federal due process rights).

<sup>5</sup> See *Todd v. Kelley*, 783 So. 2d 31, 44 (Ala. Civ. App. 2000).

<sup>6</sup> See, e.g., *Ledbetter v. Jackson Cnty. Bd. of Educ.*, 508 So. 2d 244, 245-46 (Ala. 1987).

<sup>7</sup> *Williams*, 526 So. 2d at 577.

<sup>8</sup> *Ex parte Michelin*, 795 So. 2d at 677 (citing, e.g., *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987)).

<sup>9</sup> See *Simmons v. Coosa Cnty. Bd. of Educ.*, 47 So. 3d 1231, 1238-39 (Ala. Civ. App. 2009).

<sup>10</sup> *Garner*, 4 So. 3d at 550 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)); see also *Todd*, 783 So. 2d at 44.

<sup>11</sup> See *Simmons*, 47 So. 3d at 1237 (citing *Stallworth v. City of Evergreen*, 680 So. 2d 229, 233 (Ala. 1996)) (recognizing that a public employee’s “contractual or statutory right to continued employment [is] a property interest” and that a contract can create a “legitimate claim of entitlement to continued employment”).

<sup>12</sup> *Ex parte Michelin*, 795 So. 2d at 677-78.

- Even policies in an **employee handbook or manual** can create a property interest in continued employment in some circumstances.<sup>13</sup>

Despite some widespread misconceptions, not all public employees have a property interest in continued employment. In other words, **public employees may be at-will employees**, and they are presumed to be so unless law or policy prohibits their termination except “for cause.”<sup>14</sup>

Public employers can take multiple **steps to ensure that a public employee does not obtain a property interest** in continued employment:

- Confirm that state law and county/municipal policy do not prohibit the termination of the employee except “for cause.”
- Avoid including any language in an employment contract indicating that the employee has been offered lifetime employment or employment of a definite duration.
- Include language in any employee handbook indicating that the handbook is not a contract between the agency and the employee.
  - Sample language: “This Handbook and the policies contained herein do not in any way constitute, and should not be construed as a contract of employment between the employer and the employee, or a promise of employment.”<sup>15</sup>

## ***General Hiring/Firing Authority in Municipalities***

In cities or towns with a mayor-council form of government, Alabama law provides that the city council is responsible for appointing certain **officers**,<sup>16</sup> such as the city clerk and any city manager,<sup>17</sup> and the city council may also grant itself authority to appoint other officers such as the city attorney, police chief, and fire chief.<sup>18</sup> However, the general authority to appoint **officers whose appointment is not otherwise provided for by law** rests with the mayor.<sup>19</sup>

As a general rule, **municipal employees** who are not city officers may be hired or terminated by the mayor himself.<sup>20</sup> State law or the mayor himself may assign final

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<sup>13</sup> See *Hoffman-La Roche, Inc.*, 512 So. 2d at 733-34.

<sup>14</sup> See *Williams*, 526 So. 2d at 577 (quoting *Mountain v. Collins*, 430 So. 2d 430 (Ala. 1983)); *Simmons*, 47 So. 3d at 1238.

<sup>15</sup> See *Hoffman-La Roche*, 512 So. 2d at 734 (quotation omitted).

<sup>16</sup> Officers are those with discretionary policymaking authority who hold a superior position to that of other employees. See Ala. Op. Att’y Gen. No. 2012-039, 2012 WL 775087, at \*2 (Feb. 28, 2012).

<sup>17</sup> See, e.g., Ala. Code §§ 11-43-3, -4, -20.

<sup>18</sup> See Ala. Code § 11-43-4.

<sup>19</sup> See Ala. Code § 11-43-81.

<sup>20</sup> See Ala. Code § 11-43-81; *City of Brighton v. Gibson*, 501 So. 2d 1239, 1241 (Ala. Civ. App. 1987); see also *Scott v. Coachman*, 73 So. 3d 607, 608-10 (Ala. 2011) (concluding that city councils may not take general employee appointment or supervisory power from the mayor).

termination authority to the department head overseeing the employee or to a personnel board.<sup>21</sup>

Note that these are simply the default rules for municipal employees. Different classes of towns and cities may be subject to different statutory schemes.<sup>22</sup> Moreover, some classes of employees are subject to different rules altogether, as the next section demonstrates.

## *Termination of Police Officers*

There is an argument that whether a police officer has a property interest in his job in the State of Alabama, and whether the mayor or another authority may terminate a police officer, depends on the size of the municipality.

The Eleventh Circuit has held that a state statute which merely “describes the process the state will follow in termination proceedings,” “does not give [an employee a] property interest” in continued employment. *Harris v. Birmingham Board of Educ.*, 817 F.2d 1525, 1528 (11th Cir. 1987); see also *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir.1983) (“The grievance procedure does not establish any grounds upon which a dismissal must be based . . . and thus does not create a property interest in plaintiff’s employment.”).

In cities or towns with **fewer than 5,000 people**,<sup>23</sup> the Alabama Legislature arguably has not assigned any property rights in continued employment to police officers, and it has not altered the general termination procedures that apply to other municipal employees. Accordingly, it can be argued that **police officers in municipalities with fewer than 5,000 people are considered to be at-will employees by default and may be terminated by the mayor** (or his delegatee, which may include the city police chief).

By contrast, cities or towns with a **population of 5,000 or more**<sup>24</sup> are required to establish a “**civil service merit system** governing the appointment, **removal, tenure**, and official conduct of law enforcement officers.”<sup>25</sup> Accordingly, in any city with 5,000 or more people, **police officers are considered to be merit employees with a property right in continued employment** after no more than one year,<sup>26</sup> and their termination is subject to due process requirements, including a pre-termination hearing.<sup>27</sup> Further, the final

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<sup>21</sup> See *Todd*, 783 So. 2d at 39-41 (recognizing that, in this case, policymaking authority with respect to termination of police officer rested with police chief, but recognizing that this power may be delegated); see also *Ex parte Dixon*, 841 So. 2d 1273, 1274 (Ala. Civ. App. 2002) (noting that Birmingham city personnel could appeal terminations to county personnel board). There are some decisions suggesting that a city council can assign itself general hiring and firing authority, relying in part on the mayor’s recommendations. See, e.g., *Jackson v. City of Centreville*, 2012 WL 4482393, at \*3-4 (N.D. Ala. Aug. 16, 2012). However, a recent decision from the Alabama Supreme Court has cast doubt on this allocation of power. See *Scott*, 73 So. 3d at 608-10 (observing that the Legislature assigned “general supervision and control” to the mayor and that this authority could not be overridden by the city council).

<sup>22</sup> See, e.g., Ala. Code § 11-43B-1, *et seq.* (applying different rules to Class 4 municipalities).

<sup>23</sup> *Cf.* Ala. Code § 11-43-190(b).

<sup>24</sup> Ala. Code § 11-43-190(b).

<sup>25</sup> Ala. Code § 11-43-182

<sup>26</sup> See Ala. Code § 11-43-188 (providing that a merit system may provide for “a probationary period of employment of up to one year during which time said officer shall not obtain any rights under said system.”)

<sup>27</sup> See *Todd*, 783 So. 2d at 44.

authority for termination decisions in a municipality with at least 5,000 people rests with the civil merit system's personnel board.

Additionally, a city or town with a population under 5,000 may still create a property interest in continued employment through the promulgation of municipal policies to that effect or through certain employment contracts, as discussed above.

In any case—whether or not the officer has a property interest in continued employment—**the termination of a police officer must follow an established procedure** that meets the minimum requirements set forth in Ala. Code § 11-43-230<sup>28</sup>:

- Prior to the suspension or termination of an officer, the municipality must provide for a pre-disciplinary hearing.
- Before the hearing, the person or body with disciplinary or termination authority must provide the officer with written notice of the reasons for the termination or suspension.
- The hearing must be conducted before an impartial officer or body with authority to suspend or terminate the officer. The officer has the right to appear, to have a representative present, and to address the charges against him or her.
- Additionally, the municipality may hold a separate post-disciplinary hearing, at which the officer may present evidence and question witnesses who testified against him or her.
- Other due process which exceeds these requirements may also be allowed by the municipality or (where applicable) its civil service merit system.

### ***Update on Public Employees and First Amendment Rights***

The following two cases illustrate recent developments in the federal courts concerning an employee's First Amendment speech rights and an employer's ability to curtail such speech.

***Moss v. Pembroke Pines***,<sup>29</sup> decided by the Eleventh Circuit in 2015, concerned an assistant fire chief's criticism of his city's attempts to impose pay cuts and seek pension concessions from its firefighters. A year after he voiced these criticisms, the assistant chief's position was eliminated via budget cuts, and he was not allowed to apply for vacancies in the fire department. He sued, alleging that the city's actions constituted retaliation for the exercise of his speech rights under the First Amendment. **The Eleventh Circuit held that the assistant fire chief's speech was not protected by the First Amendment.**

- Under U.S. Supreme Court precedent, the test for determining whether a public employee's speech is protected by the First Amendment rests on two questions:
  1. Is the speech about a **matter of public concern**?
  2. Did the employee **speak as a citizen** or as an employee?
- The court agreed that the assistant fire chief spoke about matters of public concern.

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<sup>28</sup> These minimum requirements do not apply if the city has continuously had a due process procedure in full force and effect since July 14, 2001. See Ala. Code § 11-43-232.

<sup>29</sup> 782 F.3d 631 (11th Cir. 2015).

- However, the court also held that the assistant chief **spoke not as a citizen, but as an employee** who was concerned about how the fire department was to be operated.
- The court recognized that **the city’s interest** in avoiding dissension and discord within the fire department’s ranks, particularly during sensitive and volatile negotiations with union members, **outweighed the assistant chief’s interest** in commenting on matters of public concern.
  - A public employee’s speech interests must be balanced against **the employer’s interest in efficiently providing public services, which is heightened in quasi-military organizations such as police or fire departments.**

In the 2016 United States Supreme Court case of *Heffernan v. City of Patterson, NJ*,<sup>30</sup> the city’s police chief was appointed by the current mayor, who was running for reelection. A police officer was friends with the mayor’s opponent, but he was not involved in the opponent’s campaign. When the officer stopped by the opponent’s campaign office to pick up a yard sign for the officer’s mother, his colleagues saw him speaking to campaign staff and reported this to his supervisors. The supervisors, mistakenly believing that the officer was engaged in the opponent’s campaign, demoted him the following day. The trial court held that the officer could not bring a First Amendment claim since he was not actually exercising protected speech. However, **the Supreme Court held that the supervisor’s mistake did not bar the officer’s First Amendment claim.**

- The **employer’s motive**—not the employee’s actual behavior—governed here.
- Here, the government demoted the officer because it (mistakenly) believed that he had engaged in protected speech.
- Municipal liability in this case tracks with the First Amendment’s language, prevents constitutional harm, and is not likely to impose additional costs on the employer.

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Mr. Canupp’s practice is focused primarily on employment law, governmental liability, and the defense of civil rights claims. He regularly represents government officials and entities in constitutional tort litigation, and he represents employers in lawsuits filed under state and federal anti-discrimination laws—including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA). In addition, Mr. Canupp provides guidance to businesses and governments in complying with the accessibility requirements of the ADA. He helps employers in drafting employment policies and handbooks, in dealing with internal employee issues, and responding to investigations by federal agencies. Mr. Canupp received his B.A., *cum laude*, from The University of Alabama and his J.D., *summa cum laude*, from Syracuse University College of Law. He is AV rated by Martindale-Hubbell, and received the Amicus Service Award from the International Municipal Lawyers Association in 2012.

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<sup>30</sup> 136 S. Ct. 1412 (2016).

**Judge Brian Howell, Presiding Circuit Judge, Seventh Judicial Circuit, Anniston**

Judge Howell graduated from Jacksonville State University in 1989 with a bachelor's degree with special honors in political science. After graduating from JSU, he received his juris doctorate degree from the University of Alabama School of Law. Upon graduation, Judge Howell joined the Office of the District Attorney for Calhoun and Cleburne Counties as an assistant district attorney. During his time there, he served as the head of the Drug and Vice Division of that office and as chief prosecutor for the Seventh Judicial Circuit Drug and Violent Crime Task Force. Judge Howell served as a prosecutor for 14 years before obtaining his present position as a circuit judge for the Seventh Judicial Circuit. He was elected to that position in 2006 and again in 2012. Judge Howell presides over civil and criminal jury trials. He also presides over Veterans, Mental Health and Drug Courts. He has been the presiding circuit judge since 2011. Judge Howell is also an active member of the Alabama Army National Guard. He has served for over 20 years. He presently serves as a judge advocate general with the rank of lieutenant colonel. He has been deployed in support of Operation Enduring Freedom and Operation Iraqi Freedom. He is also an adjunct professor at Jacksonville State University teaching in the Political Science Department. Judge Howell is married to his wife, Rebecca, and has three children.

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Ms. Hyde is a graduate of Auburn University, *summa cum laude*, and a graduate of Vanderbilt University School of Law. After more than 20 years in the practice of law, Robbie opened the firm Alexander Hyde, LLC in 2014. Her client base includes many municipalities and government agencies, large corporations, as well as small businesses and non-profit organizations. She litigates, mediates and investigates cases involving civil rights matters, including employment disputes. Robbie also conducts training on equal employment issues for clients in both the public and private sectors. Robbie's work has resulted in numerous decisions in the United States Supreme Court, Eleventh Circuit Court of Appeals, Alabama federal district courts, the Alabama Supreme Court, and the Alabama Court of Civil Appeals.