



STATE OF KANSAS

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February 2, 1988

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ATTORNEY GENERAL OPINION NO. 88- 11

Steven L. Boyce
Coffey County Attorney
514 Neosho, P.O. Box 452
Burlington, Kansas 66839

Re: Counties and County Officers -- County
Commissioners -- Powers of Board of Commissioners

Synopsis: Kansas recognizes employment at will principles which allow either party to terminate employment, absent a contract that otherwise provides. However, the doctrine of employment at will is not absolute. For instance, Kansas law restricts employment termination in cases involving discrimination, civil service, veterans, or retaliation. Public employees may have additional protections pursuant to employee manuals, established policies or adoption of the Kansas public employer-employee relations act. Absent the applicability of the aforementioned exceptions, or denial of a constitutionally protected right, the Coffey County board of county commissioners, in the interest of protecting county property, has the authority to terminate employment of an at will employee who has been convicted of felony theft. Cited herein: Preamble; K.S.A. 19-101 Fourth and Fifth; 19-212; 19-801 et seq.; 44-1001 et seq.; 68-504; 73-201 et seq.; 75-2925 et seq.; 75-4929f(b); U.S. Const., Amend. XIV § 1; U.S. Const.

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Dear Mr. Boyce:

As Coffey County Counselor you request our opinion on the ability of the board of county commissioners to terminate the employment of an individual based on a conviction of felony theft occurring after his hire date. You inform us that the employee was hired by the county in 1985 and is responsible for road and bridge maintenance. In this capacity he has use of and access to county property and tools. You further inform us that Coffey county has no resolutions or written policies forbidding the hiring of a felon nor advising an employee that conviction could result in termination.

Counties have long been authorized to exercise corporate and administrative powers in order to determine local affairs. See K.S.A. 19-101 Fourth and Fifth. In furtherance of these permissible goals, the board of county commissioners has been given authority to manage the concerns of the county. K.S.A. 19-212. Thus, when not otherwise precluded (see e.g., K.S.A. 19-801 et seq. on county sheriffs), the board of county commissioners has the authority to hire county employees. K.S.A. 68-504; K.S.A. 75-4326(b); 62 C.J.S. Municipal Corporations § 702 (1949).

Kansas follows "at-will employment" rules recognizing that, absent a contract providing otherwise, employment is terminable at the will of either party. Anco Construction Co. v. Freeman, 221 Kan. 557 (1977); Midfelt v. Lair, 221 Kan. 557 (1977); Johnson v. National Beef Packing Co., 220 Kan. 52 (1976); Lorson v. Falcon Coach, Inc., 214 Kan. 670 (1974). Restrictions upon at-will employment terminations include those contained in the Kansas acts against discrimination, K.S.A. 44-1001 et seq., the civil service laws, K.S.A. 75-2925 et seq., and the veterans preference law, K.S.A. 73-201 et seq. Another limitation upon employment termination prohibits retaliatory firing as a result of an employee's exercise of a protected right. Murphy v. City of Topeka, 6 Kan. App. 2d 488 (1981). See also, Brown, Webb, "Employment at Will: Emerging Protections for the Employee," 22 Wash. L.J. 491 (1983).

From the facts provided, the aforementioned protections do not appear to apply in the current situation. However, in making the decision to terminate an employee, the board of county commissioners should consider any possible applicability.

When the employer is a public entity, the employee may have additional protections. The Kansas public employer-employee

relations act, K.S.A. 75-4321 et seq., allows the governing body of any public employer to recognize employee organizations and establishes mediation procedures. We have been informed that Coffey county has elected not to adopt the act. By remaining outside the act, Coffey county may take unilateral action on such matters as employment termination. See, R. Geotz, "The Kansas Public-Employee Relations Law," 28 K.L.R. 243, 248 (1980).

A further consideration is the possible existence of a constitutionally protected right. The Fourteenth Amendment to the United States Constitution prohibits a state from depriving a person of a protected interest without due process of the law. In order to claim such a due process right, the public employee must show that a protected interest exists. It is questionable whether continued employment by a public employer is, in and of itself, a protected interest. In Kansas City, Kansas Frat. v. City of Kansas City, 620 F. Supp. 752 (D. Kan. 1984), the court stated:

"In determining the existence of a protected interest, we must remember that a property interest in employment can be created by ordinance or contract . . . we must determine if under Kansas law, 'there are such rules or mutually explicit understandings that support [the plaintiffs'] claim of entitlement to the benefit. . . ." Id. at 756.

See also, Polson v. Davis, 635 F. Supp. 1130, 1140 (D. Kan. 1986); Owens v. City of Derby, 586 F. Supp. 37, 40 (D. Kan. 1984); Stoldt v. City of Toronto, 234 Kan. 957 (1984).

In order to prove a due process denial, the employee who has been fired must show that a protected interest existed because local or state rule provided for continuing employment or required some procedure prior to termination, or that a mutual written or implied understanding concerning continued employment rose to the level of a contract. From the facts provided, the employee in question has not been terminated, and thus the board of county commissioners may attempt to eliminate any claim of due process violation by carefully following any previously established procedures applicable to employment termination. Any related contractual claim may be defeated by the employee's mutual right to terminate employment at any time.

The preamble to the United States Constitution establishes a protected right in liberty. To establish deprivation of a protected liberty interest ". . . a public employee must (1) show that he was stigmatized in connection with an alteration of [his] legal status as an employee, (2) allege that the stigma arose from substantially false characterizations of the employee or [his] conduct, and (3) demonstrate that the damaging characterizations were made public through channels other than the litigation initiated by the employee."

Polson v. Davis, supra, at 1142; See also, Sipes v. United States, 744 F.2d 1418, 1421 (10th Cir. 1984)

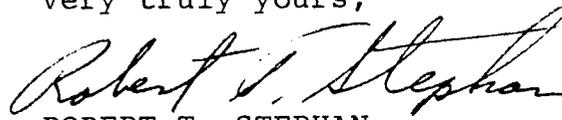
[quoting from "Developments In The Law - Public Employment," 97 Harv. L. Rev. 1161, 1789 (1984)]. The fact that a felony conviction actually occurred makes any claim of a liberty interest deprivation unlikely to succeed because a false characterization has not been made. However, it may be well-advised not to use that conviction as the basis for judgments on general character and to limit the county's involvement in the publication of any characterization of the employee that could affect future employment.

In this situation, the county may have valid concerns because the protection of county property is involved. Through his work for the county, the employee in question has access to and dominion over county property. A felony theft conviction raises serious concerns about the wisdom or propriety in allowing this employee continued access to county property and involves behavior which the board of county commissioners should justifiably consider in deciding to whom to entrust county property.

In summary, Kansas recognizes employment at will principles which allow either party to terminate employment at any time, absent a contractual agreement that provides otherwise. However, Kansas law restricts employment termination in cases such as those involving discrimination, civil service, veterans and retaliation. Public employees may have additional protections pursuant to employee manuals, established employee policies or adoption of the Kansas public employer-employee relations act. Absent the applicability of the aforementioned exceptions or the denial of a constitutionally protected right, the Coffey county board of county commissioners, in the interest of protecting county

property, has the authority to terminate employment of an at will employee who has been convicted of felony theft.

Very truly yours,



ROBERT T. STEPHAN
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