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November 4, 2009

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EMPLOYMENT LAW PRIMER

IDAHO STATE FIRE COMMISSIONERS' ASSOCIATION ANNUAL CONFERENCE 2009 Boise, Idaho

I. EMPLOYMENT AT-WILL

It is generally accepted in Idaho that “unless an employee is hired pursuant to a contract which specifies the duration of the employment, or limits the reasons for which the employee may be discharged, the employment is at the will of either party, and either party may terminate the relationship at any time for any reason (or no reason) without incurring liability.” *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 412 (Idaho 2008) (citing *MacNeil v. Minidoka Mem'l Hosp.*, 108 Idaho 588, 589 (Idaho 1985)). Such an “at-will” employment affords either party the right to terminate the relationship at any time, for any reason, except for discriminatory reasons and reasons that violate the public policy.

II. EMPLOYMENT CONTRACTS

Idaho courts will recognize an employment contract as valid when the contract possesses the necessary elements for such a contract, and when the contract creation is accompanied by a mutual intent of the parties to enter into the employment contract. In *Justad v. Ward*, 34793 (Idaho 6-18-2009), the Idaho Supreme Court lays out the necessary elements for the creation of a valid contract. The *Justad* Court held that formation of a valid contract requires a meeting of the minds, as evidenced by a manifestation of mutual intent to contract. *Id.*, (citing *Inland Title Co. v. Comstock*, [116 Idaho 701](#), [703](#), (1989)). This manifestation takes the form of an offer followed by an acceptance. *Id.* In addition, an option contract will be found where, upon sufficient consideration, an offer may not be revoked for an agreed upon amount of time. See 17A Am. Jur. 2d Contracts § 53 (2d ed. 2008).

A. Employee Handbooks.

In *Parker v. Boise Telco Fed. Credit Union*, 129 Idaho 248, 252 (App. 1996), the Idaho Appellate Court discussed the contractual implications of an employee handbook modification. The *Parker* Court held that “the presumption of an at-will employment relationship can be rebutted when the parties intend that an employee handbook or manual altering that relationship will constitute an element of an employment contract. Whether a particular handbook does so may be a question of fact, unless the handbook “specifically negates any intention on the part of the employer to have it become a part of the employment contract.” *Id.*, at 252 (citing *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 712-13 (1994); *Metcalf v. Intermountain Gas Co.*, [116 Idaho 622](#), [625](#) (1989)). Put another way, unless the employee handbook

specifically negates any intention on the part of the employer to have it become a part of the employment contract, a court may conclude from a review of the employee handbook that a question of fact is created regarding whether the handbook was intended by the parties to impliedly express a term of the employment agreement. *See Metcalf*, at 625. An employee handbook can specifically negate its terms having any bearing on the employment status of any employee by incorporating a disclaimer.

B. Implied-In-fact Contracts.

In addition to express, oral or written termination limitation language contained in a contract, a limitation may be implied if, from all of the circumstances surrounding an employment relationship, a reasonable person can conclude that both parties intended that the employer's right to terminate the employment relationship at will had been limited by the implied-in-fact agreement of the parties. *Sorensen v. Comm. Tek, Inc.*, 118 Idaho 664, 666 (1990). In *Edmondson v. Shearer Lumber Products*, 139 Idaho 172 (2003), the Idaho Supreme Court held that an employee must have more than a subjective belief that an implied-in-fact employment contract modification existed. The *Edmondson* Court found that a plaintiff's subjective understanding is insufficient to establish an express or implied agreement limiting at-will employment, but rather actual intent of *both* parties is necessary. *Id.*, at 179 (*citing Arnold v. Diet Center, Inc.*, [113 Idaho 581](#) (Ct. App. 1987)).

Examples of implied-in-fact contracts usually are found with blanket assurances like, "You can work here as long as I am your manager", or "I guarantee that you will have a job for the next 5 years if your productivity doesn't falter", or "So long as the company is not sold, you will have a job here for life." These types of assurances have the potential to limit the reasons for which an at-will employee can be terminated.

To substantiate such an implied contract alteration, the facts must be such that the intent to alter the contract may be fairly inferred. *Atwood v. Western Const., Inc.*, 129 Idaho 234, 239 (App. 1996). However, past conduct and a past course of dealings with employees is not to be considered in determining whether an implied-in-fact contract was reached. Instead, it is the specific interactions between the parties themselves that must give rise to the creation of an implied-in-fact contract. *Id.*

C. Disclaimers.

If the terms and working conditions set out in an employee handbook are not meant to transform the at-will nature of the employment contract to that of for-cause, a disclaimer must be incorporated into the employee handbook. Without a disclaimer, an Idaho court will examine the contents of the employee handbook, to determine if its contents present a question of fact whether the parties intended the employee handbook to act as an extension or modification of the employment contract, potentially shifting the employment from at-will to for-cause. "The presumption of an at-will employment relationship can be rebutted when the parties intend that an employee handbook or manual will constitute an element of an employment contract. Whether a particular handbook does so may be a question of fact, unless the handbook contains a disclaimer that "specifically negates any intention on the part of the employer to have it become a part of the employment contract."" *Mitchel*, at 716 (*citing Metcalf*, at 625).

Many courts follow a two-prong test to determine whether or not a disclaimer in an employee handbook is effective to rebut alleged guarantees of continued employment. *The first prong is that the disclaimer must be sufficiently prominent.* The New Jersey Court suggested that the disclaimer should be highlighted, underscored, capitalized or presented in any other way to make it likely that it would come to the attention of an employee reviewing it. *The second prong of the test is that the disclaimer must contain language so that a reasonable employee, against whom the disclaimer operates, can understand the contents of the disclaimer.* The disclaimer cannot contain confusing legalese, and the Court included in

its definition of confusing legalese, such terms as “not contractual”, “subject to...interpretation”, and “consideration”.

In *Crea v. FMC Corporation*, 135 Idaho 175 (2000), the Idaho Supreme court held that the following wording constituted a valid disclaimer, therefore precluding an employee from relying on any perceived contract alterations: “NEITHER THIS HANDBOOK NOR ANY OF THE COMPANY'S POLICIES OR BENEFIT PLANS SHOULD BE CONSIDERED A CONTRACT FOR PURPOSES OF EMPLOYMENT OR PAYMENT OF COMPENSATION OR BENEFITS.” *Id.*, at 180 (citing *Raedlein v. Boise Cascade Corp.*, 129 Idaho 627, 630 (1997)). Such a disclaimer expressly prohibits an employee in receipt of the handbook from relying on its contents to create an alternate term of employment, such as shifting the employment status from at-will to for cause.

III. WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY.

A commonly misunderstood tenet of at-will employment is that an employee cannot literally be fired for *any* reason. In Idaho, an at-will employee has an actionable claim against his employer, if the employee was terminated for reasons that offend good morals or any established interests of society. Idaho Courts recognize these protected interests as “public policies”, and courts disallow terminating an at-will employee for any reason that is said to contravene such public policies.

The Idaho Supreme Court in *Jackson v. Minidoka Irrigation District*, 98 Idaho 330, 333 (1977) held that “public policy” is comprised of “the principles under which freedom of contract or private dealing is restricted by law for the good of the community...Whatever contravenes good morals or any established interests of society is against public policy.” *Id.* (citing 72 C.J.S. *Policy* at page 212). The purpose of the public policy exception is to balance the competing interests of society, the employer, and the employee in light of modern business experience. See *Crea v. FMC Corp.*, [135 Idaho 175](#), [178](#) (2000).

A recent Idaho Supreme Court case, *Van v. Portneuf Medical Center*, 34888 (Idaho 7-7-2009) helps explain how Idaho courts determine what constitutes a “public policy” consideration. “The determination of what constitutes public policy sufficient to protect an at-will employee from termination is a question of law. The public policy exception to the employment at-will doctrine has been held to protect employees who refuse to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights and privileges.” *Id.*, at 10 (citing *Malonee v. State*, 139 Idaho 615, 621 (2004)). Once the court defines the public policy, the question of whether the public policy was violated is one for the jury. *Id.*, at 11 (citing *Smith v. Mitton*, [140 Idaho 893](#), [900](#), (2004)).

Although it is impossible to enumerate *all* public policy interests, some employment terminations in Idaho considered in contravention of public policy were laid out specifically in *Jackson*. The *Jackson* Court summarized the types of activities, situations, or interests that are protected by the public policy exception by adopting holdings from courts in other jurisdictions. These public policy interests included protection for employees who refuse to give false testimony, employees who report injuries and file a workman's compensation claim, employees who refuse to date a superior, and those who serve on jury duty against the wishes of the employer. See *Jackson*, at 334. The public policy exception has also been held to protect employees who refused to commit unlawful acts, who perform important public obligations, or who exercise certain legal rights or privileges. See *Sorensen*, at [668](#).

Other Idaho decisions have identified specific activities and interests that fall within the public policy exception. In *Watson v. Idaho Falls Consol. Hospitals, Inc.*, [111 Idaho 44](#), (1986), the Idaho Supreme Court noted that Idaho statutory provisions protect union activities and reminded that other jurisdictions find a violation of public policy when an employee is discharged for union membership. *Id.* Even though the *Watson* Court did not decide the issue, a later Idaho Supreme Court decision noted that

an employee's claim that her termination was in retaliation for her union activities, if true, would constitute a violation of public policy. See *Roberts v. Bd. of Trustees, Pocatello School Dist. No. 25*, [134 Idaho 890](#) (2000). In *Ray v. Nampa School Dist. No. 131*, 120 Idaho 117 (1991), the Idaho Supreme Court held that an employee's claim that he was terminated for reporting safety violations was sufficient to prevent entry of summary judgment. In *Hummer v. Evans*, [129 Idaho 274](#) (1996), the Idaho Supreme Court held that a state employee's termination violated public policy when, in response to a subpoena, but without seeking supervisor approval, the employee provided a statement on department letterhead.

Termination in violation of public policy presents a cause of action that results in contract damages. *Hummer*, at 280. Such recovery can be both for normal contract damages and for future damages, including front pay, although such damages must be proven with reasonable certainty. *O'Dell v. Basabe*, 119 Idaho 796, 812 (1991).

IV. CONSTRUCTIVE DISCHARGE.

Constructive discharge is recognized in two separate instances. The first and most common instance occurs when an employer intentionally creates or allows a hostile, intolerable work environment in order to induce an employee to resign. *Waterman v. Nationwide Mutual Ins. Co.*, 146 Idaho 667 (Idaho, 2009). The second instance occurs when an executive employee is hired for a position-specific contract, and later is demoted to a different job. See *Walker v. City of Cookeville*, M2002-01441-COA-R3-CV (Tenn. App. 8-12-2003).

Following the objective test, Idaho Courts premise the application of the doctrine of constructive discharge based on the answer to this question: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Waterman* (citing *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007)). If an employer has intentionally created or has purposely allowed others to create a work experience that is so intolerable to an employee that he feels he has no choice but to resign, such employee's resignation is recognized in Idaho as a constructive discharge. Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. See *Pennsylvania State Police v. Suders*, 542 U.S. 129, 130 (U.S. 2004). A constructive discharge results in an action for breach of contract damages. See *O'Dell*, at 817.

V. DAMAGES.

The above employment law causes of action result in breach of contract recovery. Idaho courts have consistently ruled that in actions for breach of contract "only such damages will be allowed as fairly compensate the injured party for his loss." *O.A. Olin Co. v. Lambach*, 35 Idaho 767, 772 (1922); see *Nelson v. Hazel*, [91 Idaho 850](#) (1967); *Carey v. Lafferty*, [59 Idaho 578](#) (1938); *Jensen v. Wooters*, [56 Idaho 595](#) (1936). The Idaho Supreme Court stated in *King v. Beatrice Foods Co.*, [89 Idaho 52](#) (1965) that "as a general proposition . . . the purpose or objective of the court is to place the injured party . . . in the position no better and no worse than he would have occupied had the contract been performed." *Id.*, at 58-59.

In *Anderson v. Gailery*, 100 Idaho 796 (1980), the Idaho Supreme Court held that in a breach of contract for personal services claim, the rule that the aggrieved is to be fairly compensated for his loss entitles the wrongfully discharged employee or agent to recover the contract price diminished by the expenses saved and by the amount he received or could have earned from other suitable employment available because of his discharge. See Restatement of Agency (Second) § 455, comment d (1958); 11 Williston on Contracts, § 1358 (3d ed. 1968); 5 Corbin on Contracts, § 1095 (1964); D. Dobbs, Handbook on the Law of Remedies, § 12.25 (1973). The discharged employee has a duty to mitigate his losses. This

rule applies whether the employee's agreed compensation is a fixed sum or contingent on results accomplished, 11 Williston, *supra* at 301. Cf. *Buckalew v. City of Grangeville*, [100 Idaho 460](#) (1979) (a public officer wrongfully discharged has no duty to mitigate damages).

VI. EMPLOYMENT DISCRIMINATION.

Not all types of discrimination are illegal. However, in Idaho, many types of discrimination are expressly prohibited by way of state and federal regulations. Title VII of the Civil Rights Act of 1964 and the Idaho Human Rights Act (IHRA) prohibit any employment action that discriminates based on an individual's race, color, religion, sex, or national origin. Title VII and the IHRA also prohibit any conduct that results in classification of any employee on the basis of his race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits any age discrimination in the workplace against any individual 40 years old or over. Title I and Title V of the Americans with Disabilities Act of 1990 (ADA) prohibits employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments. Additionally, the Equal Pay Act of 1963 (EPA) protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.

In sum, the following forms of employment discrimination are expressly prohibited in the workplace in Idaho by state or federal regulation:

- [Age Discrimination](#)
- [Disability Discrimination](#)
- [Equal Pay and Compensation Discrimination](#)
- [National Origin Discrimination](#)
- [Pregnancy Discrimination](#)
- [Race-Based Discrimination](#)
- [Religious Discrimination](#)
- [Retaliation](#)
- [Sex-Based Discrimination](#)
- [Sexual Harassment](#)

Idaho case law has recognized that discrimination based on violations of Title VII can be established in one of two different ways. First, an employee can make a showing that the employer's actions constituted (1) disparate treatment, or, secondly, an employee can make a showing that the employer's actions had a (2) disparate impact on the employee. "Without proving an employer's intent to discriminate, a discrimination plaintiff may make a claim for relief under either the "disparate treatment" theory of *McDonnell Douglas Corp. v. Green*, [411 U.S. 792](#) (1973), or the "disparate impact" theory of *Griggs v. Duke Power Co.*, [401 U.S. 424](#) (1971)." *Bowles v. Keating*, 100 Idaho 808, 812 (1980).

To establish a prima facie case of discrimination under the "disparate treatment" theory, a plaintiff must show (1) that she belongs to a protected class, (2) that she applied and was qualified for a job for which the employer was seeking applicants, (3) that despite her qualifications, she was rejected, and (4) that following her rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications. At this point, the burden shifts to the

employer to articulate some legitimate nondiscriminatory reason for the employee's rejection. *See McDonnell Douglas Corp., supra.*

To establish a prima facie case of illegal discrimination under the "disparate impact" theory, a plaintiff need only prove that an employer's policies and practices, while neutral on their face, nevertheless discriminate in effect against a particular group. Thereafter, an employer must show a business necessity for the use of the policies or practices challenged. *See Griggs, supra.*

VII. VOLUNTEERS.

Generally speaking, volunteers do not possess property interests in their positions, and therefore do not have a constitutional right to due process upon their termination. The Third Circuit has expressly held that a volunteer firefighter did not have a due process right to a hearing on his termination. *See Versarge v. Township of Clinton*, 984 F.2d 1359, 1370 (3d. Cir. 1993); *see also Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997) (holding that a volunteer could not state a due process claim because he lacked a property or liberty interest in his position as a volunteer.) Pragmatically, to have a protected property interest in a public employment position, one must have more than an abstract need or desire for it; rather, one must possess an entitlement that stems from an independent source such as state law. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-78 (1972). However, case law has evolved towards providing volunteers with more rights akin to those of employees.

A. Volunteers' First Amendment Rights.

In *Hyland*, the 9th Circuit held that a terminated volunteer could bring a First Amendment Violation claim because he was terminated for protected speech. While the volunteer in *Hyland* "did not have a due process right to continue in his volunteer position, he did have a First Amendment right not to be retaliated against for his protected speech...As we held above, dismissal from a volunteer position can constitute unconstitutional retaliation." *Hyland*, at 412. Ruling similarly, the Second Circuit in *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) held that the First Amendment applied when an individual lost a volunteer firefighter position for complaining about the morale and training of the department. It is increasingly the position of courts that "the opportunity to serve as a volunteer constitutes the type of governmental benefit the deprivation of which can trigger First Amendment scrutiny". *Hyland*, at 1135.

B. Volunteers' Title VII Rights.

Title VII suits are employment discrimination claims that can only be brought by "employees". However, the law has evolved to find volunteers possessing such standing if certain elements are met. Title VII prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin. An essential element in establishing standing for a Title VII claim is that the covered person must have been "hired". In order for a person to establish that he was hired, a purported employee must establish the existence of remuneration in some form, in exchange for work. *See U.S. v. City of New York*, 359 F.3d 83, 92 (2d Circuit, 2004).

In evaluating Title VII employment actions, the Second Circuit has held that an unpaid intern could not sue for sexual harassment under title VII because she did not meet the definition of employee for common law agency. *See O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997). In addition, the Supreme Court of Nebraska held that two volunteer firefighters were not employees, and therefore could not allege their cause of action for Title VII sex discrimination. *City of Fort Calhoun v. Collins*, 243 Neb. 528 (Nebraska, 1993).

However, in *Ambruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983), the 6th Circuit touched on the key distinguishing factor that can re-characterize the status of a volunteer to an employee for purposes of Title VII actions: **remuneration**. “In determining whether an individual is an employee for Title VII purposes, one must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate.” *Id.*, at 1340. The 6th Circuit’s holding is illustrative that courts are becoming increasingly willing to provide volunteers standing as employees if the reality is that the volunteer is compensated like an employee.

Where there is no remuneration or compensation paid to a “volunteer”, such volunteer lacks standing to establish a Title VII claim. “Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because although compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition...it is an essential condition to the existence of an employer-employee relationship.” *O’Connor*, at 115-16. However, this is rarely the case for volunteer firefighters in Idaho, as most volunteers do receive compensation in some form.

There is no precise formula or bright-line rule to determine what amount of compensation or remuneration is adequate to grant a volunteer standing to assert a Title VII claim. To muddy these waters even further, courts do not strictly evaluate remuneration based on direct compensation or payment. Even substantial *indirect* compensation can satisfy the threshold requirement of remuneration for purposes of employee status under title VII. If not direct salary, substantial benefits which are not merely incidental to the activity performed, such as health insurance, vacation or sick pay, are indications of employment status. *See U.S. v. City of New York*, at 92. The Second Circuit in *York v. Ass’n of Bar of City of New York*, 286 F.3d 122 (2nd Cir. 2002) held that the following factors are indicative of sufficient “financial benefit”: salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing. *See id.*, at 126. “We have further held that benefits must meet a minimum level of “significance,” or substantiality, in order to find an employment relationship in the absence of more traditional compensation.” *Id.*

In *Pietras v. Board of Fire Com'rs of Farmington* [180 F.3d 468](#) (2d Cir. 1999), the Second Circuit found benefits sufficient to satisfy the “remuneration test” in the form of “(1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits.” *Pietras*, at 471. Based on this same subjective formula, the volunteer firefighters in *Pietras* were entitled to employee status, in part, based on their receipt of significant benefits, such as disability pensions, survivors' benefits, group life insurance, and scholarships for dependent children of deceased firefighters. *See Pietras*, at 471. The determination of whether or not a volunteer possesses standing to assert a Title VII claim is in the exclusive discretion of the court reviewing the claim. Without a precise formula or an illustrative bright-line rule, it is almost impossible to predict whether a court will grant a volunteer Title VII standing.

Even though fire departments may have many “volunteers”, such volunteers are seldom without any rights. In most circumstances, these volunteers are granted a wide array of compensation, direct or indirect, similar to what an actual “employee” would receive. The development in case law has evolved in such a way that courts are more inclined to recognize standing for volunteers to assert certain First Amendment rights and Title VII claims. Bearing this in mind, it is resoundingly the best practice for Fire Commissioners and Fire Chiefs to treat their volunteers as employees for purposes of administering their district’s Title VII policies and procedures.