GUIDE TO EFFECTIVE HIRING, RETENTION, MOTIVATION DISCIPLINE AND TERMINATION OF EMPLOYEES

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PART A. GENERAL PRINCIPLES

I. STARTING THE RELATIONSHIP PROPERLY

If and when it becomes necessary to discipline an employee, starting the employment relationship properly can be a distinct advantage.

A. The Hiring Process:

- Ensure that there are clear guidelines on who can:
    - Decide if there is an opening for a particular
    - Authorize filling an opening and determination funding is available
- Verify that there is an updated job description[1] that adequately outlines:
    - The essential job functions
    - Any bona fide job qualifications
    - How the position is classified- exempt or non-exempt[2]
    - Physical and mental demands of the position
        - Lifting, pushing, pulling weight requirements
        - Ability to work out doors

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1 Under the Americans with Disabilities Act, 42 U.S.C. §12101 *et.seq.*, courts will give deference to what the employer deems as the "essential" functions/job duties of the position if they are outlined in writing in advance of any work place issue. In addition, updated and accurate job descriptions are crucial in making a determination of whether a position is properly classified as exempt or non-exempt under the "duties" portion of the test under the Fair Labor Standards Act, 29 U.S.C. §201 *et.seq.*

2 The United States Department of Labor has proposed significant changes to the "wage" test to qualify for a white collar exemption. The proposal drastically increases the minimum weekly wage and also proposes a bench mark for how the minimum wage will increase on a regular basis.

- Bending, stooping, lifting over head and the like

- An updated legal job application form clearing placing the applicant on notice that falsifying any portion of the application will be a basis for denial of employment or discipline up to and including termination of employment if discovered after employment begins. It should also include a waiver/authorization provisions whereby the applicant waives any privacy rights and allows former employers to provide information regarding the person's employment history.

    - When reviewing the current application ask a simple question: *Do I need the information – and why*

    - One size does not fit all- sometimes it is appropriate to tailor an application to a particular job- police officer recruitment being a prime example

    - Have legal staff review the application

    - Make sure the application does not seek prohibited information: health questions, age (unless minimum age required by law), marital status, religion, child care/number of children etc.

    - The Americans with Disability Act (ADA) makes it VERY clear that inquires about a disability are improper. However, you make ask:

        Are you, with or without an accommodation, able to perform the essential functions of the job listed in the attached application

        This ties into item two– updated and accurate job descriptions

- Document recruitment efforts:

    - Review how the city recruits- is it receiving the best applicant pool and, if not, why not

    - Active versus passive recruitment efforts

    - Does the application pool reflect the demographics of the work force in the community– if not- why not

    - Consider re-opening the application process on a case by case basis if the applications received are of marginal quality

- Screening the applications
    - Make sure there are procedures in place to ensure fairness in the initial review process
    - Documents reasons for rejecting an applicant
    - QUESTION: Should you interview someone even though you believe there is little or no chance the person will be hired?
        - Friend of a friend
        - Favor for a current employee
        - Favor for an elected official
    - Keep applications for a least one year-BUT do not promise unsuccessful applicants that they will be considered for the next opening without reapplying
- The Interview Process
    - Have a minimum two persons present- at least one who has been trained in employment issues
    - Have H.R. review the questions that will be asked
        - Make sure all applicants for the same position are asked the same questions- follow ups may differ
        - If score sheets are used
            - Properly tabulate the results
            - Keep the results for at least two years
            - Make sure no improper comments are written on the score sheets
    - ***You cannot ask in person that which you could not ask on the job application form***

    NOTE: Under Oklahoma law, you cannot mandate that an applicant provide his/her password to social media sites as a condition for being considered for a position
- Conducting a background investigation that is relevant to the position sought

- Criminal back ground check
- NOTE: EEOC has taken the position that an employer cannot automatically disqualify a person merely due to a criminal record unless there is a specific need for a particular position
- Credit Checks- be careful not to run afoul of the Fair Credit Reporting Act
- Workers' Compensation history- be VERY CAREFUL of the ADA- this is not a good idea
- Law suit history

B. The New Employee;

- Post Offer-Pre-Employment Issues:
  - Physicals- and for what positions
  - Drug and Alcohol screening
    - The City MUST have an updated drug and alcohol testing policy[3]– if it has not been updated in the last four years- it is out of date. Without a written and distributed policy- NO testing may be conducted
- Offers of Employment
  - Make sure the terms are clear as to:
    - Job duties
    - Hours and days of work
    - Wages and benefits

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[3] The United States Supreme Court has held that drug testing compelled by a public entity constitutes a search subject to the requirements of the Fourth Amendment of the United States Constitution. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Skinner v. Railroad Labor Executives Association*, 489 U.S. 602, 627 (1989); *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), See also *19 Solid Waste Department Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998).

- Nature of the relationship- at will or something else\

- MAKE SURE that the newly hired employee receives:
  - An updated Handbook/Manual and updates- and signs for the same
    - It must contain a professional conduct/anti harassment policy
    - Drug and Alcohol Testing Policy-IF the employer wants to be able to conduct testing
    - A Family and Medical Leave Act policy for any city over 50 employees
  - Any departmental policies and procedures- and signs for the same
  - A copy of the job description- and signs for the same
  - Benefits booklets and COBRA notice and signs for the same
  - I-9 form and Oklahoma new employee hire form
  - Any special policies on proprietary information
  - Policies on use of City equipment, materials and supplied
- Orientation for New Employees- Just don't drop them off at the site
  - Introduce the new person to co-workers
  - Introduce to the H.R. and Benefits staff
  - Safety Coordinator

  NOTE: A happy employee is a good and productive employee-make the person feel welcomed and wanted

II. KEEPING THE RELATIONSHIP HEALTHY

A. Personnel Files:

It is an unavoidable fact that, at some point, disciplinary action may be contemplated. However, prior to the issue of discipline ever being raised, certain procedures should be in place

including:

- A comprehensive Personnel File
    - There should be only **ONE** file official personnel file per person
    - Establish a clear policy on
        - What can be removed from a file
        - Who can authorize removal
        - When can items be removed from the file

B. Job Evaluations: To Conduct or Not to Conduct- That is the Question:

- Goals of an Evaluation
    - Praise the Employee
    - Point out areas needing improvement
    - Outline a short and long term plan for the employee's growth
    - COMMUNICATE
- MY REQUEST: If you are not going to do honest and fair evaluations- please do not do them at all
    - Employees should be getting feed back through the evaluation period
    - Supervisors need to be TRAINED on how to conduct evaluations and why evaluations are being done
        - Are they used for promotions
        - Are they used for merit increases
        - Are they used for anything- if not- WHY NOT
    - Nothing should come as a surprise on the evaluation (absent a very recent event)
    - Scores should match written comments
    - H.R. should be involved in the process as part of checks and balances

- Have the employee review and sign the evaluation and allow the employee to provide rebuttal

- Plans of Improvement
    - They can be effective BUT ONLY IF
        - They are well thought out
        - They are monitored during the plan period
        - Both the employer and the employee buys into the Plan
    - FOLLOW UP ON THE PLAN
        - docket dates
        - Meet with the employee during the course of the Plan
        - Follow up on training goals

C. **Promotional Opportunities:**

- Identify Opportunities
    - Posting positions
    - Any preference to current employees
    - Ensure that minimum qualifications are defined
    - Document the selection process
        - testing
        - interviews
        - scoring
        - whether there is a promotional list and duration
        - Discretion: Must the management pick the top scorer?
    - DO NOT
        - Allow friendships or animosity to cloud judgement
        - Do not promise a position to anyone or imply that a person has the inside track

III. THE START OF THE DISCIPLINE PROCESS

No matter how careful an employer is in the vetting of new employees and the management of current employees, the need to take discipline will occur. Before discipline is implemented:

- Review any prior discipline imposed and the reasons for the same
- Take steps to understand the person's actual job duties- job description
- Determine any membership in a protected class- state[4] and federal
- Understand the chain of command- any personal tensions/personal relationships
- ESSENTIAL: review any requirements in the Handbook, Manual or CBA addressing how internal investigations are to be conducted- who can conduct the same and any time restrictions on when any investigation must be completed

- Determine whether the issue is one of ***performance*** versus ***possible acts of misconduct- the issue will dictate the procedure to be used***
    - If performance issues
        - Has the person been properly trained for the job
        - Has the person undergone remedial training
        - Has the person been advised of performance deficiencies and given an adequate time to correct the same

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[4] It is important to bear in mind that the Oklahoma Anti-Discrimination in Employment Act, as amended, 25 O.S. §1101 *et.seq.*, changed the definition of "employer" under the Act. An employer now is any entity, institution or organization that pays ***one or more*** individuals a salary or wage. See 25 O.S. §1301. Therefore, an employee may be in a protected class under Oklahoma law even though the city or town does not fit the definition of an "employer" under Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act.

IV. CONDUCTING AN INVESTIGATION

Any final act of discipline should be based on facts, not rumors, personal grudges, favoritism or a fleeting temper tantrum. This requires some form of an investigation to ensure that the employer has all pertinent facts needed to make a sound decision.

- Any complaints, grievances, or even "rumors" of possible impropriety should not be ignored- even if a formal complaint has not been received
- Selection of an investigator based on the type of anticipated investigation,
    - Is the potential for criminal charges versus whether it will be for a possible internal disciplinary matter only
    - Is the choice of investigator dictated by the terms of a CBA or policy manual stipulating who ***must*** conduct the investigation
    - Make sure the investigator is TRAINED to do the type of investigation that is needed
    - Determine early on whether the allegations made, if true could give rise to potential criminal charges

NOTE: Administrative versus Criminal Investigations

If criminal charges are anticipated or possible, more formal steps need to be taken before workplace searches are conducted. Similarly, if the alleged "bad actor" is going to be interviewed during the investigation, and the information is going to be turned over to the District Attorney, the individual is entitled to be notified of his/her *Miranda* rights against self incrimination.

If there is a potential for criminal charges, consideration should be given to turning the investigation over to law enforcement agencies, such as the Police Department, the Oklahoma State Bureau of Investigation (OSBI), an investigator with the District Attorney's Officer and, in certain circumstances, the FBI or the U.S. Postal Service.

In making the determination of which law enforcement agency to utilize, the employer should be sensitive to maintaining neutrality. In smaller cities, the police department may be reluctant to become involved in investigating employees of another department due to the fact that they have to work with these people on a day-to-day basis. Further, the officers may not have had training in the investigation of white collar crimes. In contrast, in larger cities, the police departments generally have public integrity units where the officers are specifically trained to investigate purported acts of misconduct or malfeasance by city employees.

Although the OSBI has trained agents, its investigative reports ***may only be used*** to pursue criminal charges. State law prohibits a public employer from using an OSBI report in any internal administrative/disciplinary proceeding. Therefore, if the OSBI is called in, it will still be necessary for the employer to conduct a ***separate*** internal administrative inquiry. Federal law enforcement agencies may become involved when the allegations under investigation involve, for example, federal funds, violations of civil federal rights, interstate commerce, the use of the mails or wire fraud.

When the investigation conducted will be used for internal purposes only, the employer must decide whether to perform the investigation in-house or whether to hire an outside consultant such as a law firm, labor consultant, employment specialist or private investigator. There is some merit to an outside investigator, when allowed, because it reduces the risk of the employee claiming bias.[5] If a law firm is used, it is essential that there be a wall between the investigation and its findings and

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[5] The Federal Trade Commission has held that an outside agency or organization that regularly conducts workplace investigations for a fee constitutes a "consumer reporting agency" and must comply with the Fair Credit Reporting Act's disclosures and consent requirements. 15 U.S.C. §1681 *et.seq.*

any legal advice rendered as a result of the findings.

If the decision is made to investigate in-house, careful thought should be given to who should be the investigator. The investigator should

- not be somebody in the chain of command of the suspected wrongdoer
- should not have any vested personal interest in the matter
- should have a sense of discretion and an even temper
- should not have a personal/professional relationship with the accused

During the process, the investigator will need to interview the target of the investigation. If an employee is covered by a CBA, he/she should be afforded rights under National Labor Relations Board v. Weingarten, 420 U.S. 251 (1975), to request a union representative to be present during any questioning where there is reason to believe that the investigation might result in disciplinary action. Technically, the employer does not have to affirmatively offer the employee a right to representation. However, it is my strong advice that the employer does so and does so in writing.

Further, an employee covered by a CBA should be given notice, in writing, of his/her rights in a constitutional investigation under Garrity v. New Jersey, 385 U.S. 493 (1967). Pursuant to this doctrine, the employee can be ***compelled*** to answer questions during the investigation because the employer has agreed that the information gathered during the investigation may only be used for administrative purposes and may not be used in any criminal proceeding or turned over to any law enforcement agency.

Summary of Steps at the Beginning:

- Review any CBA and all handbooks, manuals and work rules to see if there is any set procedure addressing internal investigations

- Make an initial assessment of whether there is a potential for criminal charges
- Evaluate the qualifications of the investigator
- Interview the selected investigator to ensure that there is no potential for bias
- Review any written complaints and the identification of possible witnesses
- Gather relevant documentation to assist in framing the issues to be investigated

V. EVALUATE THE EMPLOYEE'S LEGAL STATUS

A determination should be made as to the status of the employee, i.e. is the individual an at-will employee or does he/she have some vested property right in employment and/or does the employee enjoy any legally protected status under an applicable federal or state statute.

A. Employment-At-Will Doctrine

Oklahoma courts traditionally have adhered to the concept that an employment relationship of no specific duration is deemed to constitute employment terminable at-will by either party, without incurring liability for breach of contract, i.e. an employment-at-will relationship. Singh v. Cities Service Oil Co., 1976 OK 123, 554 P.2d 1367. This doctrine may be modified based on, among other things:

- a charter provision-such as "merit and fitness" versus "good of the service"
- by written agreements
- provisions in a Personnel Manual/Handbook
- statutory protections- such as 11 O.S. §50-123
- provisions in a CBA- such as "cause" or "good cause shown"

In Burk v. K-Mart Corp., 1989 OK 22, 770 P.2d 24, the Oklahoma Supreme Court reiterated

the general rule that an employee may be terminated at will. However, it created a "public policy exception" to the general at-will employment rule.

> We thus follow the modern trend and adopt today the public policy exception to the at-will termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law. We recognize this new cause of action in tort. ... An employer's termination of an at-will employee in contravention of a clear mandate of public policy is a tortious breach of the contractual obligations. (Emphasis added). Id. at ¶¶6 and 17.

The determination of whether a "public policy" exists is a question for the courts to decide. Pearson v. Hope Lumber & Supply Co., Inc., 1991 OK 112, 820 P.2d 443; McCrady v. Department of Public Safety, 2005 OK 67, ¶9, 122 P.3d 473.

A viable Burk claim must allege:

> (1) an actual or constructive discharge;
> (2) of an at-will employee;
> (3) in significant part for a reason that violates an Oklahoma public policy goal;
> (4) that is found in Oklahoma's constitutional, statutory or decisional law or in a federal constitutional provision that prescribes a norm of conduct for Oklahoma;
> (5) no statutory remedy exists that is adequate to protect the Oklahoma policy goal.

Confusion on status based *Burk* claims arose from apparently conflicting decisions by the Oklahoma Supreme Court. However, the confusions has been negated by the amendments to the Oklahoma Anti-Discrimination in Employment Act. In Section 1350(A) of Title 25 of the Act provides that " a cause of action for employment based discrimination is hereby created and ***any common law remedies are hereby abolished."*** Thus, a *Burk* cause of action for employment discrimination under Oklahoma law is abolished and the sole remedy is under the Act. The provisions apply to any employer who pays "one or more individuals a salary or wages...25 O.S. §1301.

In order to bring a claim under the Act, the employee must file a charge within 180 days of the last act of discrimination. 25 O.S. §1350. Subsection G of Section 1350 limits the type of remedies allowed to include an injunction, an order of reinstatement or hiring and back pay and an additional amount as liquidated damages.

The adequacy of remedies test, however, is still applicable in cases where the plaintiff alleged that his/her ***actions*** triggered the discharge in violation of public policy. See Shephard v. CompSource Oklahoma, 2009 OK 25, 209 P.3d 228, wherein the Oklahoma Supreme Court, citing Kruchowski, held that in cases where a plaintiff's conduct is alleged to have triggered the discharge, courts must decide whether available remedies are sufficient to protect Oklahoma's public policy goal, in that case under the Whistleblower Act, 74 O.S. §840-2.5.

Summary of Key Points of Consideration:

- Is the employee a probationary employee or a permanent employee
- Is there a Collective Bargaining Agreement
- Does a charter or ordinance define the terms under which an employer may imposed substantive discipline i.e "for merit and fitness alone" versus "for the good of the service"
- Is the employee a member of any protected class or status
    - Whistleblower
    - Federal statutory protection: age, color, race, gender, national origin, religion, creed, handicap status, veteran status and the like
    - Is there a pending workers compensation claim
    - Is the employee out on FMLA leave
    - Is the employee a returning veteran- See USERRA

VI. IMPOSITION OF FINAL DISCIPLINARY ACTION

Disciplinary options can range from a mere informal "chewing out" to the ultimate discipline of termination. Discipline should be tailored to the specific event while also taking into consideration the employee's work history with the city. Other factors to weigh in the decision as to the degree of discipline, if any, that may be warranted include:

1) was the conduct intentional or unintentional;

2) is the employee a repeat offender - a serial problem child;

3) are there external factors affecting work performance or attitude;

4) has the employee engaged in any protected activity; and

5) discipline imposed in other cases for like offenses

If the objective conclusion reached is that discipline is warranted, the following factors should be carefully considered:

1. Examine the Basis of the Recommendation

    a. Have other like situations existed in the past? If so, how were they handled?

    b. Who is the person reporting the conduct at issue? Is there a history between the parties that might call into question the objectivity of the reporting party?

    c. Who is the person making the recommendation?

    d. Was an express rule violated? If so, was the employee aware that discipline might result from violation of the rule?

    e. If there was not a violation of an express rule, is it reasonable to believe that the employee knew that his/her conduct was likely to result in discipline?

2. Examine the Documentation

a. Review the personnel file and any supervisory files related to the employee

b. Review documentation of any earlier disciplinary actions and follow ups

c. Review performance appraisals

d. Determine if the employee had any prior warnings of same or similar misconduct or poor performance

e. Does the documentation mirror the employer's current assessment of the employee or does the documentation conflict with the recommendation for termination.

3. Evaluate the Risks

a. Is the employee protected by status or prior actions, covered by a contract, handbook or CBA?

Except in extraordinary situations, an employee ***should never*** be truly surprised when informed of his/her termination from employment. If the city has been doing its job, the employee should know, long in advance, of any job deficiencies or poor job attitude. In cases of misconduct, the employee should have been provided with the rules and regulations and advised of the possible consequences for violation of these provisions.

All substantive discipline should be done in person, with at least two persons present to represent management. This is not a meeting for a debate on the merits of the decision. Rather, it is to inform the employee of the decision and the basis for that decision. If a proper investigation has been conducted, the employee will have had the opportunity to present his/her side of the events before a final decision is made.

The conclusion of any internal investigation and the imposition of discipline as a result have their own pitfalls. The employees who have been interviewed, as well as others, will want to know

what has occurred. Employers need to exercise restraint so as not to defame or impair the liberty interest of the present or former employee.

The more delicate situation is where the investigation has failed to substantiate allegations of misconduct. The "accused" often wants a public apology. In contrast, individuals who cooperated in the investigation frequently are in fear of retaliatory conduct, particularly where the target of the investigation holds a supervisory position.

An employer may wish to consider a carefully drafted discreet statement indicating that the matter is closed and a reassurance that it will not tolerate any retaliatory action. It may also want to consider reminding the employees that anyone who feels that he or she is being harassed has an avenue for bringing such information to the attention of the city by way of either professional conduct/harassment policy and/or the supervisory bypass procedure.

The keys to the process include:

(1) the integrity, knowledge and skill of the investigator;

(2) the thoroughness of the investigation;

(3) the discretion of all involved in the investigation; and

(4) any fair and equitable discipline taken.

When the final act of discipline will occur an employer may want to:

- Have Human Resource personnel present
- Be sensitive to how and when the news is conveyed
- Determine whether the employee is going to be offered a chance to resign
- Have a check list of key items
    - Returning keys, security codes, uniforms and the like

- Benefit information
- COBRA
- When the last pay check will be issued
- Accrued leave balances for which the employee will be compensated
- Sensitive to how the employee may retrieve personal belongings
- Have a plan in advance on what others will be told or not told
- Limit who will be advised of the details

REMEMBER: Any final act of discipline involving a suspension without pay, demotion or termination is a public record. Therefore, choose your words with care and have the document reflecting the final act of discipline a record separate from the investigation file, report and the like.

PART B. SELECT "HOT" CONSTITUTIONAL ISSUE[6]

I. First Amendment:

The First Amendment of the United States Constitution provides, in part:

> Congress shall make no law.... abridging the freedom of speech... or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

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6 For a period of time, there was confusion on the issue of whether an individual could bring a private cause of action directly under the Oklahoma Constitution. The confusion arose by virtue of the decision in *Bosh v. Cherokee County Bldg. Authority*, 2013 OK 9, 305 P.3d 994. That case involved Article 2, Section 30 of the Oklahoma Constitution addressing searches and seizures. An inmate sued for serious injuries sustained while incarcerated in a jail and had no remedy except under the Constitution due to Section 155 of the Governmental Tort Claims Act.

In *Perry v. The City of Norman*, 2014 OK 119, 341 P.3d 689, the Oklahoma Supreme Court clarified and limited the scope of *Bosh*. Specifically, the rationale in *Bosh* is limited to cases where the Plaintiff has no other remedy.

Union activity is protected as a right of freedom of a union to advocate on its behalf members. *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463, (1979). In Oklahoma, the Oklahoma Fire and Police Arbitration Act, 51 O.S. §51-101 *et.seq.* grants firefighter and police officers the right to bargain collectively with their municipal employers.

The First Amendment also protects the right of individual employees to free speech, freedom of association and freedom to seek redress of individual grievances. *Branti v. Finkel*, 445 U.S. 507 (1980). It also prohibits an employer from terminating most employees based on political affiliation. *Elrod v. Burns*, 427 U.S. 347 (1976). In *Gann v. Cline*, 519 F.3d 1090 (10th Cir. 2008), the Court addressed the scope of the First Amendment in the context of political patronage. While noting that the practice has existed since the time of Thomas Jefferson, it nevertheless held that the practice may violate the First Amendment where a person's employment is terminated because of his/her "political beliefs, affiliations or non-affiliation unless [his or her] work requires political allegiance."

Although public employees do not give up their constitutional rights as a condition of public employment, their First Amendment rights are not unlimited. See *Pickering v. Board of Education*, 391 U.S. 563 (1968), as clarified in *Connick v. Myers*, 461 U.S. 138 (1983), in which the United States Supreme Court held:

> When an employee's express cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. *Id.* at 146.
>
> We hold only that when an employee speaks not as a citizen upon matters of public concern, but instead only as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of personnel decisions taken by a public agency

allegedly in reaction to the employee's behavior. *Id.* at 147.

Thereafter, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court stated that public employees have no First Amendment protection with regard to speech or conduct made "pursuant to the official duties" of their employment. Rejecting the contention by the employee that his actions were taken as a citizen of the community, the Court held that a public employer has a right to control "what the employer itself has commissioned or created." *Id.* at 422. See also *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202 (10th Cir. 2007) outlining a new five prong test after *Garcetti.*

II. Fourth Amendment- Searches and Seizures:

The Fourth Amendment to the United States Constitutions provides;

> [T]he right of the people to be secure in their persons, houses, papers, and effects... against unreasonable searches and seizures, shall not be violated.

As noted in Footnote 3, the United States Supreme Court has held that drug and alcohol testing constitutes a search under the Fourth Amendment. In addition, there are many legitimate reasons why a public employer may need to conduct a work place search. However, there are limitations on an employer's ability to conduct a warrantless.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a physician brought an action due to his employer's decision to search his office without a warrant. The employer, a state mental hospital, had received information that Dr. Ortega may have been engaged in acts of sexual harassment. After placing him on leave, a search of his office was conducted, during which private papers were seized. The Court addressed two issues: 1) whether the employee had a reasonable expectation of privacy; and 2) if so, whether the warrantless search was reasonable under the totality of the circumstances.

After noting that not everything that passes through the work place is considered part thereof, for example purses, briefcases and the like, the United States Supreme Court recognized that there are circumstances where a warrantless search of the work place is appropriate:

> Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. *Id.* at 717.
>
> In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the work place. *Id.* at 719-720.

It concluded that Dr. Ortega had a reasonable expectation of privacy in his desk and filing cabinet since: 1) they were assigned solely to him; 2) he had been allowed to keep private papers in them 3) his work files were kept in a separate area; and 4) the hospital ***did not have a policy*** discouraging employees from storing private items in their desks.

Having concluded that Dr. Ortega had a reasonable expectation of privacy, the United States Supreme Court went on to uphold the validity of the search applying a reasonableness standard-looking at all of the circumstances of the situation presented.

The United States Supreme Court revisited *O'Connor v. Ortega, supra.* in *City of Ontario v. Quon*, 560 U.S. 746 (2010). This case involved downloading of messages by the city of messages from a policy officer on a city issued pager. Sergeant Quon had consistently been over the allotted number of characters each month but had paid for the overage. He was warned that the City might audit his messages if the limit continued to be exceeded. After a few months where overages continued, the messages were audited. It was discovered that the messages were graphic and sexual

in nature involving Quon, his ex-wife and a female member of the department.

Although the United States Supreme Court upheld the search and seizure of the messages on the city issued pager, it struggled with the application of *Ortega.* In the majority opinion, Justice Kennedy noted:

> The Court must proceed with caution when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear...Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence and extent of privacy expectations enjoyed by employees while using employer-provided communication devices.

Several factors appeared to lead the Court to finding the search to be reasonable:

- the scope of the search– only two of nine months of messages and only on messages sent on duty
- all messages were sent by city owned equipment and through a service paid for by the city
- a written policy existed and a verbal reminders had been given to Quon regarding the policy

On the issue of a policy, Justice Kennedy agreed that an employer's policy, clearly communicated to employees, can help define and shape any expectation of privacy.

Suggestions post Quon:

- adopt a clearly written policy addressing the limitations on workplace privacy
- state that information stored on city owned equipment or transmitted via city provided internet is subject to review and auditing at any time with or without notice
- disseminate the policy and have each employee sign for the policy

III. Liberty Interest under the Fourteenth Amendment:

A public employer should exercise caution and restraint when issuing any statement regarding the status of an employee. This is due to the fact that a public employee has a liberty

interest in his "good name and reputation as it affects [his] property interest in continued employment." *Stidham v. Peace Officers Standards & Training*, 265 F.3d 1144, 1153 (10th Cir. 2001).

There is a four part test for establishing a liberty interest claim:

- the city made a public statement impugning an employee's good name, reputation, honor or integrity
- the statement was false
- the statement was made in the course of terminating the employee or the statement foreclosed future employment opportunities
- the statement was published

Sandoval v. City of Boulder, 388 F.3d 1312, 1329 (10th Cir. 2004).

A public employer should always bear in mind that, under the Oklahoma Open Records Act, 51 O.S. §24A.7(B)(4) "any final disciplinary action resulting in the loss of pay, suspension, demotion or position or termination" is deemed a public record. Therefore, ***a separate document*** should be created to reflect the final disciplinary action – reflecting only the action taken and the reasons - for example, the number and title of the policy violated– or termination "for the good of the service" where that is the standard to be used.

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