

September 9, 1996

Mr. John Hayden, Chairman
Idaho State Board of Correction
P.O. Box 15619
Boise, ID 83715-5619

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Chairman Hayden:

You have requested an opinion from the Attorney General concerning the doctrine of at-will employment in the State of Idaho. There are four aspects to your inquiry: (1) the nature of at-will employment in Idaho; (2) how the courts have applied the at-will employment doctrine in the public sector; (3) the general nature of employment relationships in the Department of Correction; and (4) the various legal restrictions and other limitations applicable to dismissal (or other discipline) of an at-will employee. You will find each of these four areas discussed below.

A. The At-Will Employment Doctrine in Idaho

Idaho's courts have long recognized and followed the at-will employment doctrine: "the employment-at-will doctrine . . . has been adopted and approved by this Court in innumerable decisions . . ." Metcalf v. Intermountain Gas Co., 116 Idaho 622, 623-24, 778 P.2d 744, 745-46 (1989). The Metcalf decision contains the following oft-cited and quoted statement of the at-will doctrine:

As the result of numerous decisions of this Court in recent years, it is now settled law in this state that:

Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship at any time for any reason without incurring liability.

Thus, in the absence of an agreement between the employer and the employee limiting the employer's (or the employee's) right to terminate the contract at will, either party to the agreement may terminate the relationship at any time or for any reason without incurring liability. However, such a

limitation on the right of the employer (or the employee) to terminate the employment relationship “can be express or implied.”

116 Idaho at 624, 778 P.2d at 746 (citations omitted).

The employment-at-will doctrine, as explained in Metcalf, establishes a *presumption* that an employment relationship in Idaho is terminable at the will of either party, at any time, and with or without notice or cause assigned. Mitchell v. Zilog, Inc., 125 Idaho 709, 713, 874 P.2d 520, 524 (1994). The presumption can be rebutted if it is shown that the parties intended to alter the at-will relationship by: (1) specifying the duration of employment (*e.g.*, a one-year employment contract); and/or (2) limiting the reasons for which an employment relationship can be terminated (*e.g.*, terminable only for specific for-cause reasons).

B. The Nature of Public Employment Relationships in Idaho

Public employment with the state of Idaho is generally governed by statute. The Idaho Personnel System Act (“PSA”), Idaho Code §§ 67-5301 to 67-5342, establishes and governs the “classified” or “merit” system of employment. All employees in state government are classified employees unless specifically defined as nonclassified. Idaho Code § 67-5303.

Employees who are hired under the terms of the PSA are typically referred to as “classified state employees.” Idaho’s courts have held that classified state employees are not at-will employees because the PSA limits the reasons for which a classified employee may be terminated (or otherwise disciplined). Arnzen v. State, 123 Idaho 899, 904-05, 854 P.2d 242, 247-48 (1993), citing Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).¹ Classified state employees enjoy a property interest in continued employment; they may be dismissed (or disciplined) for limited, specific reasons, and they are entitled to notice and an opportunity to be heard before the decision to dismiss (or discipline) is made.

Nonclassified state employees do not enjoy the statutory protections afforded by the PSA and, in the absence of a contract for term or other agreement limiting the reasons for which they may be dismissed, they are generally at-will employees. Garner v. Evans, 110 Idaho 925, 936-38, 719 P.2d 1185, 1196-98, *cert. denied*, 479 U.S. 1007, 107 S. Ct. 645, 93 L. Ed. 2d 701 (1986). To this end, nonclassified employees do not enjoy a property interest in continued employment. *Id.* They also do not have the right to file a grievance or appeal under the PSA. *Id.* See Idaho Code §§ 67-5315, 67-5316 (only classified employees may grieve and appeal to the Personnel Commission). In the absence of an agreement or understanding otherwise, an employment relationship

between the state and a nonclassified employee is generally terminable at the will of either party at any time with or without notice or cause assigned.

C. The Employment Structure of the Idaho Department of Correction

This section discusses, in general terms, the classified and nonclassified (or at-will) employment structure of the Idaho Department of Correction (“DOC”). The first subsection below addresses the general DOC employment structure below the director level. The second subsection addresses the governing or policymaking entities above the director—the Board of Correction and the Commission on Pardons and Parole.

1. Employment Structure below the Director

The Idaho Department of Correction (“DOC”) is an executive department of Idaho state government. Idaho Code § 67-2402(1). Executive department employees above the bureau chief level are generally nonclassified employees: The head of an executive department is the director, who is a nonclassified employee. Idaho Code §§ 20-217A, 67-2403, 67-2404. Directors may appoint deputy directors, who are nonclassified employees. Idaho Code § 67-2403(2). Below the director and deputy director(s) and above the bureau level, each department is divided into divisions, which are headed by nonclassified division administrators.² The director also has the power to declare one position in the department nonclassified. Idaho Code § 67-5303(d). Thus, other than the director, deputy director(s), division administrators, and the declared exempt position, department employees are generally classified employees.

2. Employment Structure above the Director

The Board of Correction (“Board”) is a constitutional entity above the DOC director which exercises “control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole” Idaho Const. art. 10, § 5; Idaho Code §§ 20-201 to 20-249. Board members are appointed by the governor to six-year terms, Idaho Code § 20-201(1), and they are specifically defined as nonclassified employees, Idaho Code § 67-5303(b). However, unlike most nonclassified employees, Board members may only be removed for limited reasons:

The governor may not remove any member of the board except for disability, inefficiency, neglect of duty or malfeasance in office. Before such removal the governor shall give such member a written copy of the charges against him and shall fix the time when he can be heard in his defense which shall not be less than ten (10) days thereafter. If such member shall be removed, the governor shall file, in the office of the

secretary of state, a complete statement of all charges against such member and his findings thereon, with a record of the proceedings.

Idaho Code § 20-203. Board members are not, then, removable at-will, because the statute quoted above limits the reasons for which a Board member may be discharged.

The Commission of Pardons and Parole (“Commission”) is another DOC entity above the director level, with the statutory directive to “act as the advisory commission to the board on matters of adult probation and parole and may exercise such powers and duties in this respect as are delegated to it by the board.” Idaho Code § 20-210. The Commission is composed of five members who are appointed by the Board to serve terms of five years. Commission members “shall serve at the pleasure of the board.” Idaho Code § 20-210.

Commission members, unlike Board members, are clearly removable at-will. Rather than being removable only after notice and for limited reasons, Commission members “serve at the pleasure of the board.” *Id.* This language establishes an at-will employment relationship. *See, e.g., Figuly v. City of Douglas*, 76 F.3d 1137, 1142 (10th Cir. 1996) (city administrator was an at-will employee where, among other things, the city charter provided that the administrator served “at the pleasure of the Mayor and Council”); *Garcia v. Reeves County*, 32 F.3d 200, 203-04 (5th Cir. 1994) (deputy sheriffs were at-will employees where Texas state law provided that “[a] deputy serves at the pleasure of the sheriff”). Furthermore, the at-will relationship between the Board and Commission is not altered by the statutory term of five years—read together, the statutory language establishes an at-will relationship which is automatically, as a matter of law, terminated after five years. Put another way, while there must be an affirmative action (dismissal by Board or resignation by Commissioner) by either party *before* the employment relationship can end during the five-year term, there is no limitation on reasons for ending the employment relationship—all Commissioners serve at the pleasure of the Board for no more than five years. *See Youngblood v. City of Galveston*, 920 F. Supp. 103 (S.D. Tex. 1996) (municipal judge appointed under city charter for two (2) year term was an at-will employee because the charter also provided that the position served at the pleasure of the city council during the term).³

D. Limitations and Restrictions on Dismissing At-Will Employees

The final part of your inquiry deals with removal or dismissal of an at-will employee. Once it is established that an employee serves in an at-will capacity, the rule of law in Idaho is that the employee can be dismissed with or without notice or cause assigned. However, although reasons for dismissal are not limited and it is not necessary to assign cause in order to dismiss an at-will employee, there are a number of limitations (statutory and court-created) on an employer’s right to dismiss an at-will employee. The

subsections below discuss these limitations and the potential causes of action available to at-will employees.

1. Discrimination

Public employers are prohibited from discriminating against employees on the basis of various protected classifications. That is, a public employer cannot dismiss (or otherwise prejudice) an employee because of, either in whole or in part, that employee's membership in a protected class. With respect to federal law, Title VII of the Civil Rights Act of 1964, as amended, prohibits public employers from dismissing or otherwise prejudicing employees on the basis of race, color, religion, national origin, and gender; the Age Discrimination in Employment Act protects individuals age forty and over from employment discrimination; and the Americans with Disabilities Act protects qualified individuals with a disability from employment discrimination. With respect to state law, the Idaho Human Rights Act protects individuals from employment discrimination based on race, color, religion, national origin, gender, age or disability. Public employers may not dismiss or otherwise prejudice at-will employees on the basis of any protected classification.

2. The Implied Covenant of Good Faith and Fair Dealing

The Idaho Supreme Court has recognized a “covenant of good faith and fair dealing,” which is implied in every employment relationship. The court adopted the covenant of good faith and fair dealing in Metcalf, *supra*, and explained its application as follows:

[T]he covenant protects the parties' benefits in their employment contract or relationship, and . . . any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant which we adopt today.

116 Idaho at 627, 778 P.2d at 749. Thus, because the covenant does not add anything to an employment relationship (it only operates to protect other benefits and rights), the court carefully explained that it does not create a duty to dismiss an employee only for cause. *Id.* See Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994) (the covenant does not apply where the employer is simply exercising its right to dismiss an employee); Olson v. Idaho State Univ., 125 Idaho 177, 868 P.2d 505 (Ct. App. 1994), *rev. denied* (covenant cannot be used to attack merits of decision to not renew a contract of a nontenured teacher). The covenant of good faith and fair dealing does not alter the at-will relationship, but it does operate to protect any other rights or benefits enjoyed by the employee as part of the employment relationship.⁴

3. Public Policy

Idaho's courts have also applied another limitation to the doctrine of at-will employment—the public policy exception. In Watson v. Idaho Falls Consol. Hosp., Inc., 111 Idaho 44, 720 P.2d 632 (1986), the Idaho Supreme Court held that an “employee may claim damages for wrongful discharge when the motivation for discharge contravenes public policy.” 111 Idaho at 49, 720 P.2d at 637, citing MacNeil v. Minidoka Hosp., 108 Idaho 588, 701 P.2d 208 (1985); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977).

The public policy exception appears to apply when an employee is fired because of an action taken protected by a statute. That is, when a statute protects or otherwise provides for the taking of some action but does not create a cause of action for a person who suffers prejudice by taking such action, the courts have created a common law cause of action, the public policy exception to the employment-at-will doctrine. A very recent Idaho Supreme Court decision contains several examples of public policy violations from Idaho cases and other jurisdictions: (1) employee discharged for refusing to commit perjury; (2) employee fired for filing worker's compensation claim; (3) employee fired for serving on jury duty against the wishes of her employer; (4) employee fired for engaging in legal union activities; and (5) employee fired for reporting safety code violations to the state electrical engineer. Hummer v. Evans, No. 21796, 1996 WL 490675, at *5-6 (Idaho Aug. 29, 1996). In Hummer, the court affirmed the district court's judgment that the employer violated public policy by firing the employee for responding to a subpoena. *Id.* These examples illustrate how an action taken based upon statutory or other legal authority can support a public policy cause of action.

4. First Amendment Rights of Public Employees

Public employees may also bring a cause of action for wrongful discharge based upon protected speech. In Lockhart v. State, 127 Idaho 546, 903 P.2d 135 (Ct. App. 1995), the Idaho Court of Appeals set forth the elements of such a claim:

Whether speech is constitutionally protected and precludes discipline of an employee involves a four-part test: First, the court must determine whether the speech may be fairly characterized as constituting speech on a matter of public concern. [Second,] if the speech involves a matter of public concern, then the court must balance the employee's interest in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs. Third, if the balance favors the employee, then the employee must show that the protected speech was a substantial or

motivating factor in the detrimental employment decision. Finally, if the employee meets this burden, then the employer is required to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected speech.

127 Idaho at 552, 903 P.2d at 141 (citations omitted). The Lockhart case involved comments made by an employee of the Idaho Department of Fish and Game—at a meeting with another department official and a newly elected female legislator, he commented that many of Idaho’s female legislators were “airheads” or had “nothing between their ears.” The court held that while the comment involved a matter of public concern, “comments regarding the intelligence of members of Idaho’s legislature constitutes a matter of public concern,”⁵ it did not merit First Amendment protection because the department’s interests in maintaining good relations with the legislative branch and promoting the efficiency of the public services it performs outweighed the employee’s interest in making the comment. 127 Idaho at 553, 903 P.2d at 142.

5. The Whistleblowing Law

The Idaho Protection of Public Employees Act (“the Whistleblowing Act”), Idaho Code §§ 6-2101 to 6-2109, protects public employees from adverse actions as a result of reporting waste and violations of a law, rule or regulation. In order to receive protection under the Whistleblowing Act, a public employee is obligated to report waste or violations in good faith. Idaho Code § 6-2104. An aggrieved employee may bring an action for damages, including attorneys’ fees and costs, and injunctive relief, and a court may order reinstatement of the employee with lost wages and benefits and impose a \$500.00 civil fine on the employer. Idaho Code §§ 6-2105, 6-2106.

E. Conclusion

An at-will employment relationship may be terminated by either party at any time, with or without notice or cause assigned. However, several exceptions and limitations apply: An at-will public employee is protected by all federal and state anti-discrimination laws; an employer may not dismiss an at-will employee in order to deprive the employee of an accrued benefit or right; an at-will employee cannot be dismissed on the basis of taking some action protected by public policy; an at-will employee cannot be dismissed based upon protected speech; and an at-will public employee cannot be dismissed for reporting, in good faith, government waste or violations of law.

I hope this guideline is responsive to your inquiry. If you require further assistance or information, please contact me.

Very truly yours,

THORPE P. ORTON
Deputy Attorney General
Idaho Personnel Commission

¹ The PSA and the Idaho Personnel Commission Rules list seventeen reasons for which a classified employee may be disciplined. “Discipline” is understood to mean dismissal, demotion, suspension, reduction in pay or involuntary transfer. Idaho Code § 67-5309(n); IDAPA 28.01.01.190.01.

² Some division administrators may be classified employees. If a division administrator held classified status prior to July 1, 1995 (the effective date of House Bill 299 (1995)), he or she retains that status so long as the position is held, *i.e.*, until separation, promotion, demotion, position elimination, etc.

³ The rationale and conclusion reached by the federal district court in Youngblood appears to be consistent with Idaho law. The district court recognized that in Texas, which is an at-will state, public employees are also at-will unless the legislature has abrogated its right to dismiss without cause. That is, unless the legislature has passed a law limiting reasons for which an employee may be discharged, the employee is an at-will employee without a property right in continued employment. The specific position at issue in Youngblood was created by statute and further defined by city charter. The Texas statute established a two year term for municipal judges, and prior Texas court opinions had interpreted the statute to permit a city to expressly provide for removal of a municipal judge. To this end, the Galveston city charter provided that a municipal judge served at the pleasure of the city council. The district court reasoned and concluded as follows:

If a public employee serves at the pleasure of his superiors, the employment relationship is at-will, and the employee has no property interest in continued employment.

....

Here, the Galveston City Charter specifically provides that the Municipal Judge serves at the pleasure of the City Council. Thus, notwithstanding the two-year term provided for by the Galveston City Charter and Tex. Gov’t Code Ann. § 29.005, Youngblood was an at-will employee and could be terminated without cause and without a hearing. Youngblood, therefore, had no property interest in continued employment as a municipal judge.

Id. at 106.

⁴ For example, in Metcalf, the court applied the covenant where the employee alleged she was fired because of the use of accumulated sick leave. The court also cited a Massachusetts case where the covenant was applied to an employee who was fired so that the employer would not have to pay earned sales commissions. *Id.*, citing Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

⁵ The court noted that speech does not lose First Amendment protection simply because of an inappropriate or controversial character, and ““debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”” *Id.* at 552-53, 903 P.2d at 141-42, citing and quoting Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 2898, 97 L. Ed. 2d 315 (1987); New York Times v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).