



# DELAWARE

## EMPLOYMENT LAW LETTER

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### EMPLOYMENT AT WILL

## **Court rejects at-will police officer's constitutional due-process claim**

by Teresa A. Cheek

*A Wilmington police officer recently failed to make a federal case out of an alleged error in the procedures the city used to place her on disability retirement. The court found that she had no legitimate expectation of continued employment and therefore no property right in her employment.*

### ***Facts***

In December 2005, officer Denise Bowers allegedly suffered a knee injury, which resulted in her being unable to work as a police officer for more than a year. The city told her that she would be placed on the "disability list" and involuntarily retired. Bowers objected, and the decision was rescinded for further evaluation of her condition. An independent physician opined that she could perform only sedentary work, and the involuntary retirement decision was reinstated.

Bowers again objected and asked for a hearing. At the hearing, the decision to retire was upheld. She then filed suit against the city, the physicians who worked at the city's medical dispensary, and the city's director of personnel, alleging that she had been deprived of her constitutional right to due process in connection with her termination.

### ***Court's decision***

The Due Process Clause of the Fourteenth Amendment to the U.S.

Constitution in part states that "no State shall . . . deprive any person of . . . property, without due process of law." The Due Process Clause covers actions by both state governments and subdivisions of state government, such as municipalities like the city of Wilmington.

The first issue before the court was whether Bowers' employment with the city could be viewed as "property." The term "property" has been interpreted to include public-sector employees' right to continued employment, but the employees have to prove that they have a "legitimate expectation" of continued employment.

This legitimate expectation can occur when an individual contract states employment may be terminated only for just cause or when the same type of provision exists in a union contract covering the employee. The expectation also can be derived from state or local laws or ordinances. A familiar example of such a law is the teacher tenure law. Under the Due Process Clause, a public-sector employee with a "property interest" in her employment is entitled to notice of the grounds for termination and an opportunity to speak in opposition to the termination before it is finalized.

In Delaware, there is a strong presumption that workers, including public-sector employees, are employed at will, meaning they may be terminated without cause and without notice and therefore have no legitimate expectation of continued employment. Bowers was required to overcome the presumption that her employment was at will to show that she had a right to due process.

However, Bowers was unable to point to any contract, collective bargaining agreement, statute, or ordinance that guaranteed her continued employment. Her only argument was that the procedure described in the Wilmington Code for approval of disability pensions gave her the right to continued employment. Under the Code, three physicians must agree that the pension candidate is disabled before she can be placed on disability. Relying on authority from the U.S. Supreme Court, the trial court held that the procedure doesn't create a substantive guarantee of continued employment.

Bowers asked the court to apply an exception to the at-will doctrine, which states employers may not base an employee's termination on fictitious reasons. She argued that there was an incorrect statement in the city physician's report regarding the agreement of three physicians that she was unable to perform her job. One of the physicians named in the report was her family physician, who had a conversation with the city physician about Bowers' condition but hadn't recently examined her.

The court rejected Bowers' argument, observing that she didn't claim that the substance of the report — that she was unable to do her job — was wrong. Thus, she couldn't show that any decisionmakers relied on false representations. Consequently, she couldn't rely on the exception to the at-will doctrine to create a property interest in her employment.

### ***Bottom line***

The at-will doctrine continues to play a significant role in determining the rights of employees in Delaware. Both private- and public-sector employers can preserve the at-will status of their employees by avoiding statements in letters, memos, and employee handbooks that could create or foster legitimate expectations of continued employment. Public-sector employers must pay close attention to the status of employees whom they are planning to terminate to ensure that employees who have legitimate expectations of continued employment are given due process in connection with their departure.

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