IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

YAUNA TAYLOR,	)	
	)	
Appellant,	)	
vs.	)	
	)	
UNIVERSITY OF ALASKA,	)	
	)	
Appellee.	)	Superior Court No. 4FA-08-02579 CIV

UNIVERSITY'S PETITION FOR REHEARING

The University believes the court has overlooked or misapplied controlling precedent of the Alaska Supreme Court (App.R. 506(a)(1)) and has overlooked or misconceived material facts (App.R. 506(a)(2)).[1] The decision states in part that:

> Termination for disciplinary or performance reasons is "for cause" termination. And the University does not dispute that Taylor was terminated for disciplinary and performance reasons. . . . This disciplinary and performance-based termination entitled Taylor to "for cause" proceedings and the protections they provide. (*Dec.* at 8)

Because the University elected[2] not to refer to disciplinary or performance reasons in its notice of nonretention ending Taylor's employment (*Dec.* at 3),[3] the court's conclusion either misconstrues the facts or is directly contrary to controlling authority. The court also recognized that under Taylor's contract of employment and University Regulation, she was subject to nonretention (without cause) on four weeks notice. (*Dec.* at 7-8) Thus Taylor's employment was not terminable **only** for cause. The court's further conclusion that Taylor was entitled to a due

[1] These issues are addressed in detail at pages 15 – 21 of the University's Appellee brief.
[2] Taylor's individual appointment letter, and the applicable policy and regulation, expressly state that for cause employment "entitles the employee to such notice and appeal processes as specified by regents' policy and university regulation" and explicitly allow the University to elect cause termination or nonretention. *See* P04.01.055.C, P04.07.100, R04.01.050.B.1 & 2.
[3] The University's reasons were stated in an internal "Note to File" e-mailed from her supervisor to Human Resources; the document is not in Taylor's personnel file and thus would not be subject to disclosure under the University's personnel policy. Taylor received the document in response to her discovery request.

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process/just cause termination process, and its corollary conclusion that nonretention is not available in the presence of performance or disciplinary reasons, overlook controlling Alaska Supreme Court precedent to the contrary.

Unexpressed performance or conduct reasons do not trigger Due Process or bar non-cause termination. In *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997), the contract of employment provided in relevant part:

> In the event Chief is terminated by the City Council **for any reason besides cause** as defined below during such times as he is willing and able to perform the duties of Chief of Police, the City agrees to pay Chief a severance of six month's [sic] pay.... City shall provide Chief with thirty (30) days advance written notice of termination or termination shall be deemed ineffective. (*Id.* at 128; emph.added)

Public allegations of excessive force were made against Ramsey, the council considered the allegations in executive session, and the city attorney asked Ramsey to resign. The city council then elected to terminate Ramsey's employment using the "for any reason besides cause" provision of the contract. *Id.* at 128-29.

The Supreme Court rejected claims identical to those made by Taylor: property interest in continued employment beyond the notice/severance periods and due process violation (*id.* at 131-32) and allegations left Ramsey under a cloud (*i.e.*, reflected discredit) (*id.* at 132-33). However, the Supreme Court permitted the city to elect the non-cause termination procedure.

The contractual language in *Ramsey* ("for any reason besides cause") is comparable to the contractual language in this case. The *Ramsey* court did not hold that performance or conduct reasons precluded use of the non-cause termination provision, as this court held. Under *Ramsey*, such language is not a condition for use of non-cause termination. It instead provides an alternative process with a different effect than cause termination, as is the case here. Regents' Policy more explicitly permits non-cause termination: "The University may discontinue or not renew an existing employment relationship through non-retention." The next sentence,

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"Nonretention does not reflect discredit on an employee," does not require the absence of performance or conduct issues any more than similar phrases such as "any reason besides cause" or "without cause" (*see also Chijide v. Maniilaq, discussed below).* This court's holding that underlying performance or conduct issues require just cause protections and preclude nonretention (*Dec.* at 8-11), is directly contrary to *Ramsey* and *Chijide*. The University's nonretention policy lacks any words of condition. "Nonretention does not reflect discredit" plainly states the status or result[4] of nonretention, rather than a condition for its use. It does so even more clearly than phrases such as "for any reason besides cause," or "without cause."[5]

The *Ramsey* decision also rejected contentions that constitutional liberty interests required a hearing because of any "discredit" that might result from the type of performance concerns involved here: "lack of professionalism," lack of responsiveness to clear expectations," and "resistance to corrective action." (*Dec.* at 8)[6]

> In the present case, a group of Sand Point citizens accused Ramsey of using excessive force. This accusation does not implicate Ramsey's liberty interest because the accusation directly concerns his **professional performance** and does not impugn his honesty, integrity or morality. (*Ramsey* at 132; emph. added)

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[4] The court also has misconstrued the facts and the law related to "discredit." *See Dec.* at 10-11. Unlike termination for cause, nonretention requires a notice period and does not result in ineligibility for re-hire. The record contains no evidence that the University has treated Taylor in a manner inconsistent with nonretention. Taylor has not applied for University employment and been treated as ineligible for rehire. Thus Taylor lacks standing to raise this issue (and has not raised it). Moreover, even if a nonretained employee were improperly treated as ineligible for rehire, the contractual remedy would be to make the individual eligible, not to invalidate the nonretention. At the same time, the requirement that the act of nonretention not reflect discredit does not bar the University from considering Taylor's prior performance or conduct if she applies for employment, since that is no more than an employer may do with any prior employee, including those who resign. *See Blackburn*, n. 6, *infra.* Neither Maniilaq, which terminated Chijide "without cause," nor Sand Point, which terminated Ramsey "for any reason besides cause," could be expected not to consider prior performance if the terminated employee reapplied.

[5] The court's interpretation of nonretention also misconstrues the facts, *i.e.*, Policy and Regulation related to layoff and financial exigency provide for non-cause terminations for financial and administrative reasons. The court's suggestion that nonretention may be used for such reasons (*Dec.* at 10) makes the provisions redundant or requires that nonretention be used for no reason, *i.e.*, in an arbitrary fashion.

[6] This court misconstrues *City of North Pole v. Zabek*, 934 P.2d 1292, 1298 (Alaska 1997). *Dec.* at 12, n.11. Unlike Taylor, Zabek was terminable **only** for cause. *Id.* at 1297. Perhaps more important, the Supreme Court actually held that the process due to Zabek depended on the termination basis selected by the city, not on related allegations of misconduct not relied on by the city. *Id.* at 1298. The teachers in *Nichols v. Eckert*, 504 P.2d 1359 (Alaska 1973), were due a hearing because they could be terminated only for cause and because they actually were sent letters of dismissal stating cause reasons and citing their need for ongoing psychiatric treatment. *Id.* at 1360-61.

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In *Chijide v. Maniilaq*, 972 P.2d 167 (Alaska 1999), the Alaska Supreme Court again rejected the contention that non-cause procedures cannot be used in the presence of cause type reasons. Chijide's contract:

> allowed Maniilaq to terminate Chijide's employment with or without cause. If Maniilaq dismissed Chijide without cause, the contract required it to provide her with ninety days' written notice and to pay her any compensation still owed. In contrast, Maniilaq could terminate Chijide for good cause without written notice and "with pay only to the date of such termination." (*Id.* at 168)

After a contentious relationship involving conflicts, grievances, and a written reprimand, Manilaq gave notice of nonrenewal of Chijide's contract of employment. The nonrenewal came after Chijide's supervisor wrote to Maniilaq's personnel director about "the 'persistent hardships' experienced in working with Chijide and asked that Maniilaq not renew Chijide's contract." *Id.* at 169-70. Like Taylor, Chijide argued that Maniilaq must provide a due process pre-termination hearing to contest the supervisor's allegations (*id.* at 172) and that "she was dismissed for cause, and therefore Maniilaq's personnel policies entitled her to notice of the charges against her and a right to appeal." The Alaska Supreme Court held that Chijide was not an employee who could be terminated only for cause, and thus was not entitled to due process. *Id.* at 171. The court also held that the existence of reasons[7] did not convert a non-cause termination to a cause termination:

> The fact that [the supervisor] provided a reason for her recommendation that the hospital decline to renew Chijide's contract does not convert the nonrewal into a dismissal for cause. [The supervisor's] letter was addressed to Manilaq, not Chijide. The notification Manilaq sent to Chijide was unambiguously notice of non-renewal that gave no reason for ending Chijide's employment. (*Id. at 172*)

Conclusion. Alaska and federal law are clear that due process protections are required when employees are deprived of property or liberty. Controlling precedent makes clear that Taylor's constitutional liberty interests were not implicated by a nonretention containing no

[7] *See also Blackburn v. State, DOTFP*, 103 P.3d 900, 902 & 906 (Alaska 2004) (reasons in at-will termination did not require cause termination, and consideration of prior termination on rehire does not trigger due process).

reference to reasons, or by underlying reasons that do not implicate constitutional liberty interests. Property rights are determined by reference to the contract of employment. If employment can be terminated only for cause, the employee has a property interest in continued employment and must be afforded due process prior to termination. This court has held that nonretention, a non-cause method of termination, is applicable to Taylor. The court's conclusion that nonretention cannot be used in the context of performance or conduct reasons, *i.e.*, that "Taylor is a 'for cause' employee when it comes to termination for disciplinary or performance based reasons" (*Dec.* at 12), is directly contrary to *Ramsey* and *Chijide*. Like Ramsey and Chijide, because Taylor is subject to nonretention, Taylor has no property interest in employment beyond the nonretention notice period. While the court relies on Taylor's contract of employment in finding her a "for cause" employee, the court then misconstrues what "for cause" means under the express terms of Taylor's contract, *i.e.*, that the University may terminate Taylor for cause, **or nonretain her on notice**. Case law, the plain language of the nonretention policy and other regulations, rules of contract interpretation, and the court's own conclusion that nonretention applies to Taylor, support the University's established interpretation of its nonretention regulation, and renders it reasonable as a matter of law. As the *Ramsey* Court stated, it can't be objectively unreasonable to do what the contract expressly permits. *Id.* at 133.

The court should grant rehearing, hold that nonretention is available to the university without a pretermination hearing when its notice does not refer to reasons, and reach the constitutional question raised by Taylor.

Dated at Fairbanks, Alaska, this 23rd day of July, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of July, 2010, a true and correct copy of the Petition for Rehearing was mailed to:

Yauna Taylor
c/o Law Office of Ken Covell
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Dated at Fairbanks, Alaska, this 23rd day of July, 2010.

Eva L. Webb
Secretary to Schendel Law Office

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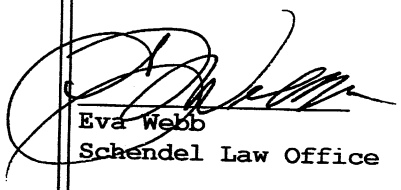

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