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Procedural Due Process for Public Employees

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A. Property Interests and Due Process

Both the Florida and federal Constitutions provide that no person shall be deprived of life, liberty or property without due process of law. U.S. Const. Am. XIV, § 1; Fla. Const. Art. I, § 9. The United States Supreme Court, in *Board of Regents of State Colleges v. Roth*, held that this guarantee of due process served to protect public employees from being deprived of a protected “property interest” in his or her employment in certain circumstances. 408 U.S. 564 (1972); *see also Perry v. Sinderman*, 408 U.S. 593 (1972).

Specifically, the Supreme Court held that, where a public employee has a “property right” or “property interest” in his or her continued employment, his or her employment may not be deprived without certain due process protections. *Roth*, 408 U.S. 564, 578. These property rights in employment may arise through a number of different ways and some public employees will have such rights while others will not.

As a result, in order to address the potential due process protections which may apply in an employment situation, a determination must first be made if the employee at issue enjoys a property right in his or her continued employment. If the answer to that inquiry is yes, then exactly what “process” is due prior to disciplining or terminating the employee becomes significant. Employees will have different potential property rights based on how the property right is devised, and employers must take different actions in terminating an employee based on these rights.

1. Determining Whether a Property Right Exists

A property right in continued employment exists where state or local laws, charters, ordinances, policies, contracts or agreements provide that the employee will only be disciplined or dismissed for “cause” (or “just cause,” “proper cause,” and the like) or where the employer otherwise similarly limits its discretion to discipline or dismiss an employee. *Roth*, 408 U.S. 564, 578; *see also Gilber v. Homar*, 520 U.S. 924, 929 (1997).

One of the most common scenarios where property rights are determined to exist is where an employer's policies or collective bargaining agreements provide for discipline or discharge only for "cause," for "just cause," or provide for tenure for the employee. In contrast, a property right will not be found to exist where the employee is employed on an "at will" basis and may be terminated for any or no reason. *Lee County Port Authority v. Wright*, 653 So. 2d 1104, 1105 (Fla. 2d DCA 1995) (*per curiam*) *Liff v. City of Cocoa*, 745 So. 2d 441, 441-442 (Fla. 5th DCA 1999); *McGregor v. Board of Comm'rs*, 956 F.2d 1017, 1022 (11th Cir. 1992). These at-will employees have no due process rights in their termination or discipline, but may still be entitled to a liberty interest, addressed later.

In this respect, a property right in continued employment is functionally the opposite of "at will" employment, which is the default rule in Florida for public and private employers where the policies, contracts, laws, etc., at issue are otherwise silent. *Smith v. Piezo Technology and Professional Administrators*, 427 So. 2d 182, 184 (1983) ("The established rule in Florida relating to employment termination is that 'Where the term of employment is discretionary with either party or indefinite, then either party for any reason may terminate it at any time and no action may be maintained for breach of the employment contract.'") (quoting *DeMarco v. Publix Super Markets, Inc.*, 360 So. 2d 134, 136 (Fla. 3d DCA 1978), *aff'd* 384 So. 2d 1253 (Fla. 1980)).

Thus, where an employer's policy, contract, law, charter, statute, ordinance, etc., provides that discipline or discharge must be based on cause, the public employer has created a property interest in continued employment, and the default rule of "at will" employment is inapplicable.

2. Disciplinary Due Process where a Property Interest Exists

Employees that enjoy a property right in their continued employment must receive due process before they may be deprived of that right (i.e., continued employment). Although the courts have repeatedly emphasized that due process is a flexible concept, the courts have generally held that, in most situations, due process requires both a pre-disciplinary and a post-disciplinary component.

i. Pre-Disciplinary Due Process:

At the pre-disciplinary stage, due process generally requires that an employee be given (1) specific notice of the charges or potential grounds for discipline being considered, (2) an explanation of the evidence and witnesses pertaining to the potential discipline, and (3) an informal opportunity to present his or her response to the charges to the decision maker (i.e., the pre-disciplinary conference). *Gilbert*, 520 U.S. at 928-930.

At a pre-disciplinary conference, an employee is afforded the opportunity to present his or her response to the charges. The pre-disciplinary conference does not have to be a formal hearing or evidentiary proceeding before the decision maker. On the contrary, it can be an informal conference and is meant only to be "an initial check against mistaken decisions" of the employer or decision maker. *Id.* at 929.

Once an employee has been offered pre-disciplinary due process procedures, an employer is permitted to impose final disciplinary action, subject to the more formal post-disciplinary appeal process discussed below. In certain very limited circumstances, an employer may be allowed to render discipline, such as suspending an employee without pay, prior to giving the employee a pre-disciplinary conference, so long as the employee is given a prompt post-disciplinary hearing. *Gilbert*, 520 U.S. 924. The circumstances where this disciplinary response is appropriate are likely limited to situations where the employer needs to take quick action in response to a serious allegation, such as where a police officer is accused of a crime. *Id.*

ii. Post-Disciplinary Due Process:

In instances where an employer elects to impose discipline on an employee after the pre-disciplinary conference, the employee is entitled to a post-disciplinary appeal process.

Post-disciplinary due process consists of a full-blown evidentiary hearing in which the employer must establish that the employee engaged in the charged conduct and that the conduct constitutes sufficient cause for the discipline imposed (that is, the employer must establish the “cause” for the discipline).

Unlike the pre-disciplinary conference, the post-disciplinary hearing is much more formal and is, in essence, a trial – complete with witnesses, exhibits and any other relevant evidence. Most courts have held that the employee must also be provided with an opportunity to confront and cross-examine witnesses relied on by the employer. The post-disciplinary hearing must be before a neutral and impartial hearing officer (or board) who will ultimately make the final decision as to whether to uphold or reverse the discipline imposed.

B. Liberty Interests and Due Process

In addition to procedural due process protections afforded to public employee “property interests” in continued employment, all public employees are also entitled to due process protections for their “liberty interests.”

In the context of public employment, the courts have ruled that liberty interests are implicated when an employee is publicly accused of misconduct that is false, of a stigmatizing nature and accompanies an employee’s discharge or other serious discipline. *Canon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); *Buxton v. City of Plant City*, 871 F.2d 1037, 1042-43 (11th Cir. 1989); *Sickon v. School Bd. of Alachua County*, 719 So. 2d 360, 366-367 (Fla. 1st DCA 1998).

The “made public” element includes instances where the stigmatizing information is published by the government through documents which are considered public records under Florida’s Public Records Law (including personnel records) or by statements made at public meetings.

Significantly, unlike due process protections afforded to property interests, protection of liberty interests is available to all employees, even those employed on an “at will” basis. In other words, whether the public employee may only be disciplined for cause is irrelevant in determining

whether an employee's liberty interests are implicated by a discharge. All that is required is that the employee be discharged due to a false and stigmatizing reason made public by the employer.

An employee who is discharged for a reason implicating his or her liberty interests is entitled to a publicly-held "liberty interest hearing" or, as it's sometimes called, a "name-clearing hearing" by his or her employer. Courts have described the content of such a hearing as follows:

In cases involving only liberty interests, the courts have required only that the claimant be accorded notice of the charges against him and an opportunity to support his allegations by argument, however brief, and, if need be, by proof, however informal. *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1345, *reh'g en banc denied*, 747 F.2d 710 (11th Cir. 1984), *cert. denied*, 470 U.S. 1052, 105 S.Ct. 1754, 84 L. Ed. 2d 818 (1985).

This opportunity for the employee to respond at a public hearing is designed to permit the employee to publicly-refute the stigmatizing allegations made public by the employer against the employee. Significantly, a name-clearing hearing is not a vehicle for the employee to challenge the dismissal decision itself. It serves only to allow the employee an opportunity to publicly refute the stigmatizing statements. *Dressler v. Jenne*, 87 F.Supp. 2d 1308, 1314 (S.D. Fla. 2000) (citing *Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977) and *Campbell*, 741 F.2d at 1345)). The employee's name-clearing hearing may take place after the dismissal of the employee and after the publication of the alleged stigmatizing false statements. *Harrison v. Wille*, 132 F.3d 679, 683, n. 9 (11th Cir. 1998) (citing *Campbell*, 741 F.2d at 1345).