



Judges, Juries and Public Employment Litigation Issues

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June 8, 2016



Judges and Employment Litigation

LESSONS WE HAVE LEARNED

Nix v. Elmore County, 158 Idaho 310 (2015)

Facts:

- Employee placed on 1 year disciplinary probation for work performance issues
- Disciplinary notice informed her that during probation she would be at-will subject to termination at any time for continued performance problems
- 4 month later, given notice of termination and not given a pre-termination hearing as at-will employee, but given a post-termination name-clearing hearing

Nix v. Elmore County, 158 Idaho 310 (2015)

Relevant provisions of personnel policy:

THIS PERSONNEL POLICY IS NOT A CONTRACT. NO CONTRACT OF EMPLOYMENT WITH ELMORE COUNTY WILL BE VALID UNLESS IT IS SIGNED IN ACCORDANCE WITH PROPER PROCEDURES BY A SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BOARD AND UNLESS IT IS SIGNED AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITTED BY THE CONTRACT.

Nix v. Elmore County, 158 Idaho 310 (2015)

Relevant provisions of personnel policy:

- The terms set forth in this booklet . . . are subject to change at any time . . . at the discretion of the Elmore County Board of Commissioners.
- The terms and conditions set forth in this policy, and in the resolutions and policy statements which support it, cannot be superseded by any other official's commitment, without the express written agreement of the Board of Commissioners.

Nix v. Elmore County, 158 Idaho 310 (2015)

Relevant provisions of personnel policy:

- Penalties for violating any of the rules [of conduct] may include, but are not limited to: (1) leave with or without pay; (2) suspension; (3) demotion; (4) verbal or written reprimand; and (5) dismissal.
- A supervisor may respond to personnel policy violations by taking disciplinary steps including, but not limited to (1) oral or written warnings; (2) suspension; (3) demotion; (4) probation; and (5) dismissal.

Nix v. Elmore County, 158 Idaho 310 (2015)



Relevant provisions of personnel policy:

The personnel policy of Elmore County establishes the right for full-time regular and part-time employees to a hearing prior to any final decision on discharge, demotion with attendant change in pay, or suspension without pay.... The following elements of procedure are for any such hearing to be held before the Supervising Elected Official, unless waived by the employee:

a. The employee shall be provided notice of the charges[] (Notice of Proposed Action) against the employee, an explanation of the employer's evidence, the proposed personnel action, and the procedure for requesting a hearing.

Nix v. Elmore County, 158 Idaho 310 (2015)

Relevant provisions of personnel policy:

The policy did not define “probationary employee,” but did contain a section entitled “Probationary Period”:

The probationary period . . . shall be utilized for closely observing the employee's work, for securing the most effective adjustment of a new employee to his or her position and for rejecting an introductory employee whose performance is not satisfactory. The initial probationary period will 1 year.

Nix v. Elmore County, 158 Idaho 310 (2015)

Notice of Termination:

On February 1, 2012, you were served with a Notice of Last Chance [and] were placed on probationary status for a period of one (1) year, during which time you were informed that you would be an at-will employee subject to termination with or without cause at any time during your probationary period. You were, also, warned that this was your last chance to continue employment with Elmore County, and any further performance problems could result in your termination of employment.

Based upon the fact that your performance in your position has not met our expectations and you have not fulfilled the performance requirements as set out in the Notice of Last Chance, you are hereby notified that your employment . . . with Elmore County is hereby terminated . . .

...

Should you believe that this termination is based upon an unlawful discriminatory purpose, you have seven (7) days from termination to notify me that you wish to meet with the Elmore County Board of Commissioners to discuss this issue. No other issues pertaining to your termination will be considered at that time.

Nix v. Elmore County, 158 Idaho 310 (2015)

Nix requested a post-termination hearing and received a notice of hearing that stated:

Pursuant to your request, the Elmore County Board of Commissioners have scheduled a meeting to discuss any discrimination claims you may have against Elmore County, its agents or employees. Please be advised that you were an at will employee, and as such are not entitled to a hearing regarding the reasons for your termination. The Board will not discuss performance-related issues.

Nix v. Elmore County, 158 Idaho 310 (2015)

Nix had no expectation of continued employment:

“Because there was a disclaimer in the [policy] explicitly stating that [it] was not a contract between employees and Elmore County, the provision providing for a pre-termination hearing is not binding on Elmore County. The disclaimer retained Nix's at-will status even though the policies also provide ... for an appeals process. This is particularly true given the notices Nix received that specifically stated she was, and would remain, an at-will employee and could be terminated at any time during her probation.”

Nix v. Elmore County, 158 Idaho 310 (2015)

Nix argued that only the BOCC and not supervisor had authority to change her status to at-will

Court rejected that argument

- Supervisor did not change terms and conditions of the policy—he only took disciplinary steps the policy explicitly authorized by it
- “The Notice of Disciplinary Action merely informed Nix what her probationary status entailed, including that she was an at-will employee and subject to termination at any time during her probation.”
- “[T]he BOCC reviewed and confirmed Nix's termination and the decision that Nix was not entitled to a pre-termination hearing. . . . [T]he BOCC effectively ratified any alleged “changes” [the supervisor] may have made to the policy's terms and conditions. “

Williams v. Madison County, USDC District of Idaho

Facts:

- Plaintiff was captain for sheriff's office
- 9/14/10—Notice of intent to terminate for handling of internal investigation
- 9/29/10—hearing conducted by sheriff with plaintiff and counsel present
- 11/10/10—decision issued by sheriff noting 4 sustained violations of rules and demoting with reduction in pay and rank rather than termination
 - decision also notified him of a 2 year probation during which he would be at-will subject to termination by sheriff
 - 4/4/11—filed NOTC regarding this discipline

Williams v. Madison County, USDC District of Idaho

Facts:

- 4/12/11—received reprimand and last chance notice for violating evidence handling procedures and untimely filing of reports
- 5/9/11—suspended with pay pending investigation for reports that he worked second job while on-duty with county
 - outside agency determined no violation of policy
 - 5/27/11—returned to work

Williams v. Madison County, USDC District of Idaho

Facts:

- 2/23/12—performance evaluation
 - met or exceeded expectations on 22/25 standards
 - had marginal performance on 3 standards
 - following chain of command
 - productivity during low activity times
 - displaying positive attitude towards job and others

Williams v. Madison County, USDC District of Idaho

Facts:

- 5/30/12—Notice of Proposed Termination
 - Referenced all prior discipline notices
 - Identified 14 additional policy violations, including many of same problems identified in previous disciplinary actions
- 7/26/12—Appeal hearing conducted by sheriff and attended by plaintiff and counsel
 - Sheriff stated that he had no personal or financial stake in the decision and that he had no animosity or bias towards plaintiff

Williams v. Madison County, USDC District of Idaho

Facts:

- 7/27/12—notice of decision terminating employment
 - Sheriff could not rely on plaintiff to follow policy
 - Plaintiff could not effectively and efficiently carry out the duties of a deputy sheriff
- Plaintiff was unable to find new employment in law enforcement

Williams v. Madison County,
USDC District of Idaho

Relevant provisions of personnel policy:

THIS PERSONNEL POLICY IS NOT A CONTRACT. NO CONTRACT OF EMPLOYMENT WITH MADISON COUNTY WILL BE VALID UNLESS IT IS SIGNED IN ACCORDANCE WITH PROPER PROCEDURES BY A SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BOARD AND UNLESS IT IS SIGNED BY AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITED BY THE CONTRACT

Williams v. Madison County, USDC District of Idaho

Relevant provisions of personnel policy:

Except as otherwise provided in this paragraph, employees of Madison County will not be suspended without pay, demoted with an accompanying change in pay, or discharged from their positions except for cause related to performance of their job duties or other violations of this policy. Cause shall be determined by the employee's supervisor/elected official and shall be communicated in writing to the employee when employee status is changed.

Williams v. Madison County, USDC District of Idaho

Relevant provisions of personnel policy:

- Provided for an at-will status for employees only during the first year of employment
- Sheriff understood that employees could only be terminated for-cause after the first year of employment

Williams v. Madison County, USDC District of Idaho

Complaint filed in Federal District Court alleging causes of action:

- Violation of procedural due process rights
- Violation of substantive due process rights
- Violation of First Amendment—free speech rights
- State law claim of wrongful termination/breach of contract
- Whistleblower claim
- Defense summary judgment motion denied in part and granted in part

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Procedural Due Process

- Personnel policy created reasonable expectation of continued employment and termination only for cause after first year of employment
- The notice placing plaintiff on probation in 2010 did not change the provisions of the personnel policy
- Personnel policy only gave the BOCC the power to change its terms and did not allow the sheriff himself to change the status of an employee to at-will
- “Probation” not defined in the personnel policy and does not include the ability to change the status to at-will

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Procedural Due Process

“Here, although [the sheriff] did not emphatically state Williams' employment would be terminated in advance of the hearing, . . . the Court concludes a reasonable juror could infer [the sheriff] prejudged the issues. First, [his] statement that he held no bias or animosity against Williams does not necessarily satisfy the above standard. While [the sheriff] may not have directed animosity toward Williams personally, his statement does not address whether he prejudged the issues constituting Williams' termination from employment. Second, the sheer number of disciplinary violations amounting to thirteen alleged policy violations could support an inference that [the sheriff] was looking for reasons to terminate Williams' employment. And, the July 27, 2012 termination decision follows a favorable employment evaluation of Williams in February of 2012 from a different supervisor. Moreover, [the sheriff] stated he could no longer rely upon Williams, suggesting he had prejudged the issues. Finally, [the sheriff] filed a previous notice of action just days after Williams submitted a notice of tort claim in April of 2012.”

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Substantive Due Process

“An individual has a liberty interest in employment protected by the Due Process Clause if the dismissal is for reasons that might seriously damage his standing in the community, or if the dismissal effectively precludes future work in the individual's chosen profession. One deprived of such a liberty interest must show 1) the accuracy of the charge is contested; 2) there is some public disclosure of the charge; and 3) the charge is made in connection with termination of employment. . . .At issue is the public disclosure requirement.

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Substantive Due Process

Despite the lack of evidence before the Court that Madison County took any proactive steps to publicize Williams' disciplinary proceedings or the reasons for the termination of his employment, Williams contends that, to apply for a job in law enforcement, he must disclose his termination, the reasons for it, and agree to release everything in his personnel file connected with his termination. Here, Williams proffers his own testimony regarding his inability to obtain employment in law enforcement, and the hiring criteria used by Bonneville and Bannock County for such positions. Given the nature and numerosity of the charges, Williams contends it will be impossible to find a position in his chosen profession, and public disclosure of the nature of the discipline (not just the fact of termination from employment) is inevitable in his case.

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Wrongful Termination/Breach of Contract

The personnel policy expressly disclaims that it is a contract,
so no contract was breached

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Trial Result

Procedural Due Process

- Plaintiff was denied an unbiased, impartial decision-maker at the 9/29/10 hearing, however he sustained no damages
- Plaintiff was denied an unbiased, impartial decision-maker at the June 26, 2012 hearing and the result would have been different if an unbiased, impartial decision-maker would have conducted the hearing

Williams v. Madison County,
USDC District of Idaho
Case No. 4:12-cv-00561

Trial Result

Substantive Due Process

- Plaintiff was not foreclosed from working in law enforcement as a result of the termination so no violation of his rights



Juries and Employment Litigation

LESSONS WE HAVE LEARNED

Juror's Don't Like You

Jury Polls Show

- 75% of jurors think employers do not strictly enforce their policies
- 73% think harassment is common at work
- 88% believe a supervisor who engages in harassment or discrimination should be fired
- 70% believe a supervisor who makes a reference to sex should be fired
- 72% believe an important function of their role is to “send a message” to organizations

Jurors Don't Like You

Jury Polls Show

- 68% of jurors “strongly agree” that the playing field between employers and employees is not even
- 70% of jurors distrust “at-will” employment arguments
- 86% of jurors think an employer should be liable for the acts of employees, even if the employer doesn't know about it

Jurors Don't Like You

Jury Polls Show

- 69% of jurors believe employers lie to win lawsuits
- 91% of jurors think an employer is negligent if it does not properly document an employee's performance issues
- 12% of jurors are predisposed to believe the employer in a dispute with an employee

Jurors Don't Like the Law, Either

Jury Polls Show

- 29% of jurors think it is more important to follow the letter of the law than the spirit of the law
- 71% of jurors think it is more important to see that “justice is done” than to follow the letter of the law
- 90% of jurors would excuse a victim for failing to complain

Jurors Don't Like Anything, Really

Jurors Do Not React Well To

- Managers who over-react, over-discipline or over-criticize
- Employers who characterize workers as lazy or incompetent
- Defenses that rest on technicalities
- Actions that do not pass the fairness test
- “Gray area” issues

Jurors Do Like Awarding Damages

- 50% of prospective jurors believe a \$1 million verdict would not be noticed by senior management in a large organization
- 90% of prospective jurors believe an employer liable for negligence should pay punitive damages
- 10% of prospective jurors are generally against punitive damages



At-Will vs. For-Cause Employment

WHY DOES IT MATTER?

For-Cause and Due Process

- Only legally required for for-cause employment
- Courts are increasingly attuned to due process and its requirements
- In county situation, not always easy to craft procedure that will satisfy the demands of due process

For-Cause and Due Process

- What is required?
- Pre-termination/discipline notice of the cause for the action
- Pre-termination opportunity to be heard
- Unbiased decision-maker

For-Cause—How Much is Enough

- For cause termination/discipline requires sufficient cause for the action taken
- Decision-maker has burden to balance all factors to make this determination
- Some factors to consider
 - Severity of action leading to termination/discipline
 - Clarity of rules prohibiting conduct
 - Response to same issue with other employees
 - Employee history of discipline
 - Likelihood of remediation/improvement by employee

For-Cause—How Much is Enough

- Remember

If litigation ensues, it is then up to the judge and/or jury to determine if you made the right balancing decision on whether there was sufficient cause

At-Will Employment

- Basic Rule
 - The employment can be terminated by either the employer or the employee at any time and for any reason that is not unlawful
 - May not be based on any discriminatory or retaliatory purpose or in contravention of constitutional or statutory protections
 - Employment attorneys are developing expertise and almost always now know how to allege discrimination or retaliation

At-Will Employment

- No procedural due process requirement which appears to make the termination/discipline process easier
- Personnel policy should not have any procedural rights provided to employees
- However, good idea to give employee a pre-termination opportunity to be heard in most circumstances

Post-Termination/Substantive Due Process

- Applies to both at-will and for-cause employment
- Required when termination/discipline based on that can harm the employee's future employment opportunities
 - Dishonesty
 - Immorality
 - Illegal conduct
 - Discriminatory or retaliatory behavior



Nuggets of Wisdom from the Litigators

LESSONS THEY HAVE LEARNED

Nuggets of Wisdom

- Because of possibility of legally being taped by employees, be careful when discussing employment issues with employees that are on the edge of being terminated
- Accurate performance evaluations
 - Don't ignore issues already addressed orally
 - Note deficiencies and plans to correct them
 - Also note positive traits/work performance

Nuggets of Wisdom

- Notices of discipline/termination need to use defensible, specific allegations rather than broad generalities that too often sound lawyerish
- It is difficult to recover when an administrator is caught lying about anything in the termination process, even if the motive is pure
- Jurors do not like to hear the words “at-will.” You must keep the use to a minimum but find a way to describe it in another way

Nuggets of Wisdom

- Administrators need to get legal advice/involvement before pulling any triggers on termination and even discipline that involves loss of pay
- Do not use probation for either at-will or for-cause employees
 - Employees think that the end of probation will wipe out the issues and change their employment status in some way
 - Best to use “last chance” notices

Nuggets of Wisdom



- Impartial decision-maker is becoming an important factor to address—the Federal court is honing in on this
 - Difficult for county since the elected officer is the responsible decision-maker for employment in his office
 - Larger counties with multiple levels of supervision have easier time

Nuggets of Wisdom



- Timing is often everything—as shown in Williams, move with caution when disciplining after NOTC or other workplace allegations
- Employees, however, often know when discipline is coming and make allegations of discrimination/retaliation just before it happens

Nuggets of Wisdom

- Whistleblower claims reporting waste or violations of law are becoming almost a given in employment cases
 - Kirt Naylor currently has case at Idaho Supreme Court for Ada County on issue of whether a violation of a personnel policy that is not adopted by ordinance can be the basis of a whistleblower claim—DC ruled in Ada County's favor
- Idaho Code 6-2109 requires employers to give notice to employees of their protection and rights under Whistleblower Act

Nuggets of Wisdom



- Document every employee problem, but be fair
- Religious discrimination claims that assert that employment requirements interfere with religious practices, requires the employer to engage in an ADA-like interactive process with the employee

Nuggets of Wisdom

- Jury trials are unpredictable
- Jurors often do what they think is fair, rather than follow the law
- You can win all the pre-trial and in-trial battles arbitrated by the judges, but lose the war in the hands of the jury