NORTHWEST WORKPLACE LAW PLLC

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When Public Employer Policies Create Enforceable Unilateral Contracts

Did you know that language in personnel policies – including those of public sector organizations – can create enforceable unilateral contracts between employers and their employees? A recent dispute between a university and its faculty members underscores how easy it is to create binding agreements (whether intentionally or inadvertently) and the importance of developing carefully crafted policies.

The Washington State Supreme Court has long recognized that an employer policy may form the basis of a unilateral contract with its employees. These contracts may address terms of employment such as wages, benefits, cause for discipline, or the modification of an at will relationship.

In a unilateral contract, one party makes a promise. The second party may accept that promise and establish a unilateral contract through performance of her end of the bargain. Consideration also must exist. Consideration requires some legal detriment, such as an employee continuing to work for an employer when not otherwise required to do so.

Storti v. University of Washington

Recently, the Washington Supreme Court found that policy language implemented by the University of Washington created a binding contract with faculty members for annual pay raises. Storti v. Univ. of Wash., 181 Wn.2d 28 (2014). In 2000, the University instituted a policy awarding an annual two percent raise to all faculty who performed meritorious work in the year prior. The University reportedly initiated this policy in response to concerns that low salaries were impacting recruitment and retention of high performing faculty members.

When the University later suspended the policy and declined to grant faculty members a raise for their prior year's performance, a class of faculty members alleged the University breached a unilateral contract. They contended that they were entitled to a raise, because the University could not retroactively suspend the policy after faculty had substantially performed their end of the bargain.

The Court concluded that because the contract requisites of offer, acceptance, and consideration were established, an enforceable contract had been created. First, the Court found that the employer policy unambiguously made a promise of annual raises for meritorious work.

PERC Case Update

Changes to promotional opportunities outside bargaining unit subject to balancing test

City of Seattle, Decision 12102-A (PECB, 2014).

The Commission recently addressed whether an employer may have a duty to bargain a decision to change eligibility standards for promotional opportunities outside a bargaining unit. The union's complaint alleged that the employer unlawfully refused to bargain a decision to amend an ordinance that set standards for promotion to assistant police chief. The Commission vacated the Unfair Labor Practice Manager's dismissal of the complaint for failing to state a cause of action. The Commission held that an examiner's determination of whether the employer had a duty to bargain the decision would require balancing the union's interest in wages, hours, and working conditions with the employer's interest in entrepreneurial control and management prerogatives.

Employer representatives found to lack sufficient authority to engage in meaningful bargaining

Kitsap County, Decision 12163 (PECB, 2014) (appeal to Commission pending).

Hearing Examiner Dianne Ramerman found the employer committed an unfair labor practice by failing to vest its negotiators with sufficient capacity and authority. In concluding the employer breached its good faith bargaining obligations, the Examine focused on the employer representatives':

- failure to adequately explain the employer's proposals and intent
- lack of adequate information and knowledge
- inability to enter tentative agreements without consulting others not at the table and
- unilateral termination of the parties' final bargaining session.

Among other remedies, the Examiner ordered the employer to send representatives to the bargaining table with sufficient authority to engage in meaningful bargaining with the union.

Employer ordered to establish internal process for responding to information requests

Seattle School District, Decision 12173 (PECB, 2014).

Hearing Examiner Dianne Ramerman concluded that the employer refused to timely provide relevant information requested by the union, by neglecting to provide the information for months and failing to effectively communicate with the union about the request. The Examiner found that neither internal misunderstanding, inadvertent delay, nor an employee's vacation were viable defenses. In addition to standard remedies, the Examiner ordered the employer to establish a formal process that identifies which individuals – not simply which departments – are responsible for responding to union information requests. The process must include steps to account for staff vacations and other instances of unavailability of the individuals assigned.

Beyond the *Loudermill* Hearing: Post-Termination Due Process Requirements

Most public employers are well familiar with Loudermill hearings and the obligation to provide pre-termination due process to employees with a property interest in their employment. It is less well known that post-termination procedures are a significant and related aspect of due process.

Inadequate post-termination procedures can constitute a distinct due process violation. Under Ninth Circuit case law, even when pre-termination due process standards are met, the court must independently evaluate the post-termination process for due process violations.

Procedural Due Process

The Fourteenth Amendment of the United States Constitution affords public employees with property interests in their employment the right to due process prior to termination. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). For public employees, a property interest is created through an expectation of continued employment; the employment is not "at will." Property interests arise from a variety of sources, such as statutes, ordinances, charter provisions, collective bargaining agreements, and express or implied contracts.

Employees with a property interest in their employment are entitled to a limited pre-termination hearing to provide an initial check against mistaken decisions, to determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

In Loudermill, the U.S. Supreme Court held that at a minimum, prior to the termination the employee must receive notice of the charges, an explanation of the employer's evidence, and an opportunity to present his or her side of the story. In identifying this minimum floor, the Supreme Court relied on the expectation of a more comprehensive post-termination hearing that would remedy any deficiencies of the pre-termination process.

If an employer provides adequate pre-termination process, it may postpone until after termination an employee's opportunity to obtain a full evidentiary hearing before an impartial decision maker – but the employee must receive such a hearing either pre- or post-termination. The scope of the post-termination process due is intertwined with the amount of pre-termination process received: the more limited the pre-termination hearing, the more process required post-termination.

Balancing Test

There are no bright line rules delineating what process is due in a particular situation. Rather, courts determine what procedures satisfy due process by applying the balancing test set forth by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976). The test balances private interests, government interests, and the risk of error. For public employees, the competing considerations are: (1) the employee's interests in retaining employment; (2) the government's interest in expeditious removal of an unsatisfactory employee; and (3) the risk of erroneous termination.

Beyond the requirements of an evidentiary hearing before an impartial decision maker, a court must apply the Mathews balancing test to the facts of the particular case to determine what process was due. Some of the elements courts have found to be required for a post-termination hearing include:

- The right to attend the hearing.
- The right to assistance of counsel.
- The opportunity to challenge the evidence.
- The right to confront and cross examine one's accuser.

- The right to call witnesses and present evidence.

An employer may meet its obligation to provide due process through a civil service process or employer-established appeal procedures, so long as those procedures satisfy due process requirements. Similarly, an employer may meet its obligation to provide due process through grievance procedures established in a collective bargaining agreement if those procedures satisfy due process. Also, the Ninth Circuit has held that where an arbitration process is available and the union declines to pursue the matter on the employee's behalf, the employer is not required to provide a separate process.

Unpaid suspensions and demotions impacting salary also are deprivations of employment that may implicate the protections of due process. As with terminations, a court would assess whether adequate procedural due process was provided through the balancing test. Because the nature of the deprivation an employee experiences determines how much process is due, deprivations short of termination do not always require the full array of procedural protections. Courts will consider the length, severity, and finality of a deprivation in determining what process was due.

Additionally, the Supreme Court has recognized that where a public employer must act quickly, or where itwould be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of due process. In Gilbert v. Homar, 520 U.S. 924 (1997), the Court stated: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demandingprompt action justify postponing the opportunity to be heard until after the initial deprivation." Courts have applied this standard in very limited circumstances (e.g., Gilbert involved a police officer charged with a drug-related felony).

Key Takeaway for Employers

Many public employers – including some in Washington – have endured expensive and burdensome litigation over the constitutional adequacy of the post-deprivation due process provided to an employee. Rather than attempting to guess what might suffice under a court's balancing test, employers concerned with mitigating risk may consider offering expansive post-deprivation process, including providing the employee the opportunity to attend the hearing, receive the assistance of counsel, challenge the evidence, confront and cross examine his or her accuser, present evidence, and call witnesses.

Eligibility for Rehire: An Essential Question

Although there are multiple elements of a thorough and defensible hiring process, it is critical that employers ensure they are not overlooking one of the most important steps: discovering the applicant's eligibility for rehire with former employers.

A reference checking process that limits contacts to references offered by the applicant may fall short of obtaining all crucial information. An individual seeking work after being fired for serious misconduct is often shrewd enough to direct prospective employers to references who will not divulge the offenses. Contacting former employers to ask whether the applicant is eligible for rehire can reveal a red flag that may not have surfaced through other steps of a routine hiring process.

What if a former employer indicates that the applicant is ineligible for rehire – is that a reasonable basis for declining to hire her? Not necessarily. For example, a

cases, an organization may deem a former employee ineligible for rehire for possibly illegal reasons, such as in retaliation for filing an EEOC charge.

Upon receiving information that your applicant is not eligible for rehire, the best practice is to gather and analyze additional information – such as providing the applicant an opportunity to explain – prior to making a final decision.

Continued from page 1

Second, the faculty members accepted the University's offer of a raise through their substantial and meritorious performance. Third, the faculty established consideration by agreeing to work for the entire year and not pursue positions elsewhere.

The Court next assessed whether the University had breached the contract. At issue was whether the "reevaluation" language accompanying the merit raise provision allowed the University to retroactively modify its contractual obligations after faculty had substantially performed.

In a 5-4 decision, the majority held that no breach occurred. The majority reasoned that because (a) the faculty were on notice of the potential for modification, (b) the University established specific procedures for modification, and (c) the University followed the procedures, no breach occurred.

The Storti decision highlights the need for employers to craft policy language with intention and care, keeping mindful of their organization's short- and long-term interests and taking steps to minimize risk.

Recommendations

- When developing personnel policies, employers should use the utmost caution to avoid creating a binding agreement where there is no intent to do so. If there is any question as to whether a contemplated provision makes a binding promise, consider whether the language gives the employer freedom to make choices or requires it to act in a particular way.
- Unless the organization intends to create an enforceable contract, avoid mandatory language ("shall," "always," "must," etc.). Also, include conspicuous, effective disclaimers clearly communicating that the policy does not create a contract or guarantee specific treatment in specific circumstances.
- Where the employer desires to make a promise to employees but seeks to retain some flexibility (e.g., to respond to an operational change or budget shortfall), the policy language should include clear notice of the possibility of modification and establish procedures for modification. The employer should plan to comply with the procedures when initiating a modification.
- Review existing policies to assess whether any potentially could be characterized as enforceable contracts. If the organization did not intend to be bound or no longer wishes to be, implement a revised policy only after providing employees with reasonable notice of the prospective change.

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