ALLEN NORTON & BLUE
PROFESSIONAL ASSOCIATION

LABOR TOPICS INVOLVING PORT EMPLOYERS

FEBRUARY 12, 2019

PRESENTED BY:

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I. INTRODUCTION

Today, more than ever, public employers face mounting costs because of employment related matters. Threatening demand letters, EEOC charges and lawsuits over 1st Amendment free speech claims, whistleblower claims, discrimination and retaliation seem to come like periodic but predicable rain. Collective bargaining and to often special magistrate proceedings are ubiquitous.

The time and money lost by employers and management to investigate and defend instead of spending their time addressing operations is becoming more and more significant thorn in the already punctured skin of the CEO of many public employers.

II. HOW TO ADDRESS THE ISSUE HEAD ON

Up front preventative maintenance is your most important tool to avoid these pitfalls. What do we do?

A. Evaluate your CBAs and personnel rules and regulations to clearly understand your obligations.

1) Do your employees have property right protection against job actions and, if so, what disciplinary actions are entitled to those protections?

2) Are your rules of conduct clear, officially disseminated and signed? (*See* Attachment 1)

3) To the extent property rights are involved, do you have a constitutionally adequate due process procedure? (*See* Attachment 2).

4) If you have arbitration in your CBA covering discipline, is your language satisfactory or do you need to either eliminate it and go with "at will" or modify it to provide better protection? (Looser pays, burden of proof, restrictions on arbitrator authority).

5) Are your supervisors trained as to how to document and counsel employees?

6) If you are considering serious discipline, do you coordinate with your labor attorney before you proceed?

7) Do you have employment insurance? Like PRM or Florida League?

Addressing and resolving these issues up front will save you a lot of headaches in the future.

III. CLAIMS

A. Wage Hour (minimum wage Federal $7.25 per hour; Florida $8.46 per hour)

1) Fair Labor Standards Act 29 U.S.C. 203 *et seq.*; Florida Minimum Wage Act (S. 24, Article X Florida Constitution) F.S. 448.10

(a) Exemptions – executive, administrative, professionals ($455.00 salary) computer ($455.00 salary or $27.63 per hour if on fee basis)(FLSA 13(a)(a); 29 CFR 541), highly paid office non-manual ($100,000.00 per year or more and $455.00 or more per week).

(b) Hours Worked and Overtime – (DOL Fact Sheet #22)

i. Time counted

ii. Overtime over 40/42/7(k) for fire

- Time and one-half if hourly
- Half time if salaried or piece rates

(c) Litigation

i. Statute of Limitations 2/3 years federal; 8/5 years state (F.S. 95.11(2)(d) and (3)(q)

ii. Liquidated damages

iii. Attorneys' fees and costs

iv. BIG BUCKS POTENTIALLY

B. Discrimination – Generally prohibits discrimination based on race, color, religion, sex, age, national origin, disability, marital status, sexual orientation (it's coming and is here in some locations)

1) Title VII

2) Florida Civil Rights Act

3) Americans with Disabilities Act

4) Local and State laws

5) Comments on "me too" and sexual harassment cases – the standard. *Mendoza v. Borden*, 195 F3.d 1238, 1245 (11th Cir. 1999); *Faragher v. City of Boca Raton*, 524 US 775, 787-788 (1998)

(a) Protected group

(b) Harassment based on sex or legally protected characteristics

(c) Unwelcome

(d) Severe and pervasive so as to change working conditions (claimant and reasonable person)

(e) Defense: policy, investigation, appropriate recommended relief (*Faragher*, *supra*).

C. Free Speech – First Amendment – employee criticism – Granddaddy Case – *Pickering v. Board of Education*, 391 US 563, 574 (1968)

1) Speaks as a citizen over a matter of public concern (not private)

2) Balance free speech over against promoting efficiency (*See also Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Connick v. Myers*, 461 U.S. 138, 147 (1983)

(a) To whom was the letter/email/comment ("communication") directed? Supervisor, CEO, Commission or Board member (e.g., newspaper, TV, etc.)

(b) Of whose activity was the communication critical? (*e.g.* Elected Official, CEO, Police/Fire Chief, a fellow employee)

(c) What did the communication say that the public employer objected to?

(d) Why do you think the communication was inappropriate?

(e) Did the communication complain about a violation of law, regulation or procedure by an employee or elected official *(e.g.,* Whistle Blower applicability)?

(f) Did the communication address wages, hours and working conditions (*e.g.,* concerted protected activity)?

(g) Did the communication violate any employer contract, personnel or department rule, regulation or procedure?

(h) Did, or does, the policy communication interfere with the operations of the employer, and, if so, how?

(i) If the employer has a rule, policy or procedure in place which addresses the subject communication, has the rule been uniformly applied?

(j) If the employer thinks disciplinary action may be appropriate, what am I required to do before I take disciplinary action? (*e.g.,* due process, Policeman's Bill of Rights)

(k) In light of the law today, do I need to revise the employer disciplinary policy, electronic communication solicitation distribution in the personnel rules, contracts or elsewhere?

(l) What are the political, morale and public ramifications of taking disciplinary action?

(m) Are the communications and employer response subject to the Sunshine Law, and if so when? (*e.g.* FS 447.605(3), FS 112.53 *et seq*.).

D. Public Employer Whistleblower – F.S. § 112.3187 *(Kogan* v. Israel*, 211 So. 3d 101 (Fla. 4th DCA 2017)*

E. Florida Police Employee Relations Act – F.S. Chapter 447

1) Recognition / Election

2) Exemptions – Managerial, Confidential, Supervisors

3) Bargaining – mandatory subjects of bargaining, including discipline and pensions / status quo

4) Parties – election Sessions F.S. 447.605

5) Impasse Resolution

6) Final Decision

IV. IMPORTANT FACTORS IN EMPLOYMENT ARBITRATION AND LITIGATION

What do EEOC/FCHR, courts and juries look at in determining a case of claimed discrimination?

A. Did the employee know the rules?

B. How serious was the conduct that led to the decision? The more serious, the less progressive discipline is a factor.

C. Unless very serious, what was the employee's past JPR and disciplinary record?

D. Was the employee given a chance to correct his or her mistakes?

E. Similar or dissimilar treatment of other employees?

F. Was the employee given notice of the possible discipline and a chance to tell his/her side BEFORE the decision?

G. Does the decision pass the "smell test"?

If you have a union, bring the steward/business agent in on final warnings and consider use of last change agreements.

V. LITIGATION

Of the options we are here to discuss, litigation is the most troublesome as far as loss of managerial time, cost and impact on operations. Essentially the law is as follows with respect to discrimination claims involving discipline:

A. Plaintiff's must establish a *prima facia* case – *i.e.,* assuming the truth of the allegations they constitute a violation of law.

B. Defendant then must articulate a legitimate non-discriminatory reason for the disciplinary action.

C. Plaintiff must prove the stated reasons are a pretext to cover up the discrimination.

D. The final burden is on the plaintiff to establish discrimination by a preponderance of the evidence.

E. But for or a motivating factor?

What are the problems with litigation?

A. Protracted – no end in sight

B. Discovery

C. Cost in time

D. Attorneys' fees – both ways

E. Risk of Loss:

1) FCHR

2) Title VII

F. Federal *vs.* State Court

G. Juries and the "smell test" – fairness *vs.* illegality – this is often THE ISSUE

H. Award limits

This may be an oversimplification of the current state of the law but gives us an overall idea to proceed with this discussion. Litigation is normally the best option to win so long as you can keep the case in federal court – but often not worth the risks or costs – so most settle, particularly if an insurance company is involved.

VI. ARBITRATION

What is good and what is bad about arbitration?

In my view, except for the fees enjoyed by your labor attorney, the "good" things are in a dog fight with the bad. It is certainly quicker and less expensive than litigation, but the chances of a clear win are not nearly as great as in federal court.

What is wrong with arbitration in discipline case?

A. No control over arbitrator – he/she comes, hears, decides, gets paid and leaves – you cannot fire him/her.

B. Many arbitrators have no concept of the operations and the impact on adverse decisions – *e.g.*, reinstatement will have on operations. Many have NO public sector experience.

C. Delay – they will get to it when they get to it – and back pay continues to run. HOW TO STOP BACK PAY – Longwood.

D. Split the baby – arbitrators often split the baby – everybody gets something – nobody gets it all.

E. Burden of proof – preponderance *vs.* clear and convincing evidence.

F. Age – many of the arbitrator lists we receive contain arbitrators that are older than dirt and are far beyond their prime. We have to drop books on the desk to wake them up.

G. Most arbitrators come from an industrialized background.

H. Many arbitrators don't apply the contract but their own view of "labor justice".

I. Most arbitrators want to be mediators but unlike mediators, they have the power to impose their resolution on the public employer.

Case examples: Hardee County, Longwood and Bartow.

J. Appeal – almost impossible to win on appeal. But with the right CBA language, you have a shot.

VII. A BETTER APPROACH

Your own due process procedure for non union and union employees like in Longwood, Punta Gorda, Longboat Key, Bartow and many others.

A. Predisciplinary

1) Notice

2) Summary of evidence

3) Predisciplinary hearing

4) Decision

B. Appeal

1) Appeal with full-blown hearing

2) Final decision

C. Advantages

1) Quick – fair to employee and employer

2) CEO responsible to legislative body

3) Continuity of disciplinary approach

4) Usually no lawyers

5) HUGE savings in time and money

THE WAY TO GO IF YOU HAVE THE WILL AND LEGISLATIVE BODY SUPPORT.

VIII. MEDIATION

Questions often asked:

A. How does mediation arise?

1) By contract *e.g.* SECI – must mediate before you arbitrate.

2) By voluntary agreement *e.g.* Gallagher

3) Through EEOC or FCHR *e.g.* Volusia Clerk

4) By court order – it is the norm

B. When to mediate?

As soon as possible.

C. How is a mediator selected?

1) Appointment

2) Agreement

D. What is the authority of a mediator?

No decision-making power – tries to avoid litigation and reach a compromise for everyone.

E. How does it work?

1) Opening statement and reach agreement on role of the mediator and rules for proceeding. Example: How the undersign handles it – opening statement, memo of issues

2) Passive run back and forth – evaluative mediator

3) Attendees – parties and representatives

4) Confidentiality

5) Walk through an example

F. Settlement – who drafts, legislative body approval

G. Who pays for mediation?

IX. CONTRACT NEGOTIATIONS/SPECIAL MAGISTRATE PROCEEDINGS

Use of a mediator.

1) During contract negotiations (*e.g.* Broward County)

2) As a prerequisite to arbitration (*e.g.* SECI)

3) As a part of the statutory impasse process

X. CONCLUSIONS

A. Get you rules, regulations and due process procedures in order

B. Train your managers and supervisors to document and counsel

C. Eliminate arbitration from contracts, or

D. Address contractual issues to provide maximum preservation of rights

E. MOST IMPORTANT – PRESS – PUBLIC DOCUMENTS – before serious discipline, consult with labor counsel up front – F.S. 119.071(1)(d) – careful up front evaluation – preparation of documents

F. Get union involved early on – union becomes your best witness

G. Be courteous – maintain dignity and goodwill

H. Mediate early on

If it doesn't work - LITIGATE