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Limitations on Property Rights in Public Employment
Pittman v. Wilson County

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Since 1972 the United States Supreme Court has held that the Fourteenth Amendment's guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law"[1] extends, in two distinct circumstances, to a public employee's job security.[2] First, a public employee's liberty interest is impaired where a public employer dismisses an employee for reasons "that might seriously damage his standing and associations in his community"[3] or that might stigmatize the employee and impair "his freedom to take advantage of other employment opportunities."[4] Where such stigmatizing charges are made public by the employer, the employee is entitled to notice and an opportunity for a hearing to clear his or her name.[5] Second, where a public employee demonstrates a vested property interest in the job—that is, a status conferred by the public employer other than "at will" employment—the employee may only be removed for cause after notice and an opportunity to respond to the proposed dismissal.[6]

In *Pittman v. Wilson County*[7] the Fourth Circuit, in an opinion by former Supreme Court Associate Justice Lewis F. Powell, significantly limited the scope of the property interest in public employment. The court held that a local government employer is not obligated to follow its procedural requirements for discharge of employees where those requirements are only set forth by resolution in an employee handbook. This bulletin reviews the holding in Pittman and summarizes the current state of the law in North Carolina concerning public employee property rights.

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1. U.S. CONST. amend. XIV, § 1.
2. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Arnett v. Kennedy, 416 U.S. 134, 157 (1974); Bishop v. Wood, 426 U.S. 341, 343 (1976); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).
3. Board of Regents v. Roth, 408 U.S. at 573.
4. *Id.*
5. Board of Regents v. Roth, 408 U.S. at 573; *See* Bishop v. Wood, 426 U.S. at 348-49; Boston v. Webb, 783 F.2d 1163, 1166 (4th Cir. 1986); McGhee v. Draper, 564 F.2d 902 (10th Cir. 1977).
6. *Loudermill*, 470 U.S. at 541-42 and cases cited therein.
7. 839 F.2d 225 (4th Cir. 1988).

THE WILSON COUNTY EMPLOYEE HANDBOOK

In 1971 the Board of County Commissioners of Wilson County adopted a personnel resolution to "govern the appointment, salary, promotion, demotion, dismissal

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and conditions of employment of employees of Wilson County."[8] The terms of the personnel resolution were printed and distributed to all Wilson County employees in the form of an employee handbook.

Article III, Section 5, of the resolution, "Disciplinary Action," sets forth a policy that provides, *inter alia*, that "an employee . . . may be dismissed by a department head and/or the County Manager. The degree and kind of action will be based upon the sound and considered judgment of the department head and the County Manager in accordance with the provisions of this policy to assure that the intent of the policy is followed."[9] The policy further states that "the causes for [employee] demotion or dismissal fall into two categories: (1) causes relating to performance of duties, and (2) causes relating to personal conduct detrimental to public service."[10]

The Wilson County policy also contains an extensive procedure requiring employees who demonstrate unsatisfactory performance to receive at least three warnings before dismissal and lists representative instances of misconduct that may serve as the basis for discipline or dismissal.[11] Most significant, the policy contains a procedure clearly adopted as a result of the Supreme Court's holding in *Cleveland Board of Education v. Loudermill*[12] that a public employee with a vested property interest is entitled, as a matter of due process, to a pretermination hearing. The procedure requires that an employee dismissed for performance or conduct be afforded a "pre-dismissal conference between the supervisor and/or the department head and the employee."[13] It further requires the supervisor or department head to specify the reasons for the proposed dismissal during this conference and to afford the employee an opportunity to respond.[14]

TERMINATION OF VICKIE PITTMAN

Vickie L. Pittman worked as a dispatcher in the Wilson County sheriff's office from 1981 to 1983. In June of 1983 she began a new job as a telecommunicator for the Wilson County Emergency Communications Center.[15] Under the terms of the Wilson County personnel resolution, Pittman became a "permanent employee" following the successful completion of a six-month probationary period required of all new employees.[16]

On January 10, 1986, the Emergency Communications Center director, Danny Hickman, met with Pittman and asked her a series of questions to determine whether she had engaged in misconduct. Specifically Hickman accused Pitmann of taking a typewriter ribbon from the typewriter of a fellow employee to read what was being written about her, which Pittman admitted was true.[17] Later that same day Pittman again met with Hickman and two other Center supervisory personnel, who confronted her with this incident and other acts of alleged misconduct and demanded her immediate resignation. Given the choice of immediate resignation or dismissal, Pittman resigned.[18]

A few days later, Pittman contacted the Center, claiming that her resignation had been coerced and demanding a discharge hearing. The Center refused.[19] Pittman then filed suit in United States District Court for the Eastern District of North Carolina under 42 U.S.C. § 1983, claiming her termination without a predismissal hearing before an impartial official violated her due process guarantees under the Fourteenth Amendment.[20]

DETERMINATION OF PITTMAN'S CLAIM BY THE COURTS

The district court, contrary to the report and recommendations of a magistrate initially appointed to hear the case, granted Wilson County's motion for summary judgment against Pittman. In doing so the court found that Pittman had not been discharged from her job as a telecommunicator and that even if her resignation was construed as a discharge, Pittman had no property interest in her job. Under North Carolina law, held the court, Pittman was an "at-will" employee entitled to no due process guarantees.[21]

The Court of Appeals for the Fourth Circuit affirmed the holding of the district court that Pittman was an "at-will" employee with no property interest in continued employment.[22] Critical to the court's determina-

8. *Wilson County Employee Handbook*, 7. The resolution became effective July 1, 1971, and was revised on March 4, 1985, and February 3, 1986.
9. *Wilson County Employee Handbook*, 11.
10. *Id.*
11. *Id.* at 12-14.
12. 470 U.S. at 541-42.
13. *Wilson County Employee Handbook*, 13-14.
14. *Id.* at 13.
15. *Pittman*, 839 F.2d at 226.
16. *Wilson County Employee Handbook*, 11.
17. *Pittman*, 839 F.2d at 226.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Pittman*, 839 F.2d at 229. The court cited Board of Regents v. Roth, 408 U.S. 564, 577 (1972), for the proposition that in order to demonstrate a property right in employment the public employee "clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

tion was its finding that her asserted basis for due process guarantees was the Wilson County personnel resolution discussed above. The court rejected Pittman's claim that the resolution's restrictions on the circumstances under which an employee may be discharged, which were communicated to county employees and managers, were sufficient to create a property interest under North Carolina law and thus were binding on the county. Instead, the court held that because the restrictions were *only* set forth in a resolution, not in an ordinance or statute, they were not binding:[23]

> The resolution is a part of a manual that describes itself as merely a "Welcome to All Employees of Wilson County." The language simply is not typical of that used in an ordinance or statute having the effect of law. Moreover, the subject matter of the personnel resolution is administrative in nature. It supplies internal guidelines to County officials for the administration of the County's employment positions, including the disciplining and discharge of employees.[24]

Having found no basis for Pittman's claim that she was other than an "at will" employee, the court concluded that she was not entitled to due process in the termination of her employment.

SIGNIFICANCE OF THE COURT'S DETERMINATION

In making the distinction between the nonbinding nature of personnel resolutions and the binding nature of ordinances and statutes, the court examined the North Carolina General Statutes. Noting that the statutes "do not expressly address the distinction between an ordinance and a resolution,"[25] the court nonetheless found significant the requirement that specific procedures be followed in enacting county ordinances. Citing G.S. 153A-45, the court declared that in order for an ordinance to be enacted by the county board of commissioners, the proposed ordinance "must receive the approval of all the members of the board."[26] In so doing, however, the court apparently ignored two other significant provisions of G.S. 153A-45: first, that the procedures are for the adoption of an ordinance or "any action having *the effect of an ordinance*"[27] (emphasis added), which would presumably include a personnel resolution; second, that the procedures also provide for the adoption of an ordinance by a majority vote at two board meetings.[28]

This finding is troubling, both because it selectively quotes from the General Statutes to imply that an ordinance may only be enacted by unanimous declaration, thus indicating a greater distinction between an ordinance and a resolution than is perhaps due, and because it indicates that a county can ignore the requirements of a duly enacted personnel resolution with impunity.

The court's distinction between a resolution and an ordinance is simply not supported by history or practice. Since 1973, G.S. 153A-12 has provided that "except as otherwise directed by law, each power, right, duty, function, privilege and immunity of the corporation [the county] shall be . . . carried into execution as provided *by ordinance or resolution* of the board of commissioners" (emphasis added). No explicit distinction is drawn between an ordinance and resolution. Further, G.S. 153A-94 provides that counties may adopt personnel procedures (which clearly include dismissal procedures) without drawing any distinction between the adoption of such procedures as rules, regulations, ordinances, measures, or policies.

The case is also potentially confusing because of what it inescapably implies but does not clearly express: in North Carolina a person employed by a city or county under the terms of a personnel ordinance *does* have a property interest in continued employment.[29] The confusion arises from the court's emphasis on the fact that the personnel resolution was communicated to the Wilson County employees in the form of a handbook. A number of state courts have held that a handbook provision governing the discharge of employees is enforceable as a contract, finding that the employee's continuation in the job is consideration for the promises

23. *Pittman*, 839 F.2d at 229.
24. *Id.*
25. *Id.* at 228.
26. *Id.*
27. G.S. 153A-45.
28. *Id.* The statute provides:
153A-45. Adoption of ordinances.
To be adopted at the meeting at which it is first introduced, an ordinance or any action having the effect of an ordinance (except the budget ordinance, any bond order, or any other ordinance on which a public hearing must be held before the ordinance may be adopted) must receive the approval of all the members of the board of commissioners. If the ordinance is approved by a majority of those voting but not by all the members of the board, or if the ordinance is not voted on at that meeting, it shall be considered at the next regular meeting of the board. If it then or at any time thereafter within 100 days of its introduction receives a majority of the votes cast, a quorum being present, the ordinance is adopted.
29. *Pittman*, 839 F.2d at 229 n.9.

set forth in the handbook.[30] In the last decade, however, it has become settled North Carolina law that conditions of employment unilaterally promulgated in a handbook or policy manual do not constitute an exception to "at will" employment in that no contract is created by the handbook.[31] Relying on that settled law, the court focuses on the Wilson County handbook as a contract, not as the means chosen by the county board of commissioners to communicate the terms of a duly enacted resolution to county employees.[32]

The case also leaves unresolved the question of whether reliance by an employee on a unilaterally promulgated handbook that provides that employees may only be discharged for cause is sufficent to create a contract of employment. Some courts have held that a contract is created where an employee relies to his detriment on an employer's promise to discharge only for cause and where that promise is set forth in a personnel handbook.[33] The North Carolina courts have not determined whether reliance on a handbook promise is sufficient to create a contract.[34] Because Pittman did not argue that she relied on the representations made in the Wilson County handbook in accepting or continuing her employment, the determination of that issue must await another case.

30. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983); Toussaint v. Blue Cross and Blue Shield of Michigan, 408 Mich. 579, 619, 292 N.W.2d 880, 894-95 (1980); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

31. Guy v. Travenol Laboratories, Inc., 812 F.2d 911 (4th Cir. 1987); Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986); Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986); Smith v. Monsanto Co., 71 N.C. App. 632, 322 S.E.2d 611 (1984); Griffin v. Housing Authority, 62 N.C. App. 556, 303 S.E.2d 200 (1983); Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982) (applying North Carolina law); Roberts v. Wake Forest University, 55 N.C. App. 430, 286 S.E.2d 120, *disc. rev. denied*, 305 N.C. 586, 292 S.E.2d 571 (1982); Williams v. Biscuitville, Inc., 40 N.C. App. 405, 253 S.E.2d 18, *disc. rev. denied*, 297 N.C. 457, 256 S.E.2d 810 (1979); George v. Wake County Opportunities, Inc., 26 N.C. App. 732, 217 S.E.2d 128 (1975).

32. *Pittman*, 839 F.2d at 229.

33. *See, e.g.*, Vinyard v. King, 728 F.2d 428 (10th Cir. 1984)(applying Oklahoma law).

34. Harris v. Duke Power Co., 319 N.C. 627, 630-31, 356 S.E.2d 357, 360 (1987).

CONCLUSION

Pittman v. Wilson County appears to sharply undermine the utility of a personnel resolution as a means of assuring fair treatment and due process for local government employees. Arguably, a public employer may conclude that its best course of action to reduce liability for wrongful discharge actions is to replace its personnel ordinance with a personnel resolution. Whether local governments will continue to extend the requirements of dismissal for cause and an opportunity for employees to respond to proposed termination in the interests of fairness and good personnel management remains to be seen. Clearly, in light of this opinion, those local government employers whose personnel policies are only set forth by resolution must decide what weight they wish to accord those policies.

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