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Personnel Section Meeting
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Progressive Discipline in the Public Sector

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Progressive Discipline in the Public Sector

Guidance from the Idaho Supreme Court Decision of *Nix v. Elmore County*

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The Personnel Section Meeting at the 2015 IMLA Annual Conference looks at local government employment progressive discipline.

This paper follows up on a discussion topic examined at an IMLA Employment Law Webinar held in June 2015. This paper and session focus on policy language and perceptions of progressive discipline, arising from an Idaho Supreme Court decision issued in April 2015.[1] It discusses two topics relevant to the issue of progressive discipline and employment status:

- considerations in drafting a progressive discipline policy; and
- disclaimers and at-will employment.

Considerations in Drafting a Progressive Discipline Policy

The following provisions from a personnel policy of Elmore County, Idaho, (ECPP) were reviewed by the Idaho Supreme Court.

General Disclaimer. The second page provides a disclaimer in bold, all-caps lettering that states:

> **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.**

Then, under the heading "General Policies" on that same page, the ECPP states:

> . . . The terms set forth in this booklet reflect public entity policy at the time of its printing, but they are subject to change at any time, after notifying the Elected Officials and at the discretion of the Elmore County Board of Commissioners.

[1] Nix v. Elmore County, __ ID ___ (2015 Opinion No. 38, April 7, 2015), available at: http://www.isc.idaho.gov/opinions/41524.pdf.

> Only the Elmore County Board of Commissioners has authority to establish general policy for Elmore County employees. 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terms and conditions set forth in this policy, and in the resolutions and policy statements which support it, cannot be superseded by any other official's commitment, without the express written agreement of the Board of Commissioners.

The ECPP also sets forth a non-exclusive list of prohibited workplace conduct and provides that penalties for violating any of the rules 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. The section entitled "Employee Discipline Procedures and Principles" elaborates further on these principles. That section provides that the purpose of the discipline policy:

"is to establish a consistent procedure for maintaining suitable behavior and a productive working environment in the workplace," and that the procedures are "directory in nature and minor variations in the processes set forth herein shall not affect the validity of any actions taken pursuant to this policy."

The section then reiterates that 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. The section further provides that:

"Elmore County reserves the right to take any of the prescribed steps in any order in the event that a supervisor deems a policy violation or action of the employee to be serious enough to warrant a certain step."

Finally, the section contains a heading entitled "Appeal Hearing (Pre-Deprivation)," which provides:

> 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.

The ECPP defines "full-time regular employees" as "[e]mployees whose typical work schedule calls for at least 20 hours of scheduled work during each weekly payroll period. Full-time regular employees shall receive all employee benefits

provided by Elmore County as such benefits now exist or may be subsequently changed." It further defines "part-time regular employees" as:

> [e]mployees whose typical work schedule calls for at least 20 hours, but not as much as 34 ½ hours of scheduled work during each week. Part-time regular employees shall receive reduced employee benefits in accordance with policies adopted by the Board of Commissioners. The scope of benefits received may vary proportionately with the number of hours typically scheduled for a part-time regular employee. The number of hours scheduled may also affect the employee's obligation to participate in certain mandatory state benefit programs. Certain benefits may not be available.

The ECPP does not define "probationary employee." However, the ECPP does contain a section entitled "Probationary Period," which states:

> The probationary period shall be regarded as an integral part of the selection process and 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 probationary period will typically be a standard 90 to 180 days. [This section was later amended to change the probationary period to one year.]

The case arose when Elmore County terminated Nix without providing a pre-termination hearing in alleged violation of the ECPP and in breach of the covenant of good faith inherent in contractual dealings.

Nix worked as a custodial employee for Elmore County from June 1, 2007, until April 30, 2012, when her supervisor terminated her employment for numerous alleged instances of poor performance.

Early in 2011, Nix's supervisor grew concerned over Nix's job performance and addressed these concerns with Nix, requesting her to maintain daily task logs for the supervisor's review. Nix's performance improved in some areas over the first few months, but still required additional improvement.

In December of 2011, Nix's new supervisor, Parsons, gave Nix a list of custodial and maintenance duties and maintained a daily log to track Nix's performance. On February 1, 2012, Parsons gave Nix a "Notice of Disciplinary Action – Notice of Last Chance," detailing numerous alleged instances of poor job performance and falsified time cards. The Notice advised Nix that (a) Parsons was placing her on probationary status for one year and that she was, and would remain, an at-will employee during her probation and (b) if she failed to meet the goals set forth in the notice or failed to show improvement in her progress reports, she would be subject to termination at any time during the probation.

In April, Nix was terminated and was provided notice stating she could appeal to the Board of Commissioners if she believed her termination was due to unlawful discrimination, but not for any reason. Nix requested a hearing and was advised several times of the limited scope of the hearing. Nonetheless, at the "discrimination hearing" in June she requested that the Board consider performance-related matters and her claim she should not have been terminated. The Board would not do so and on June 18, confirmed her termination, noting that, as a probationary, at-will employee, she was not entitled to a pre-termination hearing.

Nix filed suit and the County's motion for summary judgment was granted in September 2013, with the trial court agreeing she was an at-will employee not entitled to the hearing she sought.

The appeal to the Supreme Court involved four issues:

1. Whether the district court erred when it granted summary judgment on Nix's breach of employment contract claim.
2. Whether the district court erred when it granted summary judgment Nix's breach of implied covenant of good faith and fair dealing claim.
3. Whether Nix's supervisor acted outside of his authority under the ECPP.
4. Whether either party was entitled to attorney fees on appeal.

The decision noted that Nix was provided both ample notice of concerns with her performance and opportunity to meet with her supervisor (which she waived when she did not meet to discuss performance concerns).

Noting the employment in Idaho is generally at-will, the Supreme Court ruled that Nix's reversion to probationary status, in fact, changed her back to at-will status. That status may be changed by express contractual language or when the "circumstances surrounding the employment relationship could cause a reasonable person to conclude that the parties intended a limitation on discharge." As to whether and how a manual or handbook might alter employment, the Court said a manual's statements and policies "must be more than vague statements of opinion or prediction, and policies must manifest an intent that they become part of the employment agreement," and cited prior rulings that "an employer may provide guidelines, which are necessary conditions for continued employment, and avoid having them read as a guarantee for a specific term of employment or as placing limits on the reasons for discharge."

Part of the Court's opinion addresses the ECPP disclaimer which produced the concurring opinion discussed in the second part of this paper.

Nix cited a 9th Circuit case[2] to support her claim that her probationary status did not alter her full-time status or her right to a pre-termination hearing. The Idaho court distinguished that decision primarily on the basis that it dealt with a probationary period based on promotion to a new position and not on a disciplinary action.

As to Nix's claim of contractual good faith violation, the Court simply noted that it held "that the ECPP was not an employment contract and did not create enforceable contract rights."

Perhaps more directly related to the topic here, the Court then discussed the covenant of good faith in this employment context (citations omitted):

> ". . . covenant of good faith and fair dealing is implied in all employment agreements, including at-will employment relationships. . . . The covenant requires the parties to perform in good faith the obligations contained in their employment agreement. . . . A party breaches the covenant when it violates, qualifies, or significantly impairs any benefit or right of the other party under the employment contract—whether express or implied. . . . . However, 'the covenant does not create new duties that are not inherent in the agreement itself and, thus, cannot create a for-cause termination limitation in an at-will employment agreement.'"

The final portion of the decision ruled that the supervisors' actions did not alter the employment status – even if the change to probationary status were to have done so, Nix accepted the change by continuing to work after she reverted to probationary status.

The Nature of Disclaimers & Policy Language vis-à-vis At-Will Status [From the concurring opinion in Nix v. Elmore County Emphasis Added]

> . . . this case presents a good opportunity to address some misconceptions that parties seem to have about the limits of the at-will employment doctrine and the scope of employment manual disclaimers. The situation is not as cut and dried as some litigants seem to think.
>
> The first misconception, which appears to be fairly widespread based upon cases that have been presented to the Court in recent years, is that a disclaimer in a personnel policy manual saying that the manual is not a contract negates contractual status for any provision contained in the manual. That is simply not correct. In the present case, the Elmore County Personnel Policy (Policy) boldly states, "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

[2] *McGraw v. City of Huntington Beach*, 882 F.2d 384 (9th Cir. 1989).

SPECIFICALLY AUTHORIZED REPRESENTATIVE OF THE GOVERNING BODY AND UNLESS IT IS SIGNED BY AND CONTAINS THE NAME OF THE EMPLOYEE WHO WOULD BE BENEFITTED BY THE CONTRACT." Does this language mean that nothing contained in the Policy can have contractual status? The answer is no. The disclaimer means that the Policy, in whole, does not constitute a contract. It does not mean that individual provisions contained in the Policy may not be a part of the employer-employee contract.

Let us step back at this point and consider what constitutes the contract between an employer and employee. It starts with the employer needing help for a specific position or task. The employer makes his need known and offers the position with specific job requirements and benefits—hours to be worked, services to be provided, wages to be paid, benefits to be provided, and the like. The employee may negotiate some of the terms but when the parties agree that the employer will hire the employee, a contract is formed. **There can be no employer-employee relationship without the formation of a contract between those parties.** One of the terms of the contract that is often contested is the duration of the arrangement—how long will the contract be in effect. That is where the at-will doctrine comes into play.

An employment manual may or may not deal with the issue of contract duration. The Elmore County Policy does not deal with the issue of contract duration. There is nothing in the Policy that indicates that employment with Elmore County is at-will, on the one hand, or that it is of specific or continuing duration, on the other hand. The Policy does, however, contain a number of provisions that are contractual in nature and which this Court would obviously enforce in a legal action. [Several sections are noted such as compensation and benefits, compensatory time, overtime, jury duty pay, holidays and vacation, and sick leave.] Specific to this case, the disciplinary section of the Policy provides: "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."

While the Policy, itself, is not a contract, it would be hard to deny that specific provisions in the Policy do form a part of the employment contract between Elmore County and its employees. If Elmore County refused to pay an employee at the agreed rate for hours worked, the employee would obviously have a cause of action based on the employment contract. . . . . [In a prior case, the court had ruled] "Vacation pay may be a matter of contract between the employer and the employee. As with the pension plan, the provisions of the District's handbook relating to vacation time become part of the employment contract."

Therefore, while the Policy, as a whole, is not a contract by virtue of the disclaimer, there are provisions in the Policy that evidence agreed-upon items of a contract between the employer and the employee. The language in the Policy disclaimer that "[n]o contract of employment with Elmore County will be valid unless it is signed in accordance . . ." is obviously incorrect because the simple hiring of an employee causes a contract to come into effect. Elmore County simply cannot hire a person without a contract coming into existence. It may not be a written contract, but it is a contract, nevertheless.

The Policy does not include any provision indicating the duration of an Elmore County employee's employment contract. There are individual provisions within the Policy that could be construed in favor of at-will status, meaning no specific duration such that the contract could be terminated at any time for any reason, or against at-will employment. Section IV.B speaks of a probationary period for new employees for the purpose of "observing the employee's work . . . and for rejecting an introductory employee whose performance is not satisfactory." This provision, in itself, could be interpreted either way. That is, either that the employee can be terminated at any time during the probationary period or that the employee can only be terminated if his or her performance is not satisfactory. If the employee successfully completes the probationary period, he or she presumably becomes either a full-time regular employee . . . or a part-time regular employee . . . . **This might imply that once the employee runs the probationary gauntlet, he or she is immune from termination so long as performance is satisfactory. Since the Policy does not contain a provision regarding the duration of any employment contract, the default position under Idaho law is that the contract is presumed to be at-will—subject to termination at any time. If the employee can point to specific evidence rebutting the presumption, the issue is a question of fact for decision by a jury**.

Focusing back on the present case, even if it is determined that the duration of the contract here is at-will, i.e. of indefinite duration and terminable at any time, specific contractual formalities can still come into play. Counsel for Nix conceded during oral argument that her employment with Elmore County was at-will in nature. However, counsel contended that Nix was still entitled to the pre-discharge hearing provided in the Policy. Although counsel did not cite the specific case on point on this issue, we have previously stated that, although an employee at will may be discharged without cause and has no right to a hearing on the matter, where "a hearing is provided as a matter of contract . . . the parameters of the hearing are also defined by the contract." *Jackson,* 98 Idaho at 334, 563 P.2d 54 at 58. The hearing to which the employee may have been entitled in *Jackson* was contained in an employee handbook. In *Jackson,* however, the Court determined that the provision in the

handbook did not provide for a hearing under the particular circumstances of Jackson's termination.

The provision in the Policy appears to be unequivocal in giving "full-time regular and part-time employees" the right to a pre-discharge hearing. This reading was bolstered at oral argument by the County's counsel, who repeatedly stated that the pre-discharge provision was a "benefit" offered to County employees. If it is a benefit, it is a contractual provision regardless of the disclaimer in the Policy and subject to enforcement in a contract action.

Had Nix been a full-time regular or part-time employee at the time of her discharge, she would have been entitled to a pre-discharge hearing . . . **However, at the time of her discharge, she was on probationary status. Under the Elmore County disciplinary framework, a supervisor may place an employee on probation. The probation here specifically stated, "You are, and remain, an at-will employee." It also stated that if progress is not evident during the one-year probationary period, "you may be subject to immediate termination at any time during the probationary period."** The notice of disciplinary action was signed by Nix's supervisor and Nix signed to acknowledge receiving the same. **Although the Policy does not specifically set out the rights and obligations of an employee with regard to a probation that is not related to a new hire, the Court is correct in concluding that by continuing to work under the terms set out in the notice of disciplinary action, Nix impliedly agreed to work under such terms, including the term whereby she was subject to immediate termination for lack of progress on her disciplinary plan**. Since she agreed to the plan and since she was not by virtue of her probation a full-time regular or part-time employee at the time of her discharge, she was not entitled to the pre-discharge hearing provided for the benefit of those types of employees. Thus, the Court has reached the correct result.

Specifically, the BOCC concluded:
A probationary employee of the county is expressly an "at-will" employee. The ECPP (employment manual) states that the probationary period "shall be utilized for closely observing the employee's work . . . and for rejecting an introductory employee whose performance is not satisfactory." To construe that the ECPP creates anything other than "at-will" status for a probationary employee, or that the probationary employee is entitled to a hearing upon termination, would render the probationary employee concept meaningless under the ECPP. Probationary employees are not entitled to a hearing under the ECPP. . . .

In conclusion, several practice pointers may be derived from this decision:

- Handbooks, policies, and manuals may or may not create elements of a contractual relationship – language is important and so is context.

- Supervisors continue to play an important, perhaps decisive, role in employment relations.

- Documentation remains one of an employer's significant defenses to employment practices liability – if the documentation supports the employer action.

- Reliance on "boiler-plate" language is risky.