Employment Law

Termination of Public Employees – Due Process – *Loudermill*

***Andrade v. City of Milwaukee Bd. of Fire & Police Comm'rs*, 2024 WI 17 (filed April 30, 2024)**

HOLDING: The petitioner received due process under Wisconsin law and the U.S. Constitution in his termination as a police officer.

SUMMARY: Erik Andrade, formerly a Milwaukee police officer, challenged his termination from employment. The termination was based on a series of posts and comments he made on Facebook that garnered significant local and national attention in a civil rights lawsuit that dealt with the arrest of Sterling Brown, at the time a basketball player with the Milwaukee Bucks. According to findings of the Milwaukee Board of Fire and Police Commissioners, these posts "managed to repeat every negative stereotype plaguing big city police departments, *i.e.,* racism, use of excessive force, disregard of ethnic sensitivities, distrust of the public, and incurring excessive overtime" (¶ 22 n.14).

As part of its internal investigation of the posts, the Milwaukee Police Department informed Andrade of the departmental policies he potentially violated and scheduled an interview with him. During the interview, the investigator questioned Andrade about each of the posts and Andrade was given an opportunity to respond to their intended meaning, his understanding about how they might be received by the public and affect the department's work, and whether he believed they violated departmental policy.

Following the internal investigation, the department formally charged Andrade with violating two specific policies; both charges cited the Facebook posts as the basis for the violations. The police chief then asked internal affairs officers to reach out to the Milwaukee County District Attorney's Office, which explained that Andrade's posts would diminish his credibility in court so severely that the office would no longer use him as a witness. This convinced the chief that termination of Andrade's employment was appropriate and the chief discharged him. The chief then filed with the board a complaint containing the same charges. Neither the initial charges, the chief's order of discharge, nor the complaint with the board mentioned Andrade's inability to testify (*see* ¶ 2).

Following a full evidentiary trial, the board determined that Andrade was guilty of the policy violations and that the punishments he received were appropriate. The circuit court upheld the board's decision, as did the court of appeals in an unpublished opinion. In a majority opinion authored by Justice Hagedorn, the supreme court affirmed.

Andrade argued that his termination fell short of the 14th Amendment's due-process guarantee. He contended that due process required the department to explain why the chief terminated him instead of imposing a lesser form of discipline. As such, the department should have told him that the chief made his termination decision based on the district attorney's determination that the prosecutor's office would no longer use Andrade as a witness in its cases. Andrade insisted that the department's failure to tell him this before termination meant that he was not given an explanation of the evidence supporting the termination and that this failure violated *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

For public employees such as Andrade who are terminable only for cause, "*Loudermill* generally entitles a terminated employee to notice of the charges, an explanation of the evidence supporting them, and some pre-termination opportunity to respond. The scope and nature of the pre-termination procedures can vary depending on the nature of the post-termination proceedings and the interests that are implicated. The Fourteenth Amendment's due process guarantees in this context are not rigid and formal; they are flexible, giving employers wide latitude on the process and nature of the notice due when terminating employees" (¶ 5).

In this case, the department notified Andrade of the conduct (the Facebook posts) and which policies this conduct violated. Andrade was given an opportu-

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nity to respond to the allegations before the chief imposed punishment. The chief's termination decision was confirmed after a full administrative hearing before the board as well as judicial review in the circuit court of the board's decision.

"We conclude that the Due Process Clause does not require a more exacting and rigid pre-termination process than what Andrade received" (¶ 6). "Nothing in *Loudermill* requires an exhaustive pre-termination explanation of every fact or factor that might be considered in the disciplinary process. An employer need not detail all the consequences of an employee's misconduct, nor must it show in detail how those consequences might inform the employer's choice of discipline. The employer must simply notify the employee of the charges [here the Department policies that were violated] and evidence [here the Facebook posts] and give them an opportunity to respond. That's exactly what happened here" (¶ 33).

Andrade also argued that the chief's complaint did not comply with Wis. Stat. section 62.50(13) (a statute dealing with notice to the board regarding terminations and certain suspensions) because the complaint did not sufficiently explain the reasons for the discharge. "However, the complaint listed the policies Andrade violated and referenced the Facebook posts that formed the basis for the violations. The statute requires nothing more" (¶ 7).

Chief Justice Ziegler filed a dissenting opinion that was joined in by Justice R.G. Bradley.

Family Law

Adoptions – Nonmarital Partners – Eligibility – Fundamental Rights

***A.M.B. v. Circuit Ct. for Ashland Cnty. (In re Adoption of M.M.C.),* 2024 WI 18 (filed April 30, 2024)**

HOLDING: A Wisconsin statute that prohibits the adoption of a child by the mother's nonmarital partner is constitutional.

SUMMARY: A.M.B. is the biological mother of M.M.C. and in a "cohabitating, nonmarital relationship with her male partner, T.G." T.G. has become a father figure for the child (*see* ¶ 5). Following a hearing, the circuit court found that adoption was in the child's best interest but that T.G. was not statutorily eligible to adopt the child because he was not married to the child's mother (*see* ¶ 7). The supreme court granted a petition for bypass.

The supreme court affirmed in a majority opinion authored by Justice R.G. Bradley. Adoptions are governed by statutes that "do not allow two unmarried adults to jointly adopt a minor. Nor do the statutes permit a nonmarital partner to adopt his partner's child. Omitting those categories of unmarried individuals from the list of eligible persons who may adopt means the law does not qualify them as adoptive parents" (¶ 3).

"The adoption statutes do not implicate a fundamental right" under either the state or federal constitutions, nor do they affect a "protected class of individuals." Thus, their constitutionality is subject to rational-basis analysis (¶¶ 9, 14). The court held that the statutory classifications were rationally related to the state's interest in promoting stability for adoptive children (*see* ¶ 25). It is not the court's role to "judge the wisdom" of those classifications (¶ 33).

In a separate concurring opinion, Justice R.G. Bradley addressed the subject of state constitutional rights in response to the opinions by other justices that Wisconsin should break its lockstep with the 14th Amendment (*see* ¶ 39). She was joined by Chief Justice Ziegler and Justice Hagedorn.

Justice Dallet concurred. She agreed that a rational basis supported the statute but contended that the equal-protection claims should be separately addressed under the Wisconsin Constitution, which provides "broader protections for individual liberties than the Fourteenth Amendment" (¶ 50). She was joined by Justice A.W. Bradley and Justice Protasiewicz.

Justice Karofsky also filed a concurring opinion. "Here, we are left with the inescapable fact that the legally rational statutes prevented an adoption that all agree would have been in A.M.B.'s best interest. This incongruent outcome exemplifies the specious connection between the statutes and their stated goal of promoting a child's best interest" (¶ 63). **WL**

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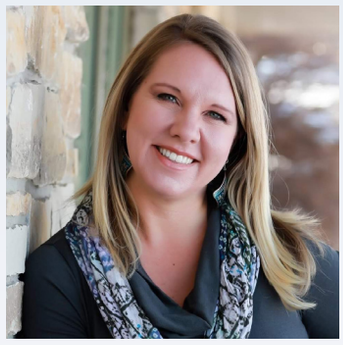

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