DISCIPLINE AND TERMINATION
OF PUBLIC EMPLOYEES:
DUE PROCESS REQUIREMENTS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
I. INTRODUCTION – THE 14TH AMENDMENT – DUE PROCESS CLAUSE

Unlike most private sector employees, public employees in Illinois have constitutional rights protecting them against various employer actions including discipline and termination without procedural due process.

A. 14th Amendment, Due Process Clause

No State shall deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV, § 1. (emphasis added).

II. DUE PROCESS

Public employers may not deprive an employee of a property interest or interfere with an employee’s liberty interest without providing that employee procedural due process. Thus, if a public employee has a property or liberty interest in his or her employment, that employee is entitled to due process prior to any discipline or termination of his or her employment. Due process requires the employer to provide the employee with notice and a meaningful opportunity to be heard.

III. PROPERTY INTEREST

A. Reasonable Expectation of Continued Employment

Public employment can constitute a “property interest” subject to constitutional due process protections when, through statute, ordinance, employment contract, collective bargaining agreement, employee handbook, a personnel or civil service code, or employer statements, practices, or policies, an employee has a reasonable expectation of continued employment or some other benefit of which he or she claims a deprivation. If an employee has such a reasonable expectation of continued employment then the employer must provide that employee with due process before it can discipline or terminate that employee.

B. Case Law

In Perry v. Sindermann, 408 U.S. 593 (1972), a teacher who was advised that his tenth one-year employment contract would not be renewed alleged that the college, by custom, practice, and through policy statements encouraging faculty to believe they had permanent tenure, created a
property interest in continued employment and therefore the non-renewal of his contract deprived him of due process. The Supreme Court agreed and found that the teacher had a property interest in his continued employment and the teacher was entitled to due process prior to the employer taking action not to renew his employment contract. The court found that a property interest could be created by a contract or an implied contract created by the employer’s words and conduct.

In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), however, the Supreme Court found that an employee whose one-year contract, which specifically noted it was a one-year contract and had no renewal provision, did not have a reasonable expectation in continued employment for the next year and therefore no due process was required prior to the Board’s decision not to renew the employee’s contract. Here, there also was no state law or university policy which created a legitimate expectation in continued employment.

Job applicants have no expectation of employment sufficient to create a property interest. See Dziewior v City of Marengo, 715 F. Supp. 1416 (N.D. Ill. 1989). However, in Board of Education of Paris Union School Dist. No. 95 v. Vail, 466 U.S. 377 (1984), the Supreme Court found that a school that enticed a coach to leave his job of ten years and move to the district to take a one-year position and gave assurances that he would receive a one-year extension deprived the coach of a property interest without due process when it refused to grant the extension of his contract. The school district’s promises to the coach created a legitimate expectation of continued employment.

To determine whether an employee has a property interest requiring due process, supervisors should examine:

- State and local laws. See, e.g., Hudson v. City of Chicago, 374 F.3d 554 (7th Cir. 2004) (Non-probationary Chicago police officers have a property interest in continued employment); 65 ILCS 5/10-1-18.1. Misek v. City of Chicago, 783 F.2d 98 (7th Cir. 1986). (Reappointed Fire Chief had one-year property interest based on village ordinance.)
- The employer’s regulations and operational procedures to determine if any representations about job security are made.
- Employee handbooks, manuals, other sources of internal policies, and all the written and unwritten personnel policies. See Tatom v. Ameritech Corp., 305 F.3d 737 (7th Cir. 2002) (Finding promises made in an employee handbook was a legitimate claim of entitlement as a property interest).
- Hiring documents, such as the employment application, offer of employment letters and other materials which provide terms and conditions of employment, and may form a basis for an implied contract argument.
- The practices and customs of the particular employer, including: a system of tenure or de facto tenure, or an established custom of providing due process.
C. Unreasonable Expectations

It is important to note that public employees do not have a presumptive property interest in their position. A property interest requiring due process only exists if the employer’s actions, a state or local law, collective bargaining agreement, contract, employee handbook, or policy creates a reasonable legitimate expectation of continued employment. Courts have held that an employee’s expectations of continued employment were unreasonable and therefore no due process was required.

In *Cole v. Milwaukee Area Technical College Dist.*, 634 F.3d 901, 904 (7th Cir. 2011), the court found that an employment agreement did not give the employee a property interest in his employment when it gave board discretion to terminate based on any “conduct” it considered grounds for dismissal.

In *Hohmeier v. Leyden Community High School Dist.* 212, 954 F.2d 461 (7th Cir. 1992), the court found that a school board’s secret nonbinding termination policy for supervisors did not create property interest in employment for employees.

In *Santella v. City of Chicago*, 936 F.2d 328 (7th Cir. 1991), the court found no mutually agreed-to entitlement to job classification when city official making such assurances lacked authority to do so, as specifically stated in city personnel rules.

IV. LIBERTY INTEREST

Employers must also provide proper due process for claims alleging interference with a public employee’s constitutionally protected liberty interest.

A. First Amendment Rights

1. Freedom of Speech

A public employee may not be disciplined or terminated for exercising his or her right to free speech.

In *Pickering v. Board of Education of Township High School Dist.* 205, Will County, 391 U.S. 563 (1968), the school district fired a teacher for conduct unbecoming of a teacher after the teacher wrote a letter to the newspaper which was critical of the Lockport School Board. The Supreme Court applied a balancing test weighing Pickering’s right to freedom of speech against the school district’s concern in maintaining a work environment and found that the school district’s action violated Pickering’s First Amendment right to free speech. The court held that a public employer could only infringe upon an employee’s right to free speech for a compelling government interest and it must be done in the narrowest way.
In *Perry v. Sindermann*, 408 U.S. 593 (1972), the United States Supreme Court held that failure to renew a teaching contract because the teacher had spoken out on public issues constituted a cause of action under due process clause. No negative employment action may be taken against employee for exercising right to free speech.

The United States Supreme Court refined the *Pickering* analysis (discussed above) in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, an assistant district attorney, who was notified she would be transferred, circulated a questionnaire to other employees. Her supervisor terminated her because she refused to accept the transfer. The Court held that the employee's speech was not protected by the First Amendment, because the questions posed in the questionnaire were not matters of public concern. The purpose of the questionnaire was to gather support and evidence in her personal dispute over her transfer and had little public impact. The limited First Amendment interest involved did not require the supervisor to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. The Court held that the *Pickering* test applied only when speech is made "as a citizen upon matters of public concern" and that the employee's speech was not a matter of public concern. *Connick*, 461 U.S. at 147 (emphasis added). Therefore, to invoke the protection of *Pickering*, the speech in question must be of public concern. In order to determine whether speech is of public concern, the content, form, and context of any given statement must be examined to determine whether it is a matter of public concern.

A few years after *Connick*, the United States Supreme Court again dealt with the question of free speech of public employees. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court considered the firing of Ardith McPherson, a clerical employee in a county constable's office, for a remark made to a coworker. After hearing of the attempt to assassinate President Reagan, McPherson remarked, "[I]f they go for him again, I hope they get him." *Rankin*, 483 U.S. at 380.

In *Rankin*, the Court applied the *Pickering* balancing test. The Court held that the statement was a matter of public concern, because it was made in the course of addressing the policies of the President's administration. The Court weighed McPherson's right to free speech against the employer's interest in maintaining discipline in the work place. The Court considered whether the speech interfered with the efficient functioning of the government office or whether the employee had discredited the office by making the statement. The Court found that the employer's interest in discharging the employee did not outweigh the employee's rights under the First Amendment because of employee's position and nature of statement (private conversation). Therefore, the Court held that McPherson's discharge violated the First Amendment.

Thus, it is the *Connick* test that determines whether the speech is protected by the First Amendment and satisfies the first prong of the *Pickering* balancing test. If a court concludes that the speech is of public concern it is protected under the First Amendment. To determine whether a public employee "spoke as a citizen on a matter of public concern," the court will look at the content, form and context of a given statement. *Shefcik v. Village of Calumet Park*, 532 F. Supp. 2d 965 (N.D. Ill. 2007). The matter of public concern must relate to a matter of "political,
social, or other concern to the community.” Shefcik, 532 F. Supp. 2d at 975. It is irrelevant whether the statement is inappropriate or controversial. The next step is to apply the second prong of the Pickering balancing test to see if the state has a compelling interest that overrides the employee’s right to free speech. If such an interest exists, the third prong of the Pickering balancing test – whether the limitation of the speech was done in the narrowest way possible – must be addressed.

An employee’s speech regarding sexual harassment, opposition to removal of a book from a school library, police officer’s complaint about media coverage of way police department handled leads, city employee’s criticism of city administration effectiveness, firefighter’s comments about wages during negotiations, and notations on a calendar indicating time other employees worked to track potential abuse, all qualified as speech on a matter of public concern. Azzaro v. County of Allegheny, 110 F.3d 968 (3d Cir. 1997); Dishnow v. School District of Rib Lake, 77 F.3d 194 (7th Cir. 1996); Gustafson v. Jones, 117 F.3d 1015 (7th Cir. 1997); Wainscott v. Henry, 315 F.3d 844 (7th Cir. 2003); Cunningham v. Village of Mount Prospect, No. 02 C 4196, 2002 U.S. Dist. LEXIS 22772 (N.D. Ill. Nov. 19, 2002); Sullivan v. Ramirez, 360 F.3d 692 (7th Cir. 2004).

2. Union Activity

Additionally, in Schlicher v. Board of Fire & Police Commissioners of the Village of Westmont, 363 Ill. App. 3d 869 (2d Dist. 2006), the Illinois appellate court considered whether a plaintiff’s union activities were constitutionally protected First Amendment expressions that gave rise to a First Amendment retaliation suit. In considering this issue, the court applied a four-part test that included the Connick and Pickering tests. The four factors considered by the court were (a) whether the plaintiff’s speech and associational activities could be considered matters of public concern, (b) whether the plaintiff’s interest in the speech and associational activities outweighs the defendants’ interest in regulating the speech and associational activities, (c) whether the speech and associational activities were substantial or motivating factors in the challenged actions taken against plaintiff, and (d) whether the defendants would have taken the same actions against the plaintiff regardless of his expression of the protected speech or his associational activities. Schlicher, 363 Ill. App. 3d at 880-883.

3. Protection for Whistleblowers

(a) Speech Not Protected if Related to Professional Duties

In Garcetti v. Ceballos, 547 U.S. 410 (2006), the United States Supreme Court issued a significant five-four decision affecting public employee whistleblowers. Richard Ceballos, a supervising deputy district attorney, reviewed an affidavit the police used to obtain a search warrant critical to a criminal case. After determining that the affidavit was inaccurate, he advised his supervisors and recommended dismissal of the criminal case. Thereafter, he testified in the criminal case, but the case was not dismissed. Later, he filed suit under 42 U.S.C. §1983, claiming retaliation for speaking out on the inaccuracies of the affidavit.
The United States Supreme Court held that his comments were not constitutionally protected, because his statements were made pursuant to his official duties. Therefore, he could be disciplined for his speech.

In *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979), the United States Supreme Court extended First Amendment protection to whistleblowers and held that reporting wrongdoing in-house was protected by the First Amendment. In-house reporting appears to still be protected, but only if the reporting is outside the employee’s official duties.

The Seventh Circuit Court of Appeals applied *Garcetti*, in *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007). In the first appeal, the court had held that the plaintiff, a state correctional officer, engaged in protected speech when she reported a possible lapse in security to her supervisor. However, after remand, the jury returned a verdict in the plaintiff’s favor, which was appealed. The court of appeals reversed the jury verdict on the basis of *Garcetti*. The court stated:

> After *Garcetti*, . . . the threshold inquiry is whether the employee was speaking as a citizen (similar to public concern); only then do we inquire into the content of the speech.

*Spiegla*, 481 F.3d at 965 (emphasis added). The court held that the plaintiff’s reporting of the possible security lapse was done pursuant to her official duties. Therefore, her speech was not protected by the First Amendment.

State employees may also have protection through the Illinois False Claims Act (IFCA), 740 ILCS 175/1, et seq. and section 19c.1 of the Personnel Code, 20 ILCS 415/1, et seq. Illinois courts have recognized a cause of action when one is terminated for reporting violations of health and safety. *Leweling v. Schnadig Corp.*, 276 Ill. App. 3d 890 (1st Dist. 1995).

4. **Right to Associate**

Within days of the Supreme Court ruling in *Pickering*, the Seventh Circuit Court of Appeals addressed the right of freedom of association in *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968). The plaintiffs, non-tenured teachers in the first year of their teaching careers, attempted to organize a teacher’s union and were fired by the school district. The Seventh Circuit overturned the terminations and found that the public employees had a right to associate under the First Amendment.

5. **Patronage Issues**

If employee shows that his or her discharge was motivated in part by his or her engaging in constitutionally protected activity, the employer bears the burden of showing political loyalty or patronage is an appropriate requirement for effective performance of job. In *Elrod v. Burns*, 427 U.S. 347 (1976), the Supreme Court held that the right of association prevented the dismissal of
public employees who do not hold a position of policymaking or confidential nature on political grounds. In *Elrod*, the Court overturned an incoming Democratic sheriff’s decision to fire dispatchers and office help hired by his Republican predecessor and to replace them with Democrats.

In *Branti v. Finkel*, 445 U.S. 507 (1980), the incoming public defender moved to fire the assistant public defenders of the opposite political party. The Supreme Court reaffirmed the principles of *Elrod* and held that the exception for policymaking and confidential employees is limited to positions for which political affiliation is a requisite. The courts will consider the nature and number of responsibilities of the position and types of decisions made. The key factor is whether the position is a policymaking position. If it is a policymaking position, patronage considerations are legitimate.

In 1985, five plaintiffs filed suit in federal court in Illinois, claiming that promotion, transfer, recall from layoff, and hiring based on political affiliation and support violated their constitutional right to freedom of association. The Supreme Court held in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), that political considerations could not be substantial or motivating factors in promotion, transfer, recall from layoff, or hiring, unless the position was one meeting the *Branti* test for exception.

After the *Rutan* decision, the State of Illinois began categorizing jobs as either *Rutan* covered (positions for which political affiliation could not be considered in making employment decisions) or *Rutan* exempt (positions for which political affiliation could be considered in making employment decisions). The Seventh Circuit has issued several decisions on what constitutes a position exempt from *Rutan*. The courts will look at the job description to determine whether the position is a policymaking one. *Riley v. Blagojevich*, 425 F.3d 357 (7th Cir. 2005).

In *Tarpley v. Jeffers*, 96 F.3d 921 (7th Cir. 1996), and *Vickery v. Jones*, 100 F.3d 1334 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that the principles of *Rutan* applied to temporary workers of the State of Illinois if the position did not fall under the *Elrod-Branti-Rutan* exception.

The Seventh Circuit has interpreted the *Branti* exception to include persons who work in small public offices which employ only a few people. In contrast, the deputy sheriffs in Cook County enjoy the full *Rutan* protection. *Upton v. Thompson*, 930 F.2d 1209 (7th Cir. 1991); *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993); *Kolman v. Sheahan*, 31 F.3d 429 (7th Cir. 1994).

Positions that the courts have found to be policymaking or confidential are: the second highest position in Chicago’s Water Department, Sheriff’s confidential secretary, second highest park district positions, superintendent of public works and police chief. *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 313 (1985); *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288 (7th Cir. 1985), *cert. denied*, 105 S. Ct. 2360 (1985); *Shakman v.*
Democratic Organization of Cook County, 722 F.2d 1307 (7th Cir. 1983); Diamond v. Chulay, 811 F. Supp. 1321 (N.D. Ill. 1993).

B. Employee’s Reputation as a Constitutionally Protected Liberty Interest

An employee’s interest in his or her reputation is not, by itself, a constitutionally protected liberty interest. Paul v. Davis, 424 U.S. 693 (1976). However, an injury to the employee’s reputation as a result of the employer’s stigmatizing actions may result in the deprivation of the employee’s liberty interest to work in his or her profession. See Johnson v. Martin, 943 F.2d 15 (7th Cir. 1991). To demonstrate an impairment of employee’s liberty interest in his or her damaged reputation, the employee must show: 1) he was stigmatized by untrue statements; 2) the stigma was result of tangible change in status (i.e., discharge); 3) the employer makes the charges public; 4) the employee suffered tangible loss of other employment opportunities as result of public disclosure; and 5) the employee was deprived of a liberty interest without due process (i.e., a meaningful hearing to allow employee to clear his name). Here, it is essential the employee show he or she cannot find other work in his or her profession as a direct result of the published untrue statements in order to preserve the liberty interest.

V. WHAT PROCESS IS DUE?

What procedure is due for any particular act varies. At a minimum a public employer must provide an employee with a continuing expectation of employment notice of the termination which includes the reasons for the termination and an informal hearing prior to the termination.

A. Balancing Test

The Supreme Court uses a balancing test to determine what procedures an employer must follow to avoid a due process violation. This test which the Court applied in Mathews v. Eldridge, 424 U.S. 319 (1976) balances the following factors: (1) the employee’s interest in keeping his or her job; (2) the risk of deprivation of interests through the procedures used and the probable value of additional procedural safeguards; and (3) the government’s interest, including the administrative and fiscal burdens that the additional or substitute procedural requirement would entail.

B. Loudermill Hearing

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the Court determined that “some kind of a hearing” was required before terminating a tenured teacher. The “hearing,” however, needs to include only evidence of the charges against her and an opportunity for her side of the story to be presented.

Due process does not require the employer to provide a full trial-type hearing at the pre-termination hearing when there is an opportunity for a full post-termination hearing. See
The hearing must be more than a brief a phone call. *Domiano v. Village of River Grove*, 904 F.2d 1142 (7th Cir. 1990).

**C. Notice**

The notice to an employee of the dismissal must provide the reasons for the termination. The detail provided in the notice must be enough to provide sufficient explanation of why the employee is being fired. *Ryan v. Illinois Dept. of Children and Family Services*, 185 F.3d 751 (7th Cir. 1999).

**D. Post Termination Hearing**

A public employer must provide a public employee with a property interest in their continued employment with a more complete post termination hearing which provides the discharged employee with an opportunity to confront accusers, present evidence and testimony before an impartial tribunal. *Swank v. Smart*, 898 F.2d 1247 (7th Cir. 1990).

**E. Pre-Suspension Requirements**

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Beth concentrates her practice in all aspects of school, labor and employment, and municipal law. Beth also represents railroads in litigation involving FELA claims and crossing accidents. Beth has extensive experience representing clients in state and federal court, and before the Illinois Department of Human Rights, the U.S. Equal Employment Opportunity Commission, Illinois Educational Labor Relations Board, arbitrators, hearing officers, and other administrative agencies.

Prior to joining Heyl Royster, Beth served as the managing partner of the Peoria office of another regional law firm where she represented school districts and municipalities on legal matters including litigation, labor and employment, board governance, special education, and student issues. Beth frequently speaks on a variety of employment and school law matters including education reform and its impact on school districts. She provides in service training for administrators on various areas of education and employment law. Beth was selected as a Leading Lawyer in Education Law in 2014 and 2015 by her peers. She authored Chapter 16 Public Employees in the Illinois Institute for Continuing Legal Education’s Publication Employment Termination, 2011 and 2013 Editions.

Prior to entering private practice, Beth served as law clerk to Third District Appellate Court Justice Daniel L. Schmidt and was an Assistant Corporation Counsel for the City of Peoria.

Beth is currently a City Council person for the City of Peoria. She is also Secretary/Treasurer and serves on the Board of Directors of the Lawyers Trust Fund of Illinois. She is the past Chair of the Education Law Section Council for the Illinois State Bar Association. Beth served as a member of the Board of Governors for the Illinois State Bar Association, the Board of Directors of the Illinois Bar Foundation, and the Board of Directors of the Peoria County Bar Association. She has also served on the Illinois Supreme Court’s Judicial Screening Committee which reviews and recommends applicants for judicial vacancies for the Tenth Judicial Circuit.

Beth currently serves on the Board of the Heart of Illinois Regional Port District, the Children’s Home Foundation, and the Peoria Historical Society. She has also served on a number of community boards including the Center for Prevention of Abuse, the Pediatric Resource Center, and the City’s Neighborhood Development Commission.

Publications

Public Speaking
- “Physical Security of Student Records; Electronic Security of Student Records; Student Surveys and Evaluations Do’s and Don’ts” Education Law Seminar: “Student Records: Legal Requirements You Need to Know,” NBI (2016)
- “Affordable Care Act” Employment Law: Beyond the Basics, Sterling Education Services (2016)
- “EEOC Strategic Enforcement Plan” How to Protect Your Company/Minimize Risks in the Workplace Heyl Royster Seminar (2014)
• “The Year In Review: The Highlights and Low lights of Illinois School Law 2011”
  Illinois Association of School Administrators
  (2011)

Professional Recognition
• Selected as a Leading Lawyer in School Law
  (2014, 2015, 2016). Only five percent of lawyers
  in the state are named as Leading Lawyers.
• Peoria County Bar Association Distinguished
  Service Award (2015)
• Named a “Woman of Influence” by InterBusiness
  Issues (2014)
• 40 Leaders Under Forty - Selected by
  InterBusiness Issues magazine
• Charles C. Schlink Good Government Award
  sponsored by the Peoria Jaycees

Professional Associations
• Lawyers Trust Fund of Illinois (Board of
  Directors; Secretary/Treasurer)
• Illinois State Bar Association (Past Member of
  Board of Governors; Assembly; Chair, Education
  Section Council; Standing Committees)
• Illinois Bar Foundation (Past Member of Board of
  Directors, Fellows and Committee Chair)
• Peoria County Bar Association (Past Member of
  Board of Directors and Committee Chair)
• Abraham Lincoln Court (Emeritus Member)
• Illinois Council of School Attorneys (ICSA)
• National Council of School Attorneys (COSA)

Court Admissions
• State Courts of Illinois
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Education
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