When Is “Immediate and Final” Not?

Ninth Circuit continues to demonstrate proclivity for wordsmithing employment contracts

Sometimes you lose even when you win. In the recent case of *Walls v. Central Contra Costa Transit Authority* ("CCCTA"), the Ninth Circuit upheld a district court's determination that CCCTA's denial of Family Medical Leave Act leave was proper because the employee requested the leave after he had been terminated and before he was reinstated. The bad news is that the Court then rejected the lower court's decision that the termination itself, which was provided for in a Last Chance Agreement, could be enforced without a pre-termination Skelly hearing.

Walls, a bus driver, was terminated for absences. His union grievied the termination, the parties negotiated and Walls was re-employed subject to a Last Chance Agreement. In that Agreement, Walls agreed that his breach of any provision would result in his "immediate and final termination." The Agreement also stated that neither Walls nor his union could "grieve or arbitrate this matter if [he failed] to comply with these conditions." On the second day the Agreement was in effect, Walls was terminated because he failed to call-in or report to work, which violated the Agreement.

The Ninth Circuit said the crux of the matter was whether Walls knowingly waived his right to a pre-termination hearing or just waived a post-termination hearing. It held that because the Agreement did not contain an "express waiver" or explicitly state that Walls had waived his due process right to a pre-termination hearing, CCCTA's failure to provide him with one violated his constitutional due process rights. The court specifically stated it is "not clear" that the term "immediate" in the context of a Last Chance Agreement "necessarily signals that the termination will take effect without a hearing or process of any kind."

If you are a public employer with just cause language in your contracts or collective bargaining agreements, and you choose to utilize Last Chance Agreements, make sure you comply with the Ninth Circuit's magic language:
• Terminate rather than suspend the employee and do not convert the termination to a suspension as part of the Last Chance Agreement;
• Expressly state in the Agreement that the employee relinquishes his or her right to a pre-termination hearing;
• Expressly state in the Agreement that the employee relinquishes his or her right to a post-termination hearing;
• Expressly state in the Agreement that the employee and the union agree not to grieve or arbitrate the termination.

Private employers – you’re on notice of a best practice.

For more information, please contact:

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