ALABAMA SUPREME COURT CONTRAVENES UNITED STATES SUPREME COURT DUE PROCESS JURISPRUDENCE: *STALLWORTH V. CITY OF EVERGREEN*

I. INTRODUCTION

The Due Process Clause is one of the most litigated and complex areas of Constitutional law. Some of the most complicated and controversial due process litigation arises in the area of employment termination. Employees who are fired often feel that their termination was unwarranted. Government employees may challenge their termination in court claiming that their due process rights were violated. The courts have attempted to balance the interests of employers in removing unsatisfactory employees and the interests of employees in not being unduly removed from a job in which they have a property interest. A correct balancing of these interests is important to a public employer in maintaining an efficient workplace and to an employee who has an interest in keeping his or her job.

Despite the importance of Due Process Clause jurisprudence, many courts have misinterpreted the United States Supreme Court cases which govern this area. For example, some courts have confused procedural and substantive due process.[1] Other courts have misunderstood the separate and distinct functions of pretermination and post-termination hearings, which in turn upsets the balance the United States Supreme Court has set in this area. One such instance is the Alabama Supreme Court's decision in *Stallworth v. City of Evergreen*.[2] In *Stallworth*, the supreme court held that a public employee is entitled to an impartial decisionmaker in the pretermination hearing, even if the employee receives a procedurally adequate post-termination hearing.[3] This holding is contrary to United

1. *See* McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994) (explaining how previous Eleventh Circuit decisions have confused substantive and procedural due process law in employment termination cases).

2. 680 So. 2d 229 (Ala. 1996).

3. *Stallworth*, 680 So. 2d at 234.

States Supreme Court law. In upsetting the balance set by the United States Supreme Court, this holding will impose undue financial and administrative burdens on public employers, invade upon the State's interest in quickly removing unsatisfactory employees, and is potentially invasive for employees who desire the reasons for their discharge to remain private. It is important for Alabama courts to gain an understanding of due process law in this area in order to avoid and correct these problems in the future.

II. DUE PROCESS LAW IN THE EMPLOYMENT TERMINATION CONTEXT

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[4] The United States Supreme Court's interpretation of this clause is that the amendment provides two different types of constitutional protection: procedural due process and substantive due process.[5] Procedural due process bars the government from procedural irregularities only when life, liberty, or property is being taken.[6] Property interests are not created by the Constitution, rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[7] A government employee's contractual or statutory right to continued employment is a property interest falling within the scope of the Fourteenth Amendment's protection.[8]

The substantive component of the Due Process Clause protects those rights that are "implicit in the concept of ordered liberty."[9] The United States Supreme Court has deemed that most, but not all, of the rights enumerated in the Bill of Rights

4. U.S. CONST. amend. XIV, § 1.
5. Zinermon v. Burch, 494 U.S. 113, 125 (1990).
6. *See Zinermon*, 494 U.S. at 125.
7. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
8. *Roth*, 408 U.S. at 576-78.
9. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

are fundamental.[10] Certain unenumerated rights, such as the penumbral right of privacy, also merit protection.[11] A finding that a right merits substantive due process protection means that the right is protected against government actions regardless of the procedures the government employs.[12]

Substantive due process rights also differ from procedural due process rights in the manner in which the violation of the right occurs.[13] A violation of a substantive due process right is complete when it occurs.[14] Hence, the availability of an adequate postdeprivation state remedy is irrelevant.[15] Since "this right is 'fundamental,' no amount of process can justify its infringement."[16] By contrast, there is no procedural due process violation unless and until the State fails to provide due process.[17] Thus, the State may cure a procedural deprivation by providing a later procedural remedy. Only when the State refuses to provide a process sufficient to cure the deprivation does a constitutional violation arise.[18]

Another important difference between substantive and procedural due process is the type of remedy generally awarded to aggrieved parties.[19] Plaintiffs in substantive due process claims generally seek compensation in the form of damages for the value of the deprived right.[20] While procedural due process plaintiffs may seek compensatory damages, they are primarily interested in equitable relief.[21] For example, an employee who challenges his or her termination "typically seeks reinstatement and a properly conducted pretermination hearing."[22] This equitable remedy is unique to procedural due process remedies because substantive due process rights are such that they "may

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10. *See* McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994).
11. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
12. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
13. *See McKinney*, 20 F.3d at 1556.
14. *See id.* at 1557.
15. *See id.*
16. *Id.*
17. Zinermon v. Burch, 494 U.S. 113, 126 (1990).
18. *McKinney*, 20 F.3d at 1557.
19. *See id.*
20. *Id.*
21. *Id.*
22. *Id.*

not be violated regardless of the process."[23] Since "the relief awarded to a person claiming a substantive due process violation primarily is monetary, not equitable, a substantive due process deprivation likely is of substantially greater monetary value than a procedural due process deprivation."[24]

Employees with a property right in employment are "protected only by the procedural component of the Due Process Clause, not its substantive component."[25] Employment rights are state created rather than "fundamental" rights.[26] Therefore, employment rights do not enjoy substantive due process protection.[27] Thus, since a procedural right has not been violated unless and until the State fails to remedy the inadequacy, a terminated employee must utilize appropriate, available state remedial measures before suing in federal court.[28] Furthermore, an employee's remedy is not potential lifetime earnings, but rather procedural equitable remedies such as "reinstatement and a directive that proper procedures should be used in any future termination proceedings."[29]

III. The United States Supreme Court's Treatment of Adequacy of Pretermination Hearings in the Due Process Context

A. Cleveland Board of Education v. Loudermill

The most prominent Supreme Court case regarding the adequacy of pretermination hearings in the context of due process is *Cleveland Board of Education v. Loudermill.*[30] In *Loudermill*, the United States Supreme Court was faced with the issue of whether the Due Process Clause entitles an employee with a statutorily granted property interest to a pretermination hearing when that employee receives an ade-

23. *McKinney*, 20 F.3d at 1557.
24. *Id.* at 1557-58.
25. *Id.* at 1560.
26. *See id.*
27. *Id.*
28. *See McKinney*, 20 F.3d at 1560.
29. *Id.*
30. 470 U.S. 532 (1985).

quate post-termination review of the dismissal. In this case, Loudermill falsely stated on his job application to the Cleveland Board of Education that he had no felony conviction.[31] After discovering that he had been convicted of grand larceny, the Board dismissed Loudermill for dishonesty.[32] He was not given an opportunity to respond to the dishonesty charge or to challenge the dismissal.[33] Loudermill was a "classified civil servant" under Ohio law, and by statute could be terminated only for cause, entitling him to an administrative review of the dismissal. After his appeal to the Civil Service Commission failed, Loudermill filed suit in federal district court claiming that the Ohio statute providing for administrative review was unconstitutional on its face because it provided no opportunity for a discharged employee to respond to charges against him prior to removal, thus depriving him of liberty and property without due process.[34]

The Supreme Court, in agreeing with Loudermill, held that "[a]n essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"[35] Thus, the Court found that this principle requires "'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."[36] Furthermore, the Court explained that the need for such a hearing comes from a balancing of the competing interests at stake: the interests of the employee in retaining employment and avoiding erroneous termination and the government's interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens.[37]

These considerations led the Court to conclude that, while pretermination hearings are necessary, they need not be elaborate and that "'something less' than a full evidentiary hearing is

31. *Loudermill*, 470 U.S. at 535.
32. *Id.*
33. *Id.*
34. *Id.* at 536.
35. *Loudermill*, 470 U.S. at 542.
36. *Id.*
37. *Id.* at 542-43.

sufficient prior to adverse administrative action."[38] Thus, pretermination hearings need not definitively resolve the propriety of the discharge, rather they should merely be "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[39] The Supreme Court then stated that the "essential requirements of due process . . . are notice and an opportunity to respond."[40] Therefore, the Court held that due process only requires that the employee receive notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.[41] The Court explicitly limited its holding by stating that "[*t*]*o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.*"[42]

B. Parratt v. Taylor

Another frequently cited United States Supreme Court case dealing with pretermination hearings is *Parratt v. Taylor*.[43] In this case, a prisoner claimed violation of his procedural due process rights because the mail-ordered hobby kits for which he had paid disappeared after their delivery to the prison.[44] The Court, in holding that the prisoner failed to make out a procedural due process claim, recognized that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process."[45] The Court further reasoned that the nature of his deprivation, "a tortious loss [resulting from] a random and unauthorized act by a state

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38. *Id.* at 545.
39. *Id.* at 545-46.
40. *Id.* at 546.
41. *Laudermill*, 470 U.S. at 546.
42. *Id.* (emphasis added).
43. 451 U.S. 527 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986).
44. *Parratt*, 451 U.S. at 530.
45. *Id.* at 539.

employee," makes it difficult, if not impossible, to hold a meaningful predeprivation hearing.[46] All that due process requires, the Court said, is a post-deprivation "means of redress for property deprivations satisfy[ing] the requirements of procedural due process."[47]

In many decisions where courts have held that there need not be an unbiased decisionmaker in a pretermination hearing, *Parratt* has been cited as authority.[48] The reasoning of *Parratt* can also apply to the employment termination context.[49] Generally, "an employment termination decision is made initially by the employee's direct supervisor or someone working in the same organization as the employee."[50] Because of their working relationship with the terminated employee, "these individuals are also likely targets for claims of bias or improper motive."[51] Even though these claims have merit in certain instances, "to require that the state ensure an impartial pretermination hearing in every instance would as a practical matter require that termination decisions initially be made by an outside party rather than the employer."[52] As well as proving to be unduly cumbersome, this procedure may also invade the privacy of an employee who might want to keep private the circumstances of his termination.[53] Thus, as burdensome and impractical as a pretermination hearing was in *Parratt*, the same can be said of providing an impartial decisionmaker in this scenario.

C. Arnett v. Kennedy

Another United States Supreme Court case dealing with the adequacy of pretermination hearings is *Arnett v. Kennedy*.[54] In *Arnett*, an employee was dismissed from his position in the Office of Economic Opportunity (OEO) for allegedly having made

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46. *Id.* at 541.
47. *Id.* at 537.
48. *See, e.g.*, Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987); McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995).
49. *McDaniels*, 59 F.3d at 460.
50. *Id.*
51. *Id.*
52. *Id.*
53. *See id.*
54. 416 U.S. 134 (1974).

recklessly false and defamatory statements about other OEO employees.[55] The employee was given a copy of the charges against him and advised of his right to give an oral or written reply to the charges.[56] Instead of responding to the substance of the charges against him, the employee asserted that the charges were unlawful because he had a right to a trial-type hearing before an impartial hearing officer before he could be removed from his employment.[57] In a plurality opinion, the Supreme Court rejected this procedural due process claim.[58] In his concurrence, Justice Powell addressed the practical considerations weighing against adding a constitutional requirement of an impartial decisionmaker at the pretermination level.[59] Justice Powell noted that

> [i]n most cases, the employee's supervisor is the official best informed about the 'cause' for termination. If disqualification is required on the ground that the responsible supervisor could not be wholly impartial, the removal procedure would become increasingly complex. In effect, a 'mini-trial' would be necessary to educate the impartial decisionmaker as to the basis for termination.[60]

IV. Treatment by the Federal Courts of Appeal

A. McKinney v. Pate

The Eleventh Circuit, in *McKinney v. Pate*,[61] specifically addressed the question of whether the failure to provide an unbiased decisionmaker at a pretermination hearing violates the procedural due process rights of the employee to be dismissed.[62] McKinney was the County Building Official in Osceola County. As such, he was a full-time permanent employee of Osceola

55. *Arnett*, 416 U.S. at 136-37.
56. *Id.* at 137.
57. *Id.*
58. *See id.* at 163.
59. *See id.* at 170-71 n.5.
60. *Arnett*, 416 U.S. at 170-71 n.5.
61. 20 F.3d 1550 (11th Cir. 1994).
62. *McKinney*, 20 F.3d at 1562.

County and could only be dismissed for cause.[63] McKinney alleged that his strict enforcement of the county's building codes angered some members of the Board of County Commissioners (the Board), especially John Pate, who was a construction subcontractor as well as a board member.[64] Subsequently, the Board ordered the county administrator to fire McKinney.[65] The Board then "held three days of hearings regarding the charges against McKinney," whereby they voted to terminate him.[66] McKinney's charge of bias was the only procedural fact relevant to his pretermination hearing that he claimed was in any way deficient.[67]

The Eleventh Circuit held that since McKinney received written notice of the charges against him and had the opportunity to present his side of the story at the pretermination hearing, "[h]e . . . received . . . all the process due under *Loudermill*."[68] The court explicitly stated that "in the case of an employment termination case, due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing."[69] The court reasoned that "due process is satisfied when the challenger has an opportunity to present his allegations and to demonstrate the alleged bias. A demonstration that the decisionmaker was biased, however, is not tantamount to a demonstration that there has been a denial of procedural due process."[70] Furthermore, the court noted that since McKinney filed his lawsuit in federal court after his termination, but before he sought redress from the State of Florida, "he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation."[71]

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63. *Id.*
64. *Id.*
65. *Id.* at 1555.
66. *Id.*
67. *McKinney*, 20 F.3d at 1561-62.
68. *Id.* at 1561-62.
69. *Id.* at 1562.
70. *Id.*
71. *Id.* at 1563.

B. Other Circuits

Other federal courts of appeal faced with this issue have rendered holdings similar to that of the Eleventh Circuit. The Third Circuit in *McDaniels v. Flick*[72] addressed a situation where a college professor accused of sexual harassment was given a pretermination hearing in front of those who recommended his termination. The court, relying on *Loudermill* and *Parratt*, held that in the public employment termination context, an impartial decisionmaker is not required at the pretermination hearing.[73] In *Walker v. City of Berkeley*[74] a city employee contended that her due process rights were violated because the Assistant City Manager, who conducted the pretermination hearing, was biased against her. In rejecting this argument, the court stated that "the failure to provide an impartial decisionmaker at the pretermination stage, of itself, does not create liability, so long as the decisionmaker at the post-termination hearing is impartial."[75] The Sixth Circuit in *Duchesne v. Williams*[76] addressed as the sole issue on appeal, "[d]oes *Cleveland Board of Education v. Loudermill* require that a discharged municipal employee receive a pretermination hearing *before a neutral and impartial decisionmaker* rather than before the supervisor who fired him?"[77] In answering this question in the negative, the court said that "[t]he *Loudermill* majority deliberately chose not to include within its definition of pretermination hearing rights the panoply of trial-type hearing rights . . . [such as an] adjudicatory hearing with an impartial judge."[78]

In *Garraghty v. Jordan*,[79] the Fourth Circuit was confronted with a situation where a prison Warden claimed his due process rights were violated when he was suspended from his position. In upholding summary judgment against the plaintiff on the due process claim, the court held that " [a] predeprivation

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72. 59 F.3d 446 (3d Cir. 1995).
73. *See McDaniels*, 59 F.3d at 460.
74. 951 F.2d 182 (9th Cir. 1991).
75. *Walker*, 951 F.2d at 184.
76. 849 F.2d 1004 (6th Cir. 1988).
77. *Duchesne*, 849 F.2d at 1005 (citations omitted) (emphasis added).
78. *Id.* at 1007.
79. 830 F.2d 1295 (4th Cir. 1987).

proceeding need not be a full evidentiary hearing with witnesses and a neutral decisionmaker so long as the employee is given an opportunity to answer the charges."[80] Furthermore, the Fifth Circuit, in a case brought by a terminated police officer, plainly stated that "due process [does not] require the state to provide an impartial decisionmaker at the pretermination hearing."[81] The Federal Circuit heard a complaint by employees of the National Weather Service that their rights to due process of law were violated at the pretermination hearing because the same person who recommended that they be terminated presided over the hearing.[82] The court, in flatly rejecting this argument, explained that "[a]t the pretermination stage, it is not a violation of due process when the proposing and deciding roles are performed by the same person."[83]

V. *STALLWORTH V. CITY OF EVERGREEN*

A. Facts and Procedural History

In *Stallworth v. City of Evergreen*,[84] Freddie Stallworth was employed as a personnel officer for the City of Evergreen.[85] "His job as personnel officer was under the merit system, and he could be terminated only for cause."[86] "At an executive session of the city council, Stallworth was asked to explain certain payroll discrepancies, but he failed to provide an explanation."[87] Consequently, Curtis Hamilton, the city administrator, recommended disciplinary action and the mayor of Evergreen concurred."[88] Hamilton then "notified Stallworth of the charges against him and of the witnesses to be called against him.[89] At the pretermination hearing, Hamilton served as the hearing offi-

80. *Garraghty*, 830 F.2d at 1302.
81. Schaper v. City of Huntsville, 813 F.2d 709, 715 (5th Cir. 1987).
82. DeSarno v. Department of Commerce, 761 F.2d 657 (Fed. Cir. 1985).
83. *DeSarno*, 761 F.2d at 660.
84. 680 So. 2d 229 (Ala. 1996).
85. *Stallworth*, 680 So. 2d at 230.
86. *Id.*
87. *Id.* at 231.
88. *Id.*
89. *Id.*

cer, but when Hamilton was called as a witness, the mayor took over as the hearing officer.[90] Stallworth, who was represented by counsel, objected to having either one serve as the hearing officer because of a perceived lack of impartiality. Following the pretermination hearing, "the mayor and Hamilton, by memorandum, advised Stallworth that he was being terminated from employment and advised him of his right to appeal to the Evergreen Personnel Review Board."[91] The Review Board was comprised of five members who were appointed by the city council and were not City employees or holders of office in the City.[92]

Stallworth received "a full evidentiary hearing" before the Review Board. The Mayor and city council member Jerry Caylor were called as witnesses.[93] "However, neither the mayor nor Hamilton or Caylor participated in the Review Board's deliberations."[94] Stallworth's termination was upheld by a vote of 3-2.[95] The city council convened to make a final determination on Stallworth's termination.[96] City Councilman Caylor abstained, but the Mayor joined the majority in its 3-2 affirmation of the termination.[97]

When Stallworth went to court, the judge held held that even if the Mayor's vote was not counted, the vote would be two to two, which would still result in the affirmance of the Review Board's decision.[98] The trial court further stated that "the Evergreen ordinance creating the personnel system provides adequate procedural due process rights as enunciated in *McKinney v. Pate* because the personnel review board is composed of citizens of Evergreen appointed by the City Council members, by district, and provides for a 'de novo hearing.'"[99]

Stallworth appealed, maintaining that his due process rights "were violated by Hamilton's participation as investigator, judge, and adverse witness in the pretermination hearing," as an

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90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Stallworth*, 680 So. 2d at 231.
97. *Id.* at 231-32.
98. *Id.* at 232.
99. *Stallworth*, 680 So. 2d at 232.

adverse witness at the Review Board hearing, and by the mayor's participation as investigator, adverse witness, prosecutor, judge, and final decisionmaker. Stallworth claimed that the proceedings were tainted by bias and prejudgment and, therefore, that the mere cancellation of the Mayor's vote at the city council meeting was not sufficient to cure the due process violations.[100]

The City of Evergreen conceded that if "the pretermination hearing had been the only procedural protection given Stallworth," then he "would not have had 'meaningful due process.'"[101] The City nonetheless maintained that since "it afforded Stallworth the right to appeal to an independent, unbiased Review Board, which it claimed constituted a mechanism to address the alleged due process deprivation, the requirement of due process was satisfied."[102]

B. The Alabama Supreme Court's Decision

The court began its analysis with an examination of *Loudermill*. It acknowledged that *Loudermill* held that only notice and opportunity to respond were essential elements of due process in a pretermination hearing.[103] The court also recognized that *Loudermill* deemed the purpose of a pretermination hearing merely to be an initial check against a mistaken decision.[104] However, the court expanded the holding in *Loudermill* by stating that an unbiased decisionmaker is one of the fundamental requirements of due process.[105] Therefore, the court reasoned that "[t]o hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity."[106] It was further

100. *Id.*
101. *Id.*
102. *Stallworth*, 680 So. 2d at 233.
103. *Id.* at 233.
104. *Id.*
105. *Stallworth*, 680 So. 2d at 233-34.
106. *Id.* at 235.

argued that no matter how fair and adequate the procedures at the post-termination hearings, the initial decision made at the pretermination hearing will significantly harm the employee's chances of prevailing at the post-termination hearing.[107] Thus, the holding in *Stallworth* was that

> [a]lthough the hearing at a pretermination hearing need only determine whether there are "reasonable grounds to believe that the charges against the employee are true and support the proposed action," the most basic precepts of due process of law require that the person making that decision, the hearing officer, must be relatively unbiased and impartial.[108]

The Alabama Supreme Court attempted to both distinguish and criticize the Eleventh Circuit's decision in *McKinney v. Pate*. The court began by noting that while it is bound by United States Supreme Court precedent on questions concerning federal constitutional law, precedent coming from the federal courts of appeal are only persuasive authority.[109] The court pointed out that while Stallworth chose to pursue a remedy in state court, McKinney failed to take advantage of any state remedies, opting instead to pursue his claim in federal court.[110] Thus, the *McKinney* court based its holding not only on a conclusion that any due process problems with McKinney's pretermination hearing had been remedied by an adequate post-termination hearing, but also on the fact that Florida courts have the authority to order the relief to which McKinney claimed to be entitled—a new hearing conducted by a fair tribunal.[111] Furthermore, the court criticized the *McKinney* court's reliance on *Parratt v. Taylor*. The court stated that a predeprivation hearing in the sort of situation in *Parratt* would be impossible, because a state cannot predict when a prison employee will negligently misplace or steal a prisoner's property.[112] Thus, the court saw situations where an employee is terminated as different because a pretermination hearing is practicable in the employee termina-

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107. *Id.* at 235.
108. *Id.* at 234 (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985)).
109. *See id.*
110. *Stallworth*, 680 So. 2d at 234.
111. *Id.*
112. *Id.* at 235.

tion context.[113]

VI. CRITICISM OF THE DECISION

A. Stare Decisis

Claims of due process violations implicate the United States Constitution and are thus issues of federal constitutional law. The United States Supreme Court is the final authority on such questions.[114] The Supreme Court in *Cleveland Board of Education v. Loudermill* addressed in detail the requirements of a pretermination hearing for public employees.[115] In doing so, the Supreme Court was very clear that the only requirements for a pretermination hearing are notice of the charges and an opportunity to respond.[116] Furthermore, the Supreme Court expressly limited this holding in saying that "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an employee."[117]

The *Stallworth* court relied heavily on *Loudermill* as justification for its holding.[118] However, the Alabama Supreme Court apparently ignored the explicit limitations the *Loudermill* Court put on the requirements of a pretermination hearing. The court justified the addition of this requirement by stating that "the most basic precepts of due process of law require that the person making that decision, the hearing officer, must be relatively unbiased and impartial."[119] Yet, if this is such a basic requirement of a pretermination hearing, why did the *Loudermill* Court not include it among the requirements of a pretermination hearing? Since the United States Supreme Court has previously discussed this issue,[120] it was not likely overlooked. Furthermore, Justice Marshall's separate concurring opinion in *Loudermill*

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113. *Id.*
114. *Id.*
115. 470 U.S. 532 (1985).
116. *See Loudermill*, 470 U.S. at 546.
117. *Id.*
118. *See Stallworth*, 680 So. 2d at 235.
119. *Id.* at 234.
120. *See* Arnett v. Kennedy, 416 U.S. 134 (1974).

argued that the right to a pretermination hearing should also encompass the right to a full-blown evidentiary, trial-like proceeding before an impartial judge.[121] Had the *Loudermill* majority agreed that a public employee has a constitutional right to a trial-type hearing with an impartial decisionmaker at the pretermination stage, Marshall would not have felt compelled to right a separate concurrence.[122] Thus, the only rational conclusion for the lack of a requirement for an impartial decisionmaker in the majority opinion is that it was deliberately excluded.

Further evidence that *Loudermill* clearly does not require an impartial decisionmaker at the pretermination stage is the treatment of this issue in the federal courts of appeal. While the Alabama Supreme Court is not bound by the decisions of the federal appellate courts, the court does recognize that such authority should be deemed extremely persuasive and of "invaluable aid in understanding Federal law as enunciated by the United States Supreme Court."[123] Such deference is particularly relevant on this issue because, of those federal appellate courts addressing this precise issue, all appear to have explicitly ruled that an impartial decisionmaker at the pretermination hearing is *not* a requirement for due process. More specifically, the Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and Federal circuits have all held that *Loudermill* does not require an unbiased decisionmaker at the pretermination hearing.[124] The Alabama

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121. *Loudermill*, 470 U.S. at 548-51 (Marshall, J., concurring in part and concurring in the judgment).

122. Justice Marshall wrote the following:

> [I] write separately . . . to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than [the employee] sought in this case. I continue to believe that . . . the employee is entitled to an opportunity to test the strength of the evidence "by confronting and cross-examining adverse witnesses and by presenting witnesses on his own behalf, whenever there are substantial disputes in the testimonial evidence" (citation omitted). Because the [majority] suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the Court's opinion in its entirety.

Id. at 548.

123. *Stallworth*, 680 So. 2d at 234.

124. *See* McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995); McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994); Walker v. City of Berkley, 951 F.2d 182 (9th Cir. 1991); Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988); Garraghty v. Jordan, 830 F.2d 1295 (4th Cir. 1987); Schaper v. City of Huntsville, 813 F.2d 709 (5th Cir. 1987);

Supreme Court in *Stallworth* is contrary to the treatment of this issue in federal courts. The unambiguous language of the United States Supreme Court coupled with its unanimous treatment in the federal circuits which have faced the issues should have required the court to reject Stallworth's due process claim.

B. Distinction Between Pretermination and Post-Termination Hearings

In the *Stallworth* opinion, the Alabama Supreme Court blurred the distinction drawn by the United States Supreme Court in *Loudermill* between pretermination and the post-termination hearings. The *Loudermill* Court recognized that the purposes of an extensive adjudicatory, adversarial, post-termination hearing and of a much more limited pretermination hearing are starkly dissimilar.[125] The purpose of a pretermination hearing is not to "definitively resolve the propriety of the discharge," as would be the case at a more formal, post-termination hearing.[126] Rather, the *Loudermill* Court restricted the pre-termination hearing's purpose by stating that "[i]t should be *an initial check against mistaken decisions*—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[127] The *Loudermill* Court further narrowed the basic components of such a hearing to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[128] In proscribing these limited rights, the Supreme Court stressed that to require more than this would intrude on the employer's interest in quickly removing an unsatisfactory employee.[129] Thus, the United States Supreme Court made it clear that any additional requirements imposed on a government entity were unwarranted.

The Alabama Supreme Court argued that

DeSarno v. Dep't of Commerce, 761 F.2d 657 (Fed. Cir. 1985).

125. *Loudermill*, 470 U.S. at 542-47.

126. *Id.* at 545.

127. *Id.* at 545-46 (emphasis added).

128. *Id.* at 546.

129. *Id.*

> [t]o hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pretermination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity . . . [because] the initial decision made after the pretermination hearing inevitably will have diminished significantly the employee's chances of prevailing at the post-termination hearing.[130]

This analysis completely ignores the policy reasons given by the *Loudermill* Court for its decision. The Supreme Court did not foresee a pretermination hearing to function as a full adjudicatory hearing to be relied upon by later hearings. Rather, the Supreme Court clearly stated that it was merely to be an initial check against mistaken decisions.[131] Stallworth undeniably received notice of the charges against him and was afforded an opportunity to present his side of the story. Therefore, the hearing served its function as an initial check against an erroneous decision by the employer, no matter who presided over the hearing. The Alabama Supreme Court appears to argue that an employee is entitled to receive two procedurally adequate hearings, while the United States Supreme Court has clearly indicated the employee is only due one. According to the Alabama Supreme Court's logic, if there is no procedural due process initially, it can never be remedied. This logic is antithetical to the holding and policy considerations given by the Supreme Court in *Loudermill*.

The United States Supreme Court has also held that a procedural due process violation that is potentially actionable is not complete when the deprivation takes place (i.e., at the time of the defective pretermination hearing).[132] Rather, such a violation does not occur "unless and until the State fails to provide due process."[133] The *Zinermon* Court held that providing a remedy for erroneous deprivations is a component of the procedural machinery that the government entity may offer to avoid

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130. Stallworth v. City of Evergreen, 680 So. 2d 229, 235 (Ala. 1996).
131. *See Loudermill*, 470 U.S. at 545-46.
132. *See* Zinermon v. Burch, 494 U.S. 113, 126 (1990).
133. *Zinermon*, 494 U.S. at 126.

constitutional violations.[134] Thus, since there is no violation of procedural due process until the State fails to provide an adequate hearing, a constitutionally adequate post-termination hearing can remedy a procedurally deficient pretermination hearing.

However, in *Stallworth*, the Alabama Supreme Court stated that "the post-termination hearing before the Review Board did not remedy and could not have remedied the earlier deprivation of Stallworth's right to a constitutionally adequate pretermination hearing; *this is the case whether or not . . . Stallworth was afforded a constitutionally adequate post-deprivation hearing.*"[135] The court thus deemed a post-termination remedy such as a post-termination hearing irrelevant to its constitutional analysis. The Alabama Supreme Court completely ignored United States Supreme Court law which says that there is no violation unless and until the State fails to provide an adequate post-termination hearing.

C. McKinney v. Pate

The holding in *Stallworth* obviously conflicts with that in *McKinney v. Pate*. The Alabama Supreme Court attempted to both distinguish and criticize *McKinney*.[136] The court distinguished *McKinney* by pointing out that the Eleventh Circuit based its holding not only on the fact that any procedural problems had been remedied, but also that since McKinney failed to take advantage of any state remedies after his termination, the Florida Courts still had the authority to order the relief he sought.[137] While this statement may be true, it has no bearing on this clear and unambiguous statement of the *McKinney* court: "[I]n the case of an employment termination case, 'due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing.'"[138] The *Stallworth* opinion deals with an employment termination case where the employee claims due process mandated an impartial

134. *Id.*
135. *Stallworth*, 680 So. 2d at 235 (emphasis added).
136. *See id.* at 234-35.
137. *Id.* at 234.
138. McKinney v. Pate, 20 F.3d 1550, 1562 (11th Cir. 1994).

decisionmaker at the pretermination hearing. Thus, the Eleventh Circuit's position on this matter is clear, irrespective of the attempted distinguishment.

The *Stallworth* court's criticism of *McKinney* was that its decision was based in part on *Parratt v. Taylor*.[139] The court pointed out that *Parratt* involved a situation where a predeprivation hearing was impossible (misplacing of a prisoner's property), while *McKinney* involved a situation where an employee was terminated.[140] Thus, the court concluded that "the Eleventh Circuit's reliance on *Parratt v. Taylor* to buttress its conclusion in *McKinney* that a denial of due process at the pretermination level can be fully remedied by a procedurally adequate post-termination hearing is questionable."[141] However, the Eleventh Circuit in *McKinney* merely used *Parratt* to support its position that one who suffers a procedural deprivation at the hand of the State has not suffered a violation of his procedural due process rights unless and until the State refuses to make available a means to remedy the deprivation.[142] This is a proposition which the United States Supreme Court has held applies to all procedural due process claims.[143] Thus, the different fact situations presented in *Parratt* and *McKinney* do not dictate different results.

D. Practical Considerations

In most circumstances, an employment termination decision is initially made by the employee's direct supervisor or by someone who works in the same department as the employee. This is logical because, as Justice Powell noted in his concurrence in *Arnett v. Kennedy*,[144] such an individual is likely to be most familiar with the interests of the employer organization, as well as the abilities and shortcomings of the employee.[145] Thus, the individuals who make the recommendation or decision to dis-

139. *See Stallworth*, 680 So. 2d at 234-35.
140. *See id.*
141. *Id.* (citations omitted).
142. *See McKinney*, 20 F.3d at 1562-63.
143. *See* Zinermon v. Burch, 494 U.S. 113, 126 (1990).
144. 416 U.S. 134, 170 n.5 (1974) (Powell, J., concurring).
145. *See Arnett*, 416 U.S. at 170 n.5.

charge an employee are the most likely targets for claims of bias simply because of their positions.

In the *Stallworth* case, the plaintiff's supervisor was the one who initiated charges against him. Though no evidence exists that the supervisor held any personal bias against Stallworth or that he had any improper motive for his employment decision, Stallworth alleged a due process violation because the supervisor acted as the hearing officer at the pretermination stage. The practical effect of requiring an unbiased decisionmaker at the pretermination hearing is that initial termination decisions will always have to be made by an outside party because charges of bias can always be made after an in-house termination.[146] This will require the State to hire an outside party and conduct a mini-trial to educate the decisionmaker as to the basis for the termination.[147] Imposing such a requirement on an employer is unduly expensive and cumbersome. Furthermore, it is also unreasonably invasive for employees who will probably desire to keep the circumstances of their discharge private. Thus, from a practical standpoint, the *Stallworth* rule will be excessive and unnecessary in situations where the State provides an impartial decisionmaker at the post-termination stage to resolve any charge of improper motive or bias.

VII. CONCLUSION

The Alabama Supreme Court in *Stallworth v. City of Evergreen* ignored United States Supreme Court precedent in the area of procedural due process by adding an impartial decisionmaker to pretermination hearings; a requirement which was purposely left out of the *Loudermill* decision. In so doing, the Alabama Supreme Court ignored both the plain language of *Loudermill* and rulings in a multitude of federal courts of appeal (including the Eleventh Circuit), while not producing one case which supported its position. The court displayed a lack of understanding of the separate and distinct functions of pretermination and post-termination hearings. The practical result of compliance with this decision will be burdensome both

146. *See* McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir. 1995).
147. *See Arnett*, 416 U.S. at 170 n.5 (1974).

to public employers and employees. In order to comply with the *Stallworth* decision, public employers must now go to the expense of hiring an outside party to preside over a pretermination hearing, even though one will be provided at the post-termination stage. Not only will this be time-consuming and expensive, but it also intrudes on the State's interest in quickly removing an unsatisfactory employee, which is just what the United States Supreme Court sought to avoid in *Loudermill*. This holding is also invasive for employees who want to keep the circumstances of their discharge private. The Alabama Supreme Court should abandon this opinion and adopt a rule consistent with current due process jurisprudence. In the meantime, any public employer faced with a lawsuit in Alabama state court for violation of an employee's constitutional due process rights because of a failure to provide an impartial decisionmaker at the pretermination hearing should promptly remove the case to federal court where the Eleventh Circuit has correctly applied the *Loudermill* decision.

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