[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13762

D.C. Docket No. 2:15-cv-00308-CG-N

TRICIA GALBREATH,

Plaintiff - Appellee,

versus

HALE COUNTY, ALABAMA COMMISSION,
HALE COUNTY, ALABAMA,
ARTHUR CRAWFORD,
Probate Judge, in his individual and official capacities,

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Alabama

(October 31, 2018)

Before MARTIN, JULIE CARNES, and O'SCANNLAIN,[*] Circuit Judges.

MARTIN, Circuit Judge:

Tricia Galbreath served as the county administrator for Hale County, Alabama from 2004 until the County fired her in 2013. Ms. Galbreath filed a complaint against Hale County, the Hale County Commission (Commission), and Judge Arthur Crawford, who serves as the County's probate judge and Commission chair (collectively, the County or Hale County). The case went to trial on three claims, and the jury returned a verdict in Ms. Galbreath's favor. The County filed a renewed motion for judgment as a matter of law and an alternative motion for a new trial. The District Court denied these motions, and this appeal followed. After careful review and with the benefit of oral argument, we affirm.

I.

The Commission consists of four Commissioners and the Probate Judge of Hale County who serves as the Commission's chair. In November 2004, Ms. Galbreath was hired by the Commission to serve as the County Administrator on the recommendation of Probate Judge Leland Avery. Her main job was to improve the County's financial procedures, including the county's check-writing and purchase-order systems, its grant obtainment, and its budget balance. To do this, she worked "day and night" for six months.

[*] Honorable Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, sitting by designation.

When she was hired, Ms. Galbreath received a copy of the County's personnel policy. A copy of this document was placed in Ms. Galbreath's personnel file. A section on "Conditions of Employment" sets forth the following policy for permanent employees:

> When disagreement over the solution of a problem cannot be resolved, permanent employees shall have access, through a grievance procedure, to successively higher levels of management. Management/supervisory personnel will produce resolution of problems and grievances, attempting always to ensure every permanent employee the right to due process under the grievance procedure.[1]

The policy later specifies a four-step grievance procedure in more detail. In general terms, step one calls for discussing the incident with an immediate supervisor. Step two is to file a complaint to a department head. Step three is to request review by the Personnel Review Board, which must hear the grievance within ten days. At step four, the County Commission reviews the recommendation of the Personnel Review Board and adopts, modifies, or rejects it.

The handbook also details a multi-step procedure for "Disciplinary Actions":

> Employees are expected to attend work regularly, arriving in [sic] time and spending the assigned time in productive work efforts. They are also expected to deal honestly, fairly and effectively with the County's resources and citizens. When employees cannot or will not conform to the Personnel Rules and Regulations as outlined herein, they may be disciplined in the following ways:

[1] The handbook also provides that new employees serve three-month probationary periods before attaining permanent-employee status. During the probationary period, these employees have no right to access the grievance procedure.

1. Verbal Reprimand: a notification of which will be placed in the personnel file;
2. Written Reprimand: a copy will be placed in the personnel file. The employee will also be given a copy of the written reprimand.
3. Suspension: for up to ten (10) consecutive working days. Suspensions of an aggregate of twenty-five (25) days in any calendar year (dating from the first suspension) will result in termination. Suspensions are without pay.
4. Demotion and Reduction of Pay:
5. Transfer:
6. Termination:

Steps 4, 5 and 6 shall be only with the concurrence of the County Engineer. An appeal can be made following the steps in [the] grievance procedure.

Ms. Galbreath also entered into written contracts with the County. On October 1, 2005, Ms. Galbreath entered into a five-year employment contract with the County that paid $55,650 annually. The contract was executed by Ms. Galbreath and Judge Avery.

One month after entering the contract with Hale County, Ms. Galbreath began working as the Chief Financial Officer for Greene County, earning $65,000 per year. She worked for Greene County from Monday to Thursday, 8 a.m. to 3:30 p.m. One Hale County commissioner explained Ms. Galbreath had no set hours and was permitted to work part-time and assist other counties. The County knew of and did not object to her work for other counties.

In November 2012, Arthur Crawford defeated Judge Avery in the election for Hale County Probate Judge. Before leaving office, Judge Avery issued a

revised contract to Ms. Galbreath. This contract extended the term of her employment for six years, until November 25, 2018, and required unanimous consent of the Commission for termination. The Commission voted on the contract. The four Commissioners' vote resulted in a tie that Judge Avery broke in favor of approving the new contract. Ms. Galbreath and Judge Avery executed the contract. Judge Avery proposed the new contract due to a rumor that the incoming commission wanted to "clean house" and told Galbreath he was giving her the new contract to "protect" her job.

In early 2013, Ms. Galbreath was hired as County Administrator in Lawrence County. During that year, Hale County officials became dissatisfied with Ms. Galbreath's performance. One Commissioner said Galbreath was unavailable when he requested information. Other county officials and staff complained about her absence from the office, her inappropriate work attire and foul language, her inappropriate work trips, and her failure to record commission meeting minutes.

A Commission meeting was scheduled for June 18, 2013. Before the meeting, Judge Crawford told Ms. Galbreath to place the position of County Administrator and County Attorney on the meeting agenda. Ms. Galbreath, who ordinarily attended Commission meetings, did not ask why her position was put on the agenda. At the meeting, the Commission entered into a private executive

session. During this session, Judge Crawford presented a pre-prepared "Employee Disciplinary Action Form," which he read at the session.

While Judge Crawford read the disciplinary action form, Ms. Galbreath repeatedly interrupted him. When he finished reading, he gave Ms. Galbreath a chance to address the Commission. She replied, "No comment, I'll contact my attorney." When the commission returned to public session, Commissioner Anderson moved to terminate Ms. Galbreath. Commissioner Hamilton seconded the motion. A majority of the Commission (two votes to one with one abstaining) voted to terminate Ms. Galbreath.

After being fired by Hale County, Ms. Galbreath continued to work for Lawrence County until 2014 when she was terminated there. Since her termination from Hale and Lawrence Counties, Ms. Galbreath has applied for no other jobs.

Ms. Galbreath filed her complaint against Hale County in June 2015. Her original complaint included eight counts, most of which the District Court dismissed under Rule 12 or at summary judgment. The parties went to trial on three claims: (1) a procedural due process claim under 42 U.S.C. § 1983; (2) a state-law breach-of-contract claim; and (3) a state-law wrongful-termination claim.

The jury returned a verdict in favor of Ms. Galbreath on all three claims, awarding $128,600 for back pay and benefits, and $8,000 for mental anguish. In post-trial orders, the District Court awarded front pay in the amount of $70,269.03,

pre-judgment interest of $14,613.28, post-judgment interest of $539, and $139,736.06 in attorney's fees and costs. The total award was $361,757.37. The District Court denied the County's motions for judgment as a matter of law and for a new trial. This appeal followed.

II.

A.

The County argues Ms. Galbreath's procedural due process claim fails as a matter of law. It says Ms. Galbreath did not have a constitutionally protected property interest in her employment, received constitutionally sufficient process anyway, and could have sought state-court remedies to correct for any procedural errors.

We review de novo the District Court's denial of the County's motion for judgment as a matter of law. Chaney v. City of Orlando, 483 F.3d 1221, 1227 (11th Cir. 2007). Judgment as a matter law should only be granted "when there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1192 (11th Cir. 2004).

1.

At the summary judgment stage, the District Court ruled that the Court's personnel policy created an employment contract and a property interest protected by due process.

A government employer cannot terminate an employee who possesses a state-created property interest in employment without due process, including a pretermination opportunity to respond. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 545, 105 S. Ct. 1487, 1491, 1495 (1985). "State law defines the parameters of a plaintiff's property interest." Mackenzie v. City of Rockledge, 920 F.2d 1554, 1559 (11th Cir. 1991) (citation omitted). "Whether state law has created a property interest is a legal question for the court to decide." Id. (internal quotation marks and citation omitted). Under Alabama law, "language contained in a handbook can be sufficient to constitute an offer to create a binding unilateral contract." Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725, 735 (Ala. 1987). Three factors guide courts' analysis: (1) whether the language is "specific enough to constitute an offer"; (2) whether the offer is "communicated to the employee by issuance of the handbook"; and (3) whether the employee accepted the offer by "retaining employment after he has become generally aware of the offer." Id.

Without citing any authority, the County argues Ms. Galbreath does not have a property interest based on the personnel policy because she did not subjectively

believe the policy applied to her. The District Court was right to reject this argument. The third Hoffman-LaRoche factor looks only to whether the employee continued to work after being provided the policy, not to whether the employee subjectively understood that the policy applied to her. See Hoffman-La Roche, 512 So. 2d at 737 ("It is not disputed that Campbell continued to work after the handbook had been issued. By his retention of employment after he had become aware of the handbook (offer), he accepted the unilateral contract."). As the District Court said, "[i]t is the employee's performance that supplies consideration for the contract, not a subjective understanding." By continuing to work after receiving the policy (the offer), Ms. Galbreath accepted its terms. Her subjective understanding of whether the policy applied to her is not relevant.

The District Court also correctly ruled that the written contract created a property interest. See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–77, 92 S. Ct. 2701 (1972) (holding that a contract can create a property interest in employment). The District Court found that Article 4, Paragraph A of the 2012 contract provided three scenarios for when the County could fire Ms. Galbreath for cause. First, the County could fire her if she failed to perform her duties and that failure to perform "shall not have been remedied . . . in accordance with County's disciplinary procedures." Second, the County could fire Ms. Galbreath if she "engaged in malfeasance, dishonesty[,] or gross misconduct." And third, the

County could fire Ms. Galbreath if she "committed a material breach" of the contract. Had she been fired for any of these reasons, the County could avoid paying her the compensation and benefits she was due under the contract. Otherwise, she would be due her "full compensation, benefits[,] and expense reimbursements due and payable . . . under the terms of this Agreement, including any salary increase [that] would have been due under said Contract for the remainder of the contract term." The language of this contract was sufficiently clear to establish a property interest in employment for the term of the contract. See Green v. City of Hamilton, Hous. Auth., 937 F.2d 1561, 1564 (11th Cir. 1991) (holding that a contract's terms created a material dispute of fact about whether contract was for "permanent" employment that would give rise to a property interest protected by due process).

2.

The County argues alternatively that, even accepting that Ms. Galbreath did have a property right, her due process claim fails because she received sufficient notice and was given an opportunity to respond at the hearing but declined when she replied "No comment." The County's argument is based on the Supreme Court's decision in Loudermill, 470 U.S. at 532, 105 S. Ct. at 1487. In Loudermill, the Supreme Court held "[t]he tenured public employee is entitled 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." 470 U.S. at 546, 105 S. Ct. at 1497. However, "the pretermination 'hearing,' though necessary, need not be elaborate." Loudermill, 470 U.S. at 545, 105 S. Ct. at 1495. The County argues the notice and opportunity to respond it gave Ms. Galbreath satisfied Loudermill's requirements.

The District Court correctly rejected this argument. The evidence showed the on-the-spot notice provided at the Commission's executive session was "conclusory, without factual explanation, and without any supporting materials." On this record, a reasonable juror could find that Ms. Galbreath did not have a "meaningful" opportunity to respond to the charges, even if she was formally asked to respond.

The evidence also showed Ms. Galbreath had no reason to believe her job was immediately at risk during the executive session, and she was surprised by the motion made to terminate her when the public hearing resumed. Due process requires "written notice of the reasons for termination" and opportunity to rebut those reasons. Nicholson v. Gant, 816 F.2d 591, 598 (11th Cir. 1987) (emphasis added). This means, at a minimum, the employee must know she is at risk of being fired. During the public hearing, Ms. Galbreath was not given an opportunity to respond before the vote. This record was sufficient for a reasonable juror to find

the County violated Ms. Galbreath's procedural due process rights under Loudermill.

3.

Finally, the County argues Ms. Galbreath's procedural due process claim is barred by McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc), because she could have sought a state-court hearing on her termination. See Bell v. City of Demopolis, 86 F.3d 191, 192 (11th Cir. 1996) (per curiam) (recognizing that Alabama state courts are available to remedy inadequate public employee termination proceedings).

In McKinney, the plaintiff argued that the three-day pretermination hearing he received was defective because the decision maker was biased against him. 20 F.3d at 1555, 1561. Our Court analyzed whether an unbiased decision maker was required at the pretermination hearing and held one was not. Id. at 1562 ("[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." (quotation marks omitted and alterations adopted)). For this reason, it was acceptable for the state to cure the biased-decision-maker problem through a later hearing where "the challenger has an opportunity to present his allegations and to demonstrate the alleged bias." Id. More generally, the en banc court reaffirmed that "a procedural due process violation is not complete unless and until the State fails to provide due

process." Id. at 1557 (quotation marks omitted). Thus, a state "may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." Id. Applying this holding, our Court ruled that "McKinney could have availed himself of state court procedures that not only could have provided him with adequate relief, but also would have satisfied his interest in due process." Id. at 1567. Because Mr. McKinney did not use those state-court procedures, "there was no due process violation and, as a result, no section 1983 claim." Id.

Ms. Galbreath argues in response that McKinney has no application to a case like this one, which alleges there was no pretermination hearing at all in violation of Loudermill, 470 U.S. at 542–43. She is right. Properly understood, McKinney's holding that a state "may cure a procedural deprivation by providing a later procedural remedy" is true only where post-deprivation procedures satisfy due process. 20 F.3d at 1557. But, where a due process violation is already complete because no hearing was held as required by Loudermill, McKinney has no application.

Our prior precedent has always recognized this distinction between Loudermill claims and claims barred by McKinney. McKinney itself makes two important references to Loudermill, each time suggesting that if Mr. McKinney

had not received a pretermination hearing under Loudermill, he could have pursued a claim. See McKinney, 20 F.3d at 1561–62, 1565 ("[T]he process due McKinney under Loudermill and Parratt was limited to an opportunity to present his case before the Board at a pre-termination hearing and the presence of adequate post-termination remedies." (emphasis added)). Likewise, in Narey v. Dean, 32 F.3d 1521, 1527 (11th Cir. 1994), before addressing the plaintiff's claim that the decision maker was biased, this Court recognized as undisputed that the plaintiff "had an opportunity to tell . . . his side of the story" and "therefore received a pre-termination hearing with 'all the process due under Loudermill.'" Id. at 1257 (quoting McKinney, 20 F.3d at 1562). And in Laskar v. Peterson, 771 F.3d 1291 (11th Cir. 2014), we said "if a plaintiff suffered a procedural deprivation at his administrative hearing, there is no procedural due process violation if the state makes available a means to remedy the deprivation." Id. at 1300 (emphasis added). That analysis presumes the plaintiff received a hearing.

The fundamental difference between McKinney and Ms. Galbreath's case is that, unlike Mr. McKinney, Ms. Galbreath did not receive "all the process due under Loudermill." See McKinney, 20 F.3d at 1562. She received no hearing at all. The District Court therefore correctly ruled Ms. Galbreath's claim, which is

based on the "complete lack of a pretermination hearing," is not barred by McKinney."[2]

B.

The County argues Ms. Galbreath cannot recover on a state-law wrongful termination claim for two reasons. First, it says Alabama does not recognize a tort for wrongful termination. Second, it argues alternatively that even if Alabama does recognize the tort, the claim exists only if the employee is entitled to a hearing and does not receive one. Ms. Galbreath cannot recover on this theory, the County says, because she was not entitled to a hearing and in any event received due process.

The Alabama Court of Civil Appeals has recognized that "[t]he dismissal of a public employee who is entitled to a pretermination hearing, without such a hearing, is a wrongful act constituting a tort under Alabama law." City of Gadsden v. Harbin, 398 So. 2d 707, 708 (Ala. Civ. App. 1981); see Hardric v. City of Stevenson, 843 So. 2d 206, 210 (Ala. Civ. App. 2002). The County argues these

[2] The County also argues that a new trial is warranted because the District Court gave two erroneous jury instructions on the procedural due process claim. This argument is without merit. The District Court properly instructed the jury that it had already decided Ms. Galbreath "had a protected property interest as a matter of law." See Mackenzie, 920 F.2d at 1559 ("Whether state law has created a property interest is a legal question for the court to decide."). The District Court also correctly instructed the jury that due process in this context requires an opportunity for Ms. Galbreath to defend herself. See Harrison v. Wille, 132 F.3d 679, 684 (11th Cir. 1998) (per curiam) ("Plaintiff had several opportunities to be heard. All three of his initial statements and the two separate predisciplinary conferences provided Plaintiff the opportunity to present evidence in his defense—to tell his side of the story." (emphasis added)).

cases are wrongly decided because they misinterpret a prior Alabama Supreme Court case, which itself misinterpreted federal law. See Jefferson Cty. v. Reach, 368 So. 2d 250 (Ala. 1979). However, "absent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently." McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002). There is no indication here that the Alabama Supreme Court has suggested it would decide the issue differently from the Alabama Court of Civil Appeals. We therefore conclude Alabama recognizes a tort for wrongful termination of a public employee entitled to a pretermination hearing. See Harbin, 398 So. 2d at 708.

Alternatively, the County argues Ms. Galbreath cannot establish that she was entitled to a pretermination hearing. We reject that argument for the reasons explained above.

C.

As mentioned above, Judge Avery said he issued the 2012 contract to prevent the majority of the Commission from terminating Ms. Galbreath. The County argues this fact makes the 2012 contract void under Alabama law, meaning Ms. Galbreath cannot recover on her breach-of-contract claim. To support its argument, the County relies on Shores v. Elmore County Board of Education, 3 So.

2d 14 (Ala. 1941) and Willett & Willett v. Calhoun County, 117 So. 311 (Ala. 1928).

In Shores, the Alabama Supreme Court held that a county board of education could not enter into a contract guided by the previous superintendent that "deprived itself of the advice of" the incoming superintendent. Shores, 3 So. 2d at 16. Willett similarly concerned a school board's attorney. Willett, 117 So. at 311. In Willett, the Alabama Supreme Court held that the succeeding board "should at all times be free to select its own confidential legal advisor." Id.

The District Court distinguished Shores on the ground that the Hale County Probate Judge is not a position comparable to a school superintendent because the probate judge administers county commission meetings and the bulk of the probate judge's duties relate to administrative matters like license renewal, vehicle title, and marriage licenses. Similarly, the District Court distinguished Willett on the ground that Ms. Galbreath's duties were administrative in nature and not analogous to the attorney-client relationship at issue in Willett. We agree with the District Court's analysis of Willett and Shores and conclude that because the role of county administrator is largely administrative in nature, it does not implicate the reasoning of Willett or Shores. Neither case stands as to bar Ms. Galbreath's recovery on her breach-of-contract claim.

D.

The County also seeks judgment in its favor on Ms. Galbreath's breach-of-contract claim on the ground that she failed to perform the contract by not recording the minutes of the Commission as required by Alabama Code § 11-3-18.

Ms. Galbreath testified she took minutes at Commission meetings and then typed them into her work computer and gave the media and Commissioners a copy. The Commission would then approve the computer copy for permanent recordation. Ms. Galbreath testified she had difficulties recording the official minutes because of problems printing the minute sheets and due to the infrequency with which Commissioners were available to sign the minutes. She also said the minutes were available at all times on the County's computer even if they had not been placed in the permanent book. Based on this evidence, the District Court ruled "a reasonable juror could conclude that Galbreath did not breach the 2012 Contract because of the minutes and, if she did, that it was not a material breach." We agree and affirm on this ground.

E.

The County raises a number of arguments about whether the evidence supported the jury's damages award and other forms of relief. None of these arguments has merit.

The County argues Ms. Galbreath is not entitled to front pay because inadequate pretermination process can be cured by holding a post-termination proceeding. See Best v. Boswell, 696 F.2d 1282, 1288 (11th Cir. 1983); Langford v. Hale Cty. Ala. Comm'n, No. 2:14-cv-00070, 2016 WL 4974960 (S.D. Ala. Sept. 16, 2016). We review the District Court's award of front pay for abuse of discretion. EEOC v. W&O, Inc., 213 F.3d 600, 619 (11th Cir. 2000).

The District Court's front pay ruling is based on the jury's verdict on the breach-of-contract claim as well as the procedural due process claim. District Court explained that "Galbreath has an expectation that she will receive the benefit of the bargain under the 2012 Contract. The 2012 Contract states that Galbreath will receive 'full compensation' and 'benefits' 'due and payable' to Galbreath in the wake of a breach by Hale County." Based on these terms, the District Court found "the parties [to the contract] envisioned some type of front pay." Because the County never argued Ms. Galbreath cannot recover front pay under the contract—the basis of the district court's ruling—we affirm the Court's front pay award. See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 680 (11th Cir. 2014)

The County also argues the record does not support an award of damages for mental anguish. However, Ms. Galbreath testified she suffered sleep loss and a shingles outbreak as a result of stress induced by the County's due process

violation. This testimony supported the mental anguish award. See Akouri v. State of Fla. Dep't of Transp., 408 F.3d 1338, 1345 (11th Cir. 2005) (holding a "plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation").

The County also argues Ms. Galbreath failed to mitigate her damages because she did not look for other work. The District Court correctly rejected that argument on the ground that "Defendants did not show that substantially comparable work existed within the relevant area." See Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527 (11th Cir. 1991), superseded by statute on other grounds, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, as stated in Munoz v. Oceanside Resorts, Inc., 223 F.3d 1340 (11th Cir. 2000).

Finally, the County argues we should reverse the District Court's award of attorney's fees under 42 U.S.C. § 1988 if we reverse on the procedural due process claim. Since we affirm the judgment on Ms. Galbreath's procedural due process claim, we also affirm the associated award of attorney's fees under § 1988.

AFFIRMED.