

BLISS·McKNIGHT[®]

Keeping Out of Trouble

**YOU WON THE ELECTION –
NOW WHAT?**

With 1st Amendment Rights of Employees

SESSION GOALS

General
Employee

GENERAL RULE

Policymaking
Position

EXCEPTION 1

Confidential
Position

EXCEPTION 2

YOU WON THE ELECTION: NOW WHAT?



You want your own
administration

— 0 QUESTIONS? 0 —
Who stays? | Who goes?

YOU WON THE ELECTION: NOW WHAT?

If you're not sure if you can dismiss an employee...



Talk to your attorney or your HR Director *before* taking any action.

YOU WON THE ELECTION: NOW WHAT?

Can you fire
anyone you want
when setting up
your
administration?



YOU WON THE ELECTION: NOW WHAT?

Can you fire
anyone you want
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administration?



THE GENERAL RULE

The First Amendment protects most public employees from being terminated for political reasons.



THE GENERAL RULE

If you dismiss an employee because of their:

Political
Activity

PROTECTED

Political
Affiliation

PROTECTED

Speech

PROTECTED

You can be liable for violating their
Constitutional rights under the First Amendment.

THE GENERAL RULE

The clearest example of a First Amendment violation is when a new administration dismisses everyone hired by or known to support, the former administration.¹



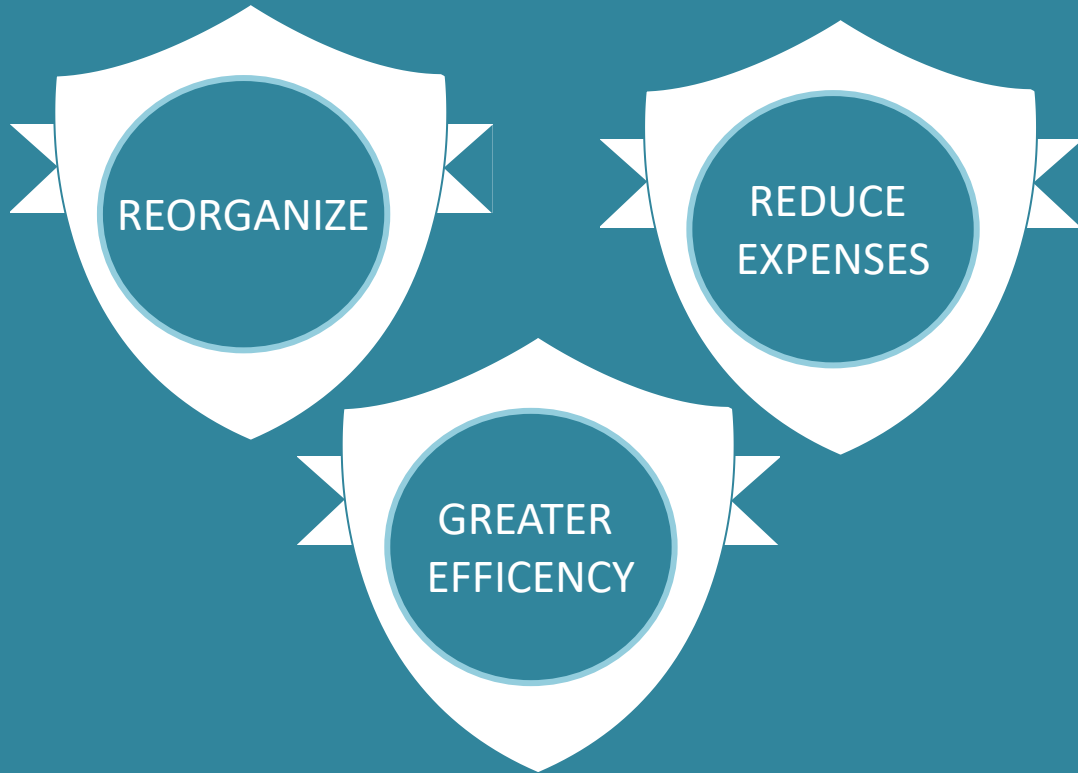
1. Elrod v. Burns, 427 U.S. 347 (1976); Nelms v. Modisett, 153 F. 3d 815 (7th Cir. 1998)

THE GENERAL RULE

Dismissing a **GROUP** of employees is compelling evidence a new administration is weeding out supporters of an opposing political party.



THE GENERAL RULE



A reorganization which causes some eliminated positions is OK, provided it wasn't a PRETEXT for getting rid of employees for political reasons.

THE GENERAL RULE

An employee can be discharged for a good reason or no reason, as long as it's not an **ILLEGAL** reason.

If you fire someone because of their political affiliation, activity, or speech, you can be liable for violating their Constitutional rights.



THE GENERAL RULE

CAUTION:

Dismissed employees may claim the reason for their dismissal was because of their support for the other political party.



THE GENERAL RULE: CAUTION

In order to win their case, a terminated employee must demonstrate:

- 1 His or her conduct was constitutionally protected,
- 2 The conduct was a SUBSTANTIAL or motivating factor in the employment decision.

THE GENERAL RULE: CAUTION

If a fired employee attended rallies, fundraising activities, or other campaign events for an opponent, that conduct is protected.



The employee must prove the new official *KNEW* about the activities.



The mere fact the employee was registered to vote for the other party is not enough to show the discharge was politically motivated.

THE GENERAL RULE: CAUTION

Even politically neutral employees can show they were discharged for political reasons **with evidence** they were fired for refusing to support the winning candidate.

Usually, someone who is **NOT** politically active or affiliated with the opposing party **CANNOT** show that political motivation drove the decision to fire them.

THE GENERAL RULE: RISK MANAGEMENT

TO AVOID LAWSUITS:

Document the *non-political reason* the employee was dismissed.

If an employee demonstrates that *political affiliation was a factor* for discharge, the burden shifts to the **EMPLOYER** to prove the dismissal was for a legitimate, non-political reason.



THE GENERAL RULE: RISK MANAGEMENT

If you can't provide a good explanation why the employee was dismissed, the evidence of political motivation is more likely to gain a foothold toward proving a First Amendment violation.



What about policy making positions?



EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



High-ranking public officials who provide meaningful input into developing policies and goals can be dismissed, *even for political reasons.*

EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



When the employer can demonstrate that political loyalty is an appropriate requirement for the effective performance of the public office involved, the general rule does not apply. ²

2. *Branti v. Finkel*, 445 U.S. 507, 518 (1980)

EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



Purpose:

To facilitate implementation of the new executive's policies, goals and direction.

After all, that's why the voters elected you!

EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



Employees who are policymakers and political enemies of a new administration could undermine the newly elected official.

The difficult question is whether or not the employee is a policymaker.

EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS

Does the position authorize, directly or indirectly, meaningful input into decision making on issues where there is room for principled disagreement on goals and their implementation?



EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



Examples:

- A police or fire chief
- Directors of departments who answer directly to the mayor
- Officials appointed by the previous mayor

EXCEPTION TO THE GENERAL RULE # 1 – EMPLOYEES IN POLICY MAKING POSITIONS



The specific nature of the position determines whether it involves policymaking.

- Employees' own descriptions of day-to-day work are usually not relevant if there is a job description to the contrary.
- If no job description, testimony about the job is relevant to the question of policy maker status.

What about employees in confidential positions?



EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS

An employee who holds a confidential and trusted position can be dismissed even for political reasons.



3. *Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909 (6th Cir. 1991). See also, *Soderbeck v. Burnett County WI.*, 752 F2d 285 (7th Cir.1985) and *Meeks v. Grimes*, 779 F2d. 417 (7th Cir. 1985)

EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS

Example: a mayor's secretary, who is trusted with confidential and sensitive information.

- While not a policymaker, someone in this position could undermine the new mayor's ability to manage effectively.



EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS

As one court explained:

“A mayor’s secretary must undertake those functions in relation to the flow of information, whether by writing, speech, or personal visit, to and from the mayor’s office that the mayor wants the secretary to perform.”³



3. *Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909 (6th Cir. 1991). See also, *Soderbeck v. Burnett County WI.*, 752 F2d 285 (7th Cir.1985) and *Meeks v. Grimes*, 779 F2d. 417 (7th Cir. 1985)

EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS



A particular secretary's duties may be limited, but the function of the office is constant.

As political action cannot occur without communication, a position that controls the lines of communication of a political actor must be inherently political.

EXCEPTION TO THE GENERAL RULE # 2 – EMPLOYEES IN CONFIDENTIAL POSITIONS



CONFIDENTIAL
POSITIONS

EXCEPTION 2

A mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job.⁴

WARNING!



Because these claims are almost always litigated in federal court, a successful plaintiff can collect attorney's fees which are often more than the compensatory damages.



• Duties •

• Defined •

• by Statute •

Duties Defined by Statute



Sometimes duties are defined by statute.

A deputy county auditor was a policymaking employee under the statute governing deputy auditors and other deputies of county office holders. ⁵

5. Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997).

Duties Defined by Statute



Indiana Code 36-2-16-3(a) allowed an appointed deputy to perform all the official duties of the appointing officer and is subject to the same regulations. *Id.*

The statutes used to reach this conclusion would apply to a deputy treasurer.

5. Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997).

Duties Defined by Statute



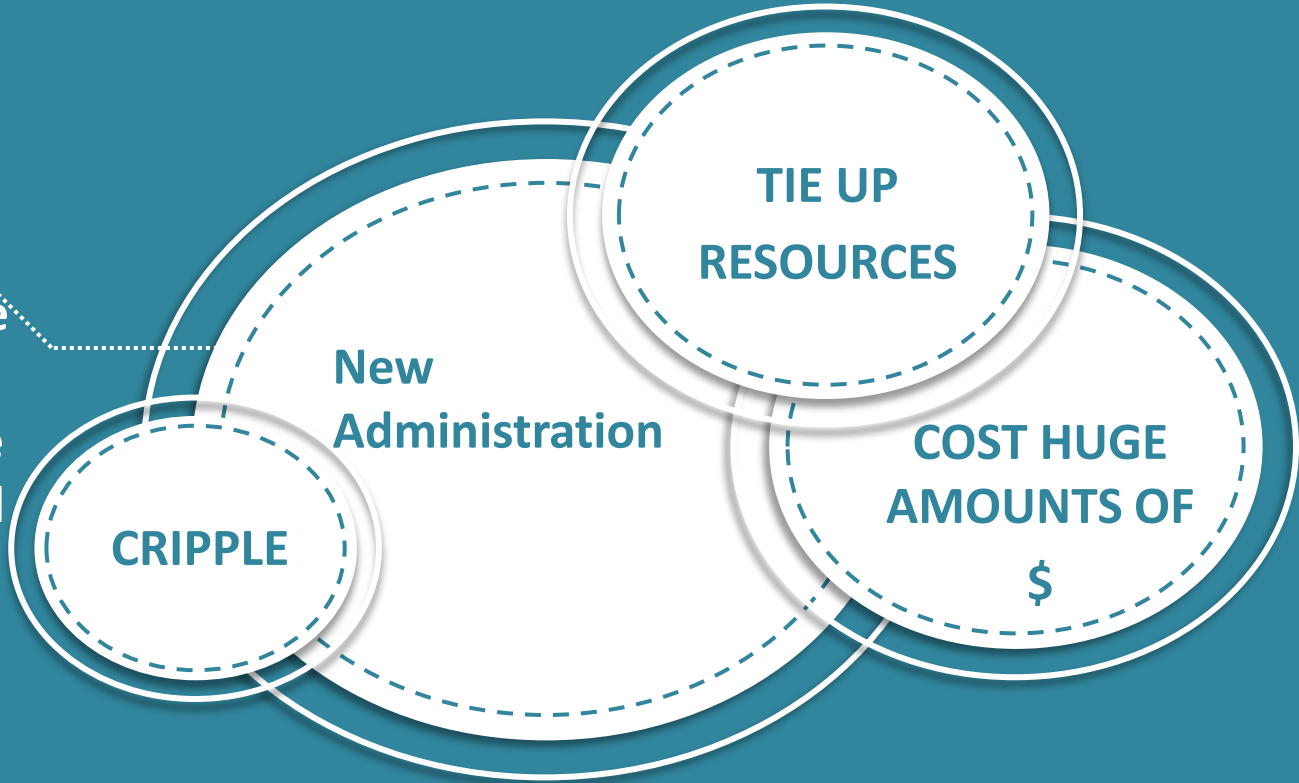
Indiana Code 36-2-16-4 allows specified officeholders, including the auditor, to appoint first deputies and other deputies of her choosing. *Id.*

The court concluded the statutory scheme resulted in a deputy auditor having inherent policymaking authority as a matter of law.

5. Kline v. Hughes, 131 F.3d 708 (7th Cir. 1997).

CONCLUSION

LAWSUITS by employees alleging adverse employment actions because of their political activities or affiliation can



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THANK YOU!

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QUESTION TIME

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