STATE OF MICHIGAN

COURT OF APPEALS

PAUL J. MESSINEO,

Plaintiff-Appellant,

v

CITY OF ECORSE,

Defendant-Appellee.

UNPUBLISHED
December 29, 1998

No. 200358
Wayne Circuit Court
LC No. 95-501806 CZ

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this wrongful demotion case. We affirm.

Plaintiff was promoted from Deputy Fire Chief to Fire Chief by defendant's city council on July 1, 1994, with his employment contract to be negotiated and effective retroactively to July 1, 1994. However, by January 1995, plaintiff and defendant had still not agreed to an employment contract. As a result, defendant's city council passed Resolution No. 29.95 which provided that if plaintiff did not accept defendant's final offer of an employment agreement, plaintiff would be demoted to his former position as Deputy Fire Chief. Plaintiff rejected defendant's final offer and was demoted to Deputy Fire Chief.

On appeal, plaintiff argues that the trial court improperly granted defendant's motion for summary disposition because plaintiff and defendant had an express employment agreement providing for just-cause employment and plaintiff was demoted without just cause. We disagree. This Court reviews a trial court's decision to grant summary disposition de novo. *Terry v Detroit*, 226 Mich App 418, 423; 573 NW2d 348 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim and the trial court must consider the pleadings, affidavits, depositions, and other documentary evidence, give the benefit of any reasonable doubt to the nonmoving party, and draw any reasonable inferences in favor of that party. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 361-362; 575 NW2d 290 (1998).

Employment relationships are presumptively terminable at the will of either party. *Rood v General Dynamics Corp*, 444 Mich 107, 117; 507 NW2d 591 (1993). However, an employee can overcome the presumption of at-will employment with sufficient proof of either a contract provision for a definite term of employment, or a provision forbidding discharge absent just cause. *Rood, supra*, 444 Mich 117. Such provisions may become part of an employment contract as a result of explicit promises. *Rood, supra*, 444 Mich 117. An employee can also overcome the presumption of at-will employment with employer policies and procedures if such policies and procedures instill "legitimate expectations" of job security. *Rood, supra*, 444 Mich 117. On appeal, plaintiff asserts his wrongful demotion claim under the contractual theory because the "legitimate expectations" theory will not support a claim for wrongful demotion. *Fischhaber v General Motors Corp*, 174 Mich App 450, 455; 436 NW2d 386 (1988).

In evaluating oral assurances of just cause employment, this Court considers all relevant circumstances, including other written and oral statements and other conduct manifesting intent to evaluate the intent of the parties. *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 639; 473 NW2d 268 (1991). However, such oral assurances must be clear and unequivocal. *Rowe, supra*, 437 Mich 641. The first step in analyzing oral statements is to determine the meaning that reasonable persons might have attached to the language, given the circumstances presented. *Rowe, supra*, 437 Mich 640.

On July 5, 1994, defendant's city council passed Resolution No. 261.94 which appointed plaintiff to Chief of the Fire Department and provided that:

> BE IT FURTHER RESOLVED, That said appointments are effective July 1, 1994 and that said officers shall be compensated retroactively to July 1, 1994 based on the current salary of the Fire Chief and the Deputy Fire Chief.
>
> BE IT FURTHER RESOLVED, That the *Controller is directed to negotiate employment contracts with said officers* and that said contracts shall be retroactive to July 1, 1994. [Emphasis added.]

Plaintiff accepted the appointment and began receiving a salary of $59,000, which the previous Chief had received as an annual salary. Although plaintiff argues that he had an express employment agreement with defendant, Resolution No. 261.94 directed defendant's controller to negotiate an employment contract with plaintiff. In fact, defendant's controller began negotiating contract terms with plaintiff and offering terms which differed from plaintiff's previous contract.

On October 8, 1994, defendant's city council adopted Resolution No. 405.94S which reduced the Fire Chief's salary from $59,000 to $56,000. Defendant sent plaintiff three proposed agreements, all of which plaintiff rejected. On January 17, 1995, defendant's city council adopted Resolution No. 25.95 which provided:

> RESOLVED, That the labor negotiator is authorized to submit an employment agreement to Paul Messineo, a copy of which agreement is on file in the Office of the Controller.

> BE IT FURTHER RESOLVED, That in the event Paul Messineo does not accept this agreement no later than noon on Friday, the 20th day of January, 1995, he shall revert to Deputy Fire Chief at his Deputy salary, and further that Deputy Chief Lafferty act as interim Fire Chief at his current salary.

An employment contract is just a contract, and as such, the parties must mutually assent to be bound by the terms of the contract. *Rood, supra,* 444 Mich 118; *Thomas v John Deere Corp,* 205 Mich App 91, 93; 517 NW2d 265 (1994); *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992).

> An offer is a unilateral declaration of intention, and is not a contract. A contract is made when both parties have executed or accepted it, and not before. A counter proposition is not an acceptance. Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract. [*Kamalnath, supra,* 194 Mich App 549 (citations omitted).]

On January 27, 1995, plaintiff's attorney sent a letter to defendant's attorney stating that plaintiff had made changes to defendant's proposed contract which if agreed to would have taken effect on January 31, 1995. Plaintiff's attorney also indicated that the terms of defendant's last proposed contract were unacceptable. Accordingly, the employment agreement that plaintiff signed and returned to defendant was a counteroffer and not an acceptance. *Kamalnath, supra,* 194 Mich App 549. Moreover, when plaintiff filed his original complaint and motion for writ of mandamus, plaintiff requested that the trial court order defendant to offer plaintiff a yearly salary of $59,000, and "to negotiate the remaining terms and conditions of the employment agreement as provided in the resolution."

Considering all relevant circumstances, including the written and oral statements, and conduct of the parties, this Court concludes that plaintiff did not have an express employment agreement with defendant. *Rowe, supra,* 437 Mich 639. All of the relevant circumstances indicate that plaintiff and defendant were involved in ongoing negotiations regarding plaintiff's employment contract which cannot substitute for the formal requirements of a contract. *Kamalnath, supra,* 194 Mich App 549. Accordingly, summary disposition was appropriate.

Plaintiff next argues that defendant violated plaintiff's First Amendment rights to negotiate his employment contract when defendant adopted Resolution No. 25.95 which required plaintiff to either accept defendant's terms or be demoted to Deputy Fire Chief. We disagree.

A claim based on 42 USC 1983 requires a showing that the defendant's conduct, carried out under the color of state law, deprived the plaintiff of rights, privileges, or immunities guaranteed by the United States Constitution or laws of the United States. *Berlin v Superintendent of Public Inspection,* 181 Mich App 154, 166; 448 NW2d 764 (1989). The First Amendment prohibits a government employer from taking actions which were designed to suppress the rights of public employees to participate in public affairs. *Connick v Myers*, 461 US 138, 145-146; 103 S Ct 1684; 75 L Ed 2d 708, 716-717 (1983); *Rathjen v Litchfield*, 878 F2d 836, 841 (CA 5, 1989). However, the First Amendment does not prevent a government employer from taking action in response to an

employee's expression that does not touch upon a matter of public concern. *Connick, supra*, 461 US 138, 145-146; 103 S Ct 1684, 1689; 75 L Ed 2d 708; *Rathjen, supra,* 878 F2d 841. If plaintiff's speech cannot be characterized as constituting speech on a matter of public concern, it is unnecessary for this Court to scrutinize the reasons for plaintiff's demotion. *Connick, supra*, 461 US 138, 146; 103 S Ct 1684; 75 L Ed 2d 719. Whether an employee's speech is a matter of public concern is a question of law and questions of law are reviewed de novo on appeal. *Connick, supra*, 461 US at 148 n 7; 103 S Ct 1684; 75 L Ed 2d at 720 n 7.

In his complaint, plaintiff alleged that defendant advised plaintiff that if he did not accept defendant's last contract offer, he would be demoted. Plaintiff refused defendant's last contract offer and was demoted to Deputy Fire Chief. Plaintiff rejected defendant's offer because plaintiff found the terms regarding job security unacceptable. These negotiations over plaintiff's employment contract do not relate "to any matter of political, social or other concern to the community." *Connick, supra,* 461 US 146; 103 S Ct 1684; 75 L Ed 2d 720. When plaintiff was negotiating his employment contract, he was speaking as "an employee upon matters only of personal interest," his salary and job benefits. *Connick, supra*, 461 US 146; 103 S Ct 1684; 75 L Ed 2d 720. Moreover, the First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective. *Smith v Arkansas State Hwy Employees*, 441 US 463, 465; 99 S Ct 1826; 60 L Ed 2d 360, 363 (1979). Accordingly, summary disposition was proper because plaintiff has not established that his First Amendment rights were violated.

Finally, plaintiff argues that he lost employment rights which were created by defendant's resolution and therefore, his case "represents a situation where fundamental interests can and should be protected by substantive due process." Again, we disagree. A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint and should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *ABB Paint Finishing, Inc v Nation Union Fire Ins Co of Pittsburgh,* 223 Mich App 559, 561; 567 NW2d 456 (1997).

The Fourteenth Amendment has a substantive due process component that protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action. *Sutton v Cleveland Bd of Ed*, 958 F2d 1339, 1350 (CA 6, 1992). However, in *Charles v Baesler,* 910 F2d 1349, 1353 (CA 6, 1990), and *Ramsey v Bd of Ed of Whitley Co,* 844 F2d 1268 (CA 6, 1988), the Sixth Circuit Court of Appeals held that a breach of contract by a public employer does not give rise to a claim by its employee under 42 USC 1983 for a denial of substantive due process. Moreover, in *Sutton v Cleveland Bd of Ed*, 958 F2d 1339, 1351 (CA 6, 1992), the Sixth Circuit Court of Appeals held that a claim by a public employee for improper discharge from employment cannot be brought under the substantive due process component even though the employment contract provides that the employee could only be discharged for just cause. Accordingly, summary disposition was properly granted because plaintiff's claim of wrongful demotion does not constitute a violation of substantive due process.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald