STATE OF MICHIGAN

COURT OF APPEALS

CLINTON C. LOVETT,

Plaintiff-Appellant,

v

CITY OF DETROIT, DETROIT CITY COUNCIL, and KATHIE DONES-CARSON,

Defendants-Appellees.

UNPUBLISHED
October 6, 2009

No. 287585
Wayne Circuit Court
LC No. 05-530081-CL

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition to the city of Detroit, its Council, and the director of its Research and Analysis Department (Council Research). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

An earlier appeal relating to this case included a concise statement of the facts:

> Lovett filed a complaint in mid-October 2005, in which he alleged that he worked for defendant, Detroit City Council, as a staff attorney in the Research and Analysis Department, and defendant, Kathie Dones-Carson, was his immediate supervisor. In count one . . . Lovett alleged that defendants violated Michigan public policy by terminating him on October 15, 2002, after he refused to sign a confidentiality form "prohibiting him from ever discussing public business with anyone," and drafted a legal memorandum arguing that he was exempt from signing the form under MCL 15.243(1)(i). In count two, Lovett alleged that defendants violated his rights of due process and equal protection when he "was notified by [Dones-Carson] that he was arbitrary [sic] fired without cause and justification." In count three, Lovett alleged that, as a male over 40 years of age, he was a member of two protected classes under Michigan's Civil Rights Act, which defendants violated by treating him differently than younger, female employees. . . .

> In early July 2006, defendants moved to dismiss Lovett's complaint because he had failed to appear for properly noticed depositions on three occasions . . . . After a hearing before the trial court, the parties agreed to hold depositions of Lovett and Dones-Carson on July 25, 2006.
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> . . . The trial court . . . noted that Lovett and defense counsel could call the court around the date of the settlement conference to adjourn the conference, if necessary.
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> The trial court dismissed Lovett's complaint with prejudice after he failed to appear at the settlement conference on September 11, 2006. . . . Defense counsel then stated that he had a motion "to dismiss the case administratively" because of Lovett's failure to appear. After noting that it had previously questioned whether Lovett had a cause of action, and stating, "[so] in a way I'm not surprised he's not here," the trial court agreed to dismiss the case. . . . [*Lovett v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2008 (Docket No. 273710), slip op at 1-2.]

This Court reversed the order of dismissal because the trial court abused its discretion by failing to consider alternatives before imposing the drastic sanction of dismissal in response to plaintiff's failures to fulfill pretrial obligations and remanded the case to the trial court for further proceedings. *Id.*, slip op at 3-4, 7.

In proceedings on remand, defendants moved for summary disposition pursuant to MCR 2.116(C)(10) and (8), and the trial court granted the motion. The court ruled that plaintiff was an at-will employee, so he was not entitled to civil service protections, or, alternatively, that if he were a civil service employee, he must first raise his grievances through pertinent administrative proceedings or a collective bargaining agreement. The court additionally ruled that plaintiff's dismissal did not violate public policy, that plaintiff failed to state a claim for constitutional violations, and that plaintiff failed to make a prima facie case of employment discrimination or show the existence a genuine issue of material fact in connection with such a claim.

In the instant appeal, plaintiff argues that the trial court erred in failing to recognize that he was a civil service employee thus entitled to civil service protections and additionally asks this Court to remand this case to the trial court with instructions to allow him to amend his complaint to state a claim in connection with the First Amendment.

II. At-Will or Civil Service

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "When reviewing an order of summary disposition under MCR 2.116(C)(10), we examine all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could

differ." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). We accept as true all factual allegations in the claim "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

Detroit's municipal ordinances include the following provision: "The director of the council division of research and analysis shall be appointed by the City Council and shall be subject to removal without cause assigned. All other employees shall be appointed by the director in accordance with the Charter as it relates to civil service." Detroit City Code, § 2-2-34. Plaintiff points to evidence that because he was appointed to service on Council Research by its director, the defendant director's predecessor, he must be deemed a civil-service employee. However, assuming without deciding that the municipal ordinances do indeed envision that every employee of Council Research, except its director, be in the civil service, this nonetheless leaves open the possibility that the ordinances were not perfectly complied with in this instance. An unclassified appointee is not transformed into a classified civil service employee simply because an ordinance suggests that such would be the proper arrangement. Nor does plaintiff cite authority for the proposition that a municipal ordinance must hold sway where it creates a conflict with that municipality's charter. Indeed, an appointment "in accordance with the Charter as it relates to civil service" is one subject to that charter's provisions for exemptions from civil service arrangements. The trial court stated as follows:

> Plaintiff argues that, based on his own interpretation of the City Code of 1984, the 1974 Charter and the 1918 Charter, he was not an at-will employee but a civil servant and therefore protected from termination except for just cause. However, the Charter of the City of Detroit, effective January 1, 1997, specifically exempts appointed City Council staff and "persons holding appointments under this Charter" from article 6, chapter 5 of the Charter which includes Classified Services.

The court continued, "The evidence, including Plaintiff's letter of appointment and his own testimony, establishes that Plaintiff was appointed to his position." Alternatively, the court added, "if he were considered to be in the classified service of the city, Plaintiff's contractual rights would be governed either by collective bargaining agreement or commission procedure and administrative remedies pursuant thereto."

Section 4-120 of the charter provides, "The city council may appoint a staff, exempt from article 6, chapter 5 of this Charter." As the trial court noted, chapter 5 of article 6 sets forth the provisions establishing the city's civil service system. Plaintiff protests that he was appointed by the director of Council Research, not the City Council itself. Yet, plaintiff presents no authority other than the above-mentioned provision from the ordinances which itself defers to the charter for the proposition that the appointments of the director of Council Research may not be imputed to the City Council itself.

Defendants present several documents that indicate that plaintiff was an appointed or dual-capacity employee, instead of a salaried and rated employee. A memorandum dating from 1984 whereby the Director of Council Research asked that plaintiff be put on the payroll announces that plaintiff "has been *appointed* to a Staff Analyst position." [Our emphasis.] The

city's "White Book" listing of salary and wage adjustments for 2001-2002 lists the position of city council research and analysis staff analyst among the nonunion appointees. A 2002 letter from the city's Budget Director announces the "[t]he above-referenced appointee's last date of employment" and directs that plaintiff be paid for his unused vacation days.

Given that the charter grants the City Council broad authority to appoint staff exempt from civil service classification and that the evidence of plaintiff's status as an appointee is unrebutted but for plaintiff's own protestations from the municipal code, we conclude the trial court did not err in granting summary disposition to defendants.

Moreover, plaintiff fails to rebut the trial court's alternative basis for rejecting his argument relating to civil-servant status—that if he were indeed a civil servant, he would have to redress any grievances through recourse to pertinent administrative remedies or a collective-bargaining agreement. See 1997 Detroit Charter, § 6-514. Plaintiff's failure to rebut this conclusion leaves unchallenged an alternative basis for dismissing this case and is an alternative basis for affirmance.

III. The First Amendment

In the proceedings below, plaintiff's constitutional claims consisted of due process and equal protection challenges to his having been terminated without good cause or an opportunity for a hearing and opportunity to respond. In this appeal, plaintiff does not revive those issues, but raises, for the first time, the argument that count I of his complaint "without mention implicates the First Amendment" and cites that amendment as establishing the public policy that militated against his having to sign a confidentiality form relating to casino gambling proposals. Plaintiff additionally reminds this Court that where summary disposition is granted under MCR 2.116(C)(8), the trial court should give the dismissed party an opportunity to amend the pleadings to correct the deficiency. See MCR 2.116(I)(5).

"[D]ecisions granting or denying motions to amend pleadings . . . are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, unpreserved claims of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Plaintiff nowhere asserts, and the record does not suggest, that he moved below to amend his complaint for this reason below. Thus, there was no decision below to attack or defend on appeal. Certainly the trial court's disinclination, sua sponte, to invite plaintiff to amend his complaint, let alone coach him to assert the First Amendment, was not plain error.

Moreover, plaintiff fails to rebut the trial court's alternative basis for rejecting his public policy arguments—that he has failed to show that his refusal to sign the confidentiality form caused his dismissal. The trial court noted that plaintiff was terminated just one day after "his failure to appear in front of the City Council to explain his refusal to type his documents." Because the trial court identified an act of insubordination, entirely apart from any controversy concerning the confidentiality form that might reasonably have incurred the wrath of his

superiors and because plaintiff nowhere disputes that fact, plaintiff's public policy argument must fail.

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello