REL: September 20, 2019

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

1170833

Helen Wiggins

v.

City of Evergreen

Appeal from Conecuh Circuit Court
(CV-17-900024)

MITCHELL, Justice.

This case concerns the dismissal of a municipal employee. The City of Evergreen ("the City") terminated the employment of Helen Wiggins, a warrant clerk and magistrate, after the Evergreen City Council ("the Council") accepted the

recommendation of the City's mayor that she be dismissed for dereliction of duty. Wiggins thereafter filed a wrongful-termination action against the City in the Conecuh Circuit Court. The trial court ultimately entered a judgment in favor of the City and against Wiggins. She now appeals that judgment. We affirm.

Facts and Procedural History

On February 15, 2017, Cynthia Salter, the manager of a Chevron gasoline service station in Evergreen, was reviewing surveillance videos when she discovered that one of her employees and that employee's husband had stolen money from the business. Salter promptly terminated the employment of the employee shown in the video and notified the police of the theft. Police officers were dispatched to the business, and, after they prepared a written report, they instructed Salter to obtain arrest warrants at the City's municipal building ("city hall"). The police officers told Salter that, once she obtained those warrants, they would arrest the former employee and her husband.

At approximately 9:15 a.m. the following day, Salter went to city hall to obtain the warrants the police had told her

she needed. Wiggins, one of two warrant clerks and magistrates employed by the City, was on duty at the time.[1] After Salter explained why she was there, Wiggins told her that she would have to return at approximately 11:30 a.m. when Barbara Ashley-Kemp, the other warrant clerk and magistrate, would be on duty. At a subsequent hearing conducted by the Council, Salter testified that Wiggins gave her no explanation for not issuing the warrants.

When Ashley-Kemp reported for work at approximately 12:00 p.m., Salter was waiting for her. Ashley-Kemp promptly issued the warrants Salter needed because, Ashley-Kemp later testified, "I thought she had probable cause." Ashley-Kemp described her encounter with Salter as "a completely routine issuance of a warrant." Ashley-Kemp further testified that when one warrant clerk was not present in the office the other warrant clerk was responsible for issuing warrants.

Salter stated that, after she obtained the warrants, she left the magistrate's office and was confronted by the two individuals who were the subjects of the warrants. Salter

[1]Wiggins, who had worked for the City for approximately 20 years at that time, was the senior warrant clerk and magistrate.

stated that they offered her money not to seek warrants for their arrests, but she told them that the warrants had already been issued and they did not escalate the matter. When questioned by Wiggins's attorney at the hearing before the Council, Salter explained why she objected to Wiggins's failure to issue the warrants when they were first sought:

> "Q. So why was this upsetting to you that you didn't get the warrant [on your first trip] -- I mean you got the warrant.
>
> "A. Right.
>
> "Q. You just had to come back when [Wiggins] had her assistant there, why is this upsetting to you?
>
> "A. What do you mean why is it upsetting? Well, for the simple fact that at 11:30 when I was doing it with [Ashley-Kemp], the person that I accused of stealing, the husband, he was trying to get back there to the office. Therefore I was afraid, I didn't know what I was going to be confronted with.
>
> "Q. You understand Helen Wiggins has no control over those folks?
>
> "A. Correct.
>
> "Q. And when you did receive the warrant at 11:30 --
>
> "A. Right.

"Q. -- you don't have any complaint that it was issued by her assistant warrant clerk as opposed to herself, do you?

"A. No.

"Q. And didn't she tell you when you came at 9:30 or 9 a.m., whichever one it was the first time, that she was getting something ready for the judge, that she was busy?

"A. No, she did not.

"Q. Well, I don't hear you saying anything about there being a heated exchange, it sounds like you said fine, I'll come back at 11:30.

"A. Right, what else was I supposed to do? I mean she refused to do it at 9, so I was supposed to come back.

"....

"Q. So how as a citizen do you feel that you were denied some right to have a warrant issued by the City of Evergreen? Or do you?

"A. I feel like that if she would have did the job at 9 something that morning, I wouldn't have been confronted outside of City Hall by the two accused people."

On March 2, 2017, the mayor sent Wiggins a letter notifying her that he was recommending that her employment be terminated for "dereliction of duty by failing to issue a warrant when probable cause existed."[2] Wiggins was placed on

[2]The record does not reveal exactly how the mayor became aware of the interaction between Wiggins and Salter on

administrative leave with pay effective immediately and was advised that she had the right to a pre-termination hearing before the Council if she desired. Wiggins promptly exercised that right and, on March 23, 2017, the Council conducted a hearing to consider two charges against Wiggins. The first charge was based upon Wiggins's alleged dereliction of duty as stated in the mayor's letter; the second charge, which was added only two days before the hearing, involved an alleged ethics violation unrelated to Wiggins's actions on February 16, 2017. At the conclusion of the hearing, the five-person Council voted 3-0 to accept the mayor's recommendation to terminate Wiggins's employment, with two council members abstaining.

On March 28, 2017, Wiggins sued the City, alleging that it had wrongfully terminated her employment.[3] Wiggins specifically argued that the City's dismissal was wrongful because, she says, she had engaged in no conduct that violated § 11-43-160(a), Ala. Code 1975, which provides:

February 16, 2017.

[3]Wiggins also asserted due-process and invasion-of-privacy claims in her initial complaint, but she subsequently agreed to dismiss those claims.

> "(1) Any person appointed to office in any city or town may, for cause, after a hearing, be removed by the officer making the appointment.
>
> "(2) The council of the municipality may remove, by a two-thirds vote of all those elected to the council, any person in the several departments for incompetency, malfeasance, misfeasance, or nonfeasance in office and for conduct detrimental to good order or discipline, including habitual neglect of duty."

Wiggins accordingly sought backpay, reinstatement, compensatory and punitive damages, attorney fees, and costs. In its subsequent answer, the City asserted several affirmative defenses and generally denied Wiggins's claim that it had acted wrongfully.

Wiggins and the City agreed that her complaint was tantamount to a petition seeking certiorari review of the Council's decision, and the City thereafter moved the trial court to enter a judgment based on the record before the court, including a transcript of the pre-termination hearing held by the Council and other documentary evidence. See, e.g., Hammonds v. Town of Priceville, 886 So. 2d 67, 68 (Ala. 2003) ("A municipal employee has no statutory right to appeal from a town council's decision to terminate the worker's employment. Because a terminated municipal employee has no

such right, a petition for a common-law writ of certiorari is the proper method for having the trial court review the council's decision."). Wiggins subsequently filed her own motion seeking a summary judgment.

On March 16, 2018, the trial court heard arguments from both Wiggins and the City. Both parties thereafter submitted proposed orders, and on May 8, 2018, the trial court entered a final judgment in favor of the City. In rendering that judgment, the trial court explained that testimony at the pre-termination hearing established that Wiggins was one of two warrant clerks employed by the City and that it was her job to issue warrants, if probable cause existed, when the other warrant clerk was not in the office. The trial court further stated that additional testimony indicated that, when Salter came to city hall on February 16, 2017, to obtain warrants, Wiggins told her without explanation that she would have to come back later. The trial court concluded:

> "The testimony indicates that [Wiggins] did not do her job, and [Wiggins] chose not to testify at the hearing so the testimony presented by the City was not rebutted. Under these circumstances, where the undisputed evidence shows that [Wiggins] did not perform the act she had responsibility to perform, the Court is of the opinion that the first charge is supported by substantial legal evidence."

The trial court further explained that "nonfeasance" was one of the grounds in § 11-43-160 for which a municipality could terminate an employee's employment and that Wiggins's "nonperformance is the essence of nonfeasance, and is a sufficient basis for [her] dismissal from employment that is supported by substantial, and undisputed, legal evidence in the record."[4] Because the trial court held that the first charge against Wiggins was supported by substantial evidence, it did not consider the second charge against her. See Ex parte Belcher, 280 Ala. 252, 252, 192 So. 2d 454, 454 (1966) ("If there is any substantial legal evidence supporting one of the charges, which alone would warrant the dismissal, we have no alternative but to affirm."). On June 11, 2018, Wiggins filed a timely notice of appeal to this Court.

Standard of Review

Because a municipal employee has no statutory right to appeal the termination of his or her employment, the trial

[4]The trial court supported its conclusion by quoting Taylor v. Shoemaker, 605 So. 2d 828, 834 (Ala. 1992) (Houston, J., concurring in part and dissenting part) ("'Nonfeasance' is defined in Black's Law Dictionary, 1054 (6th ed. 1991), as '[n]onperformance of some act which [a] person is obligated or has responsibility to perform; omission to perform a required duty at all; or, total neglect of duty.'").

court properly treated Wiggins's complaint as a petition for a common-law writ of certiorari. See Hammonds v. Town of Priceville, 886 So. 2d at 68. This Court has stated that, if such an employee thereafter seeks appellate review of the trial court's decision upholding the termination of employment, this Court will apply the same standard of review that the trial court used. Ex parte Wade, 957 So. 2d 477, 481 (Ala. 2006).

The Court of Civil Appeals described that standard of review in Hicks v. Jackson County Commission, 990 So. 2d 904, 910 (Ala. Civ. App. 2008), an appeal that was similarly brought by a dismissed municipal employee:

> "The circuit court's standard of review of a petition for a common-law writ of certiorari is well settled. On a petition for a common-law writ of certiorari, the circuit court's 'scope of review was limited to determining if the decision to terminate [an employee's employment] was supported by legal evidence and if the law had been correctly applied to the facts.' Evans v. City of Huntsville, 580 So. 2d [1323,] 1325 [(Ala. 1991)]. 'In addition, the court was responsible for reviewing the record to ensure that the fundamental rights of the parties, including the right to due process, had not been violated.' Id. 'Questions of fact or weight or sufficiency of the evidence will not be reviewed on certiorari.' Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863, 868 (Ala. Civ. App. 1985).

> "'"'[A] common-law writ of certiorari extends only to questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute. The trial is not de novo but on the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review.'"'
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> "G.W. v. Dale County Dep't of Human Res., 939 So. 2d 931, 934 n. 4 (Ala. Civ. App. 2006) (quoting City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919)). 'This court's scope of appellate review is the same as that of the circuit court.' Colbert County Bd. of Educ. v. Johnson, 652 So. 2d 274, 276 (Ala. Civ. App. 1994)."

Thus, to the extent Wiggins challenges the evidence supporting the City's decision to terminate her employment, this Court will review the record only to determine whether there is evidence to support the City's decision; we will not reweigh that evidence. Even with this limited review, however, Wiggins's arguments that are based purely on issues of law or the application of the law to undisputed facts are subject to de novo review. Ex parte Lambert, 199 So. 3d 761, 765 (Ala. 2015).

Analysis

Wiggins makes several arguments, all of which are unavailing. First, she argues that the Council's decision should be reversed because, she contends, two-thirds of the members of the Council did not vote to remove her, as required by § 11-43-160(a). Wiggins, however, never presented that argument to the trial court.[5] Rather, she articulates it for the first time on appeal. "'This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court.'" Marks v. Tenbrunsel, 910 So. 2d 1255, 1263 (Ala. 2005) (quoting Andrews v. Merritt Oil Co., 612 So.

[5]In her reply brief, Wiggins contends that, because her argument involves how the law should be applied to undisputed facts, the de novo standard of review applies and it does not matter that she did not make this argument to the trial court. That contention is without merit. See Ex parte Knox, 201 So. 3d 1213, 1218 (Ala. 2015) ("The well settled rule [that an appellate court's review is limited to only those issues that were raised before the trial court] admits of no exception for cases in which legal issues, or the application of legal principles to undisputed facts, are considered de novo by the appellate court."); see also In re Kroner, 953 F.2d 317, 319 (7th Cir. 1992) ("The waiver doctrine merely determines which arguments are properly preserved for consideration on appeal while the de novo standard of review refers to the appellate court's fresh look at the way the trial court applied the law to the facts of the case. The law is clear, an issue not preserved for appeal is simply not reviewable regardless of the standard of review.").

2d 409, 410 (Ala. 1992)). Accordingly, we do not consider that argument.[6]

Second, Wiggins argues that the evidence does not support the trial court's judgment affirming the City's decision to terminate her employment. Wiggins emphasizes that the role of a magistrate is to exercise judgment and that a magistrate must be able to use discretion in the manner in which he or she exercises his or her judgment. She further notes that the Supreme Court of the United States has recognized that magistrates work under "docket pressures," Malley v. Briggs, 475 U.S. 335, 346 (1986), and has concluded that "the informed and deliberate determinations of magistrates ... are to be preferred over the hurried actions of officers and others who

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[6]Although it is unnecessary for this Court to consider the merits of Wiggins's argument that two-thirds of the Council did not vote to terminate her employment, we note that, in response to her argument, the City has cited § 11-43-160(b), Ala. Code 1975, which provides:

> "Notwithstanding subsection (a), in municipalities having a population of less than 12,000 inhabitants, according to the last or any subsequent federal census, the mayor may vote on the removal of any person appointed to office in the municipality pursuant to subsection (a) and the mayor shall be considered as a member of the council in determining whether there is a two-thirds vote of the council for the removal of the officer."

happen to make arrests." United States v. Lefkowitz, 285 U.S. 452, 464 (1932). Wiggins asserts that in this case she merely exercised the authority and discretion that she has as a magistrate to delegate, on a busy morning, the issuance of a warrant to another magistrate. Because the evidence is undisputed that the other magistrate, Ashley-Kemp, was qualified to make probable-cause determinations and that she, in fact, issued the warrants approximately three hours later on the same date they were requested, Wiggins argues that there is no basis to support a finding of "incompetency, malfeasance, misfeasance, ... nonfeasance, ... or habitual neglect of duty," § 11-43-160(a)(2), or a finding that she violated her oath of office.

The City resists Wiggins's attempt to cast this case as simply being about a busy magistrate managing her time and delegating the issuance of a warrant to another magistrate. The City argues that there was no testimony at the pre-termination hearing or any other evidence to support Wiggins's assertion that she did not consider Salter's application for warrants because she was busy with other matters. Rather, the City claims, the evidence established without dispute that

Wiggins was the only magistrate on duty the morning that Salter sought the warrants the police had directed her to obtain and that Wiggins failed to even consider Salter's request, instead directing her to return at a later time when another magistrate would be on duty. The City argues that Wiggins failed to offer any explanation to either Salter or the Council about why she failed to consider Salter's request and that Wiggins's undisputed nonperformance is the essence of nonfeasance and provides a sufficient basis for the termination of her employment.

In this case, the trial court was limited to determining whether the City's decision to terminate Wiggins's employment was supported by the evidence and whether the Council correctly applied the law to the facts. Hicks v. Jackson Cty. Comm'n, 990 So. 2d 904, 910 (Ala. Civ. App. 2008). "'Questions of fact or weight or sufficiency of the evidence will not be reviewed on certiorari.'" Id. (quoting Personnel Bd. of Jefferson Cty. v. Bailey, 475 So. 2d 863, 868 (Ala. Civ. App. 1985)). As long as there was competent and legal evidence presented to the Council, "the reviewing circuit court may not supplant the Council's judgment with its own."

Ex parte City of Tuskegee, 447 So. 2d 713, 715-16 (Ala. 1984). Here, the testimony presented to the Council at Wiggins's pre-termination hearing showed that it was Wiggins's job as a magistrate to issue warrants if probable cause existed, regardless of whether the other magistrate was present, and that she failed to do so when Salter first came to her office. That testimony was sufficient to support the City's termination of Wiggins's employment. Accordingly, the trial court properly entered a judgment in favor of the City. Because Wiggins's dismissal was supported by the evidence, we must affirm the judgment of the trial court on that basis. City of Tuskegee, 447 So. 2d at 715-16; Belcher, 280 Ala. 252, 192 So. 2d 454.

Wiggins next argues that, under the separation-of-powers doctrine, the mayor and the Council lack the power to remove her from office. Wiggins asserts that a magistrate is a part of the judicial branch of government, while a mayor is a part of the executive branch and a city council is a part of the legislative branch. On that basis, she argues that allowing the mayor to recommend her dismissal and allowing the Council to vote to dismiss her for actions she took related solely to

her judicial function violates the separation-of-powers doctrine. Wiggins cites Baker v. McCollan, 443 U.S. 137, 145 (1979), for the general proposition that there must be a "reasonable division of functions" between the judicial branch and the executive branch of government exercising police power, but she otherwise fails to cite any authority that would support her argument that the mayor and the Council had no authority to dismiss her from her position.

The City responds that Wiggins's separation-of-powers argument fails because the mayor and the City have statutory authority to supervise and discipline a municipal warrant clerk and magistrate. Specifically, § 11-43-81, Ala. Code 1975, provides that a mayor is "the chief executive officer" of a municipality and has "general supervision and control of all other officers and the affairs of the city or town" except as otherwise provided by statute. Section 11-43-81 further authorizes a mayor "to appoint all officers whose appointment is not otherwise provided for by law" and to "remove any officer for good cause, except those elected by the people," subject to review by a city or town council if the officer was elected by the council or appointed with its consent.

Moreover, § 11-43-160, quoted above, sets forth a specific statutory procedure that allows a city or town to remove an officer or employee. Wiggins has not challenged the constitutionality of those statutes, and we agree with the City that the legislature has given it the authority to terminate Wiggins's employment.[7]

Conclusion

The City terminated Wiggins's employment under § 11-43-160 after it determined that she had failed to perform the duties of her job as a warrant clerk and magistrate on February 16, 2017, when she declined to consider a citizen's application for arrest warrants, instead telling that citizen to return in several hours when another warrant clerk and magistrate would be there. Wiggins subsequently filed a

[7]Wiggins also argues that the second charge against her, based on an alleged ethics violation unrelated to her actions on February 16, 2017, was not supported by the evidence and that this charge cannot serve as an alternate basis for terminating her employment. In light of our conclusion that the evidence supports her dismissal on the first charge, we do not need to consider that argument. As the trial court explained in its judgment, "[b]ecause the first charge is supported by substantial legal evidence, which alone would warrant [Wiggins's] dismissal, the court has no alternative but to affirm the decision of [the Council]." We therefore pretermit consideration of Wiggins's argument about the second charge against her.

wrongful-termination action against the City. Because there is evidence in the record that supports the City's decision, we hold that the trial court properly entered a judgment in favor of the City. For the reasons set forth above, that judgment is hereby affirmed.

AFFIRMED.

Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur.