IN THE COURT OF APPEALS OF IOWA

No. 8-1055 / 08-0983
Filed February 4, 2009

MICHAEL BURKE,
Plaintiff-Appellant,

vs.

JOHN MARDIS, Mayor and THE CITY OF EVANSDALE,
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Plaintiff appeals from the district court's denial of his petition for a writ of certiorari. **AFFIRMED.**

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

David E. Schrock and Charles A. Blades of Scheldrup, Blades, Schrock, Sand, Aranza, P.C., Cedar Rapids, for appellees.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Plaintiff, Michael Burke, appeals from the district court's denial of his petition for a writ of certiorari. He contends the city of Evansdale mayor, John Mardis, and the city acted illegally in terminating him as chief of police of the city without first offering him a pre-termination hearing to refute the evidence against him. He asserts he was entitled to a pre-termination hearing under the city employee handbook and as a matter of due process. We affirm.

I. BACKGROUND.

Michael Burke was employed beginning in 1996. Burke was suspended without pay for three days in October 2006, after an investigation revealed that Burke did not correctly handle property confiscated during a criminal investigation. While suspended, Burke was informed by letter that a sexual harassment complaint had been filed against him and Burke would be placed on administrative leave after the suspension expired. Burke appealed his suspension to the civil service commission on October 24, 2006.

Burke and his attorney met with mayor Mardis on October 27, 2006. Mardis informed Burke he could resign or be terminated. Mardis proposed to the city council that Burke be terminated and the council confirmed the termination on October 31, 2006. Burke was served with a letter from Mardis on November 1, 2006, terminating him from his position as chief of police. The letter informed Burke that he had thirty days to request a public hearing on the issues connected with his termination. Burke's request for an appeal hearing on the suspension

was denied on November 13, 2006. He did not request a public hearing following his termination.

On November 27, 2006, Burke filed a petition for writ of certiorari alleging, in part, that Mardis and the city acted illegally in terminating Burke without first providing a pre-termination hearing so he could refute the grounds for termination. He asserted that he was entitled to a pre-termination hearing under the city employee handbook and as a matter of due process under several statutes. The district court denied the petition, determining the handbook did not establish a contractual right to a pre-termination hearing because it contained specific language disclaiming any such right and asserting the nature of the employment was at-will. It also found that he was not entitled to a pre-termination hearing to satisfy due process. It concluded Iowa Code section 372.15 (2005) only entitled Burke to a post-termination hearing. Burke appeals contending these findings are not supported by substantial evidence.

II. SCOPE OF REVIEW.

A writ of certiorari shall be granted when a "board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401; *Frank Hardie Adver., Inc. v. City of Dubuque Zoning Bd. of Adjustment*, 501 N.W.2d 521, 523 (Iowa 1993). Appeals of certiorari proceedings are governed by the rules applicable to ordinary actions. Iowa R. Civ. P. 1.1412. We review a decision on a petition for writ of certiorari for correction of errors at law. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 413 (Iowa 2001). Our review of those claims involving alleged constitutional violations will

be de novo. *See Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 64; *Dressler v. Iowa Dep't of Transp.*, 542 N.W.2d 563, 565 (Iowa 1996). The petitioner carries the burden of proving the illegal action and the findings of fact by the board or officer are binding if supported by substantial evidence. *Waddell v. Brooke*, 684 N.W.2d 185, 189-90 (Iowa 2004). "Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings." *Chiafos v. Mun. Fire & Police Ret. Sys. of Iowa*, 591 N.W.2d 199, 201 (Iowa 1999).

III. EMPLOYEE HANDBOOK.

Burke first contends the failure to hold a pre-termination hearing was illegal because the city employee handbook provides that a pre-termination hearing will be held prior to termination. Section 5.2(3) of the handbook outlines the city's disciplinary process, including termination procedures:

> Termination, Demotion, Suspension: Where the person having the appointing power regarding the employee, determines that the above disciplinary procedures are not appropriate or have already been taken without effect, an employee may be demoted or suspended after prior notification [by] the Mayor, or may be terminated after a pre-termination hearing before the Mayor.

The section on discipline also includes a disclaimer stating in part,

> The employer reserves the right to use whatever discipline it deems appropriate and necessary to correct the situation. The disciplinary action is not intended to erode the discretion of the employer or change the at-will nature of the employee/employer relationship.

The first page of the handbook also has a general disclaimer.

> This employee handbook is not intended to create any contractual rights in favor of you or the City. This handbook is not to be construed as an employment contract or as a promise that you will be employed for any specified period of time. Except for employees covered by Civil Service and/or a bargaining contract, employment can be terminated at any time by either you or the

> City. Nothing in this handbook changes the at-will nature of your employment with the City of Evansdale.

Burke argues that he had a contractual right to expect the procedures outlined in the handbook would be followed. He maintains that honoring a blanket disclaimer would leave the entire handbook meaningless because none of the provisions would have any legal force.

Employment relationships in Iowa are presumed to be at-will where either party may terminate the relationship without consequences if there is not a valid employment contract in place. *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 79 (Iowa 2001); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 281 (Iowa 1995). An implied contract for employment can arise from the terms of an employee handbook if: "(1) the handbook is sufficiently definite in its terms to create an offer, (2) it is communicated to and accepted by the employee so as to create an acceptance, and (3) the employee provides consideration." *Jones v. Lake Park Care Ctr.*, 569 N.W.2d 369, 375 (Iowa 1997) (citing *McBride v. City of Sioux City*, 444 N.W.2d 85, 91 (Iowa 1989)). A disclaimer in the handbook may prevent the formation of an employment contract by showing that the employer has no intent to make an offer. *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 204 (Iowa 1997); *Anderson*, 540 N.W.2d at 287. In making this determination, "we simply examine the language and context of the disclaimer to decide whether a reasonable employee, reading the disclaimer, would understand it to mean that the employer has not assented to be bound by the handbook's provisions." *Anderson*, 540 N.W.2d at 288.

In looking at the text and context of the disclaimers, we believe a reasonable person reading the disclaimer could not expect that the city intended to be bound by the handbook provisions, including the termination procedures. The disclaimers are unambiguous, conspicuous, and clearly indicate the city intended not to create a contract. *See Phipps*, 558 N.W.2d at 204 (finding multiple, clearly phrased and prominently displayed disclaimers showed the employer's intent to maintain the at-will relationship and prevented an employee handbook from creating contractual rights as a matter of law). The mayor and city had no contractual duty to provide Burke with a pre-termination hearing by virtue of the employee handbook. Substantial evidence supports this conclusion and the district court properly denied the writ of certiorari on this basis.

We understand Burke's argument that the disclaimer leaves the terms and policies in the handbook unenforceable. Our courts have recognized that "the essential purpose of a disclaimer is to claim at-will status for the employment relationship by repudiating or denying liability for statements expressed in the handbook" and that other states have therefore imposed restrictions on disclaimers. *Anderson*, 540 N.W.2d at 287. Nonetheless we have declined to restrict disclaimers and instead construe them in the same manner as other language in the handbook. *Id.* at 288.

IV. DUE PROCESS.

Burke also contends he was entitled to a pre-termination hearing as a matter of fundamental due process. "A government employee is entitled to procedural due process only when he has been deprived of a constitutionally

protected property or liberty interest." *Winegar v. Des Moines Indep. Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994); *see also Bailiff v. Adams County Conference Bd.*, 650 N.W.2d 621, 625 (Iowa 2002) (noting a public employee must have a legitimate claim of entitlement to a position to have a constitutionally protected property right in the employment). A protected property interest is found when state law places contractual or statutory limits on an employer's right to terminate an employee. *Winegar*, 20 F.3d at 899. If a protected property interest is at stake, a pre-termination hearing is required. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494, 503-04 (1985); *Bennett v. City of Redfield*, 446 N.W.2d 467, 471 (Iowa 1989). A protected liberty interest arises when a city's discharge of an employee damages the employee's "reputation so severely that associational or employment opportunities are impaired or foreclosed." *Bennett*, 446 N.W.2d at 471. When an employee's liberty interest is at stake, a post-termination hearing is sufficient. *Borschel v. City of Perry*, 512 N.W.2d 565, 568 (Iowa 1994); *Bennett*, 446 N.W.2d at 471.

Burke asserts he acquired a protected property right in continued employment because the employee handbook operated as a contract between him and the city. As explained above, the employee handbook did not create contractual rights because the disclaimers negated any statements that could be construed as an offer of continued employment or a promise to follow certain disciplinary procedures.

Burke's contention that he was entitled to a pre-termination hearing to protect his liberty interest also fails. A post-termination hearing satisfies procedural due process requirements to protect a public employee's liberty interests. *Borschel*, 512 N.W.2d at 568.

> [L]iberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person "an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

Bennett, 446 N.W.2d at 471 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 157, 94 S. Ct. 1633, 1646, 40 L. Ed. 2d 15, 35 (1974)). Burke was entitled to a post-termination hearing under Iowa Code section 372.15 and was informed of this right in his termination letter but he did not request a hearing.[1] His due process rights were not violated since he was offered a post-termination hearing.

Lastly, Burke contends that he was entitled to both the post-termination hearing provided by Iowa Code section 372.15 and the pre-termination hearing described in the handbook. He argues that under rules of statutory construction, effect can be given to both procedures. This argument fails in two capacities. First, we have already determined that due to the disclaimer, the mayor and city

---

[1] Iowa Code section 372.15 provides:

> Except as otherwise provided by state or city law, all persons appointed to city office may be removed by the officer or body making the appointment, but every such removal shall be by written order. The order shall give the reasons, be filed in the office of the city clerk, and a copy shall be sent by certified mail to the person removed who, upon request filed with the clerk within thirty days of the date of mailing the copy, shall be granted a public hearing before the council on all issues connected with the removal. The hearing shall be held within thirty days of the date the request is filed, unless the person removed requests a later date.

could have, but were not obligated, to follow the policies and procedures contained in the handbook. Also, under procedural due process analysis, we need not consider whether additional procedures were available. We only need to determine whether the fundamentals of due process, notice and a meaningful opportunity to be heard, were provided and adequate under the circumstances. *See e.g.*, *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 264 (Iowa 2001); *Aluminum Co. of Am. v. Musal*, 622 N.W.2d 476, 479 (Iowa 2001); *Lunde v. Iowa Bd. of Regents*, 487 N.W.2d 357, 360-61 (Iowa Ct. App. 1992).

V. CONCLUSION.

The district court properly denied Burke's petition for writ of certiorari. Substantial evidence supports the court's conclusion that Burke did not have a contractual right to a pre-termination hearing and the post-termination hearing offered to him provided adequate due process procedures to protect his liberty interests.

AFFIRMED.