STATE OF MICHIGAN

COURT OF APPEALS

GARY WUNDERLIN,

Plaintiff-Appellant,

V

WESTERN MICHIGAN UNIVERSITY BOARD OF TRUSTEES,

Defendant-Appellee.

UNPUBLISHED
June 29, 2004

No. 243304
Court of Claims
LC No. 00-017840-CM

Before: O'Connell, P.J., and Wilder and Murray, JJ.

PER CURIAM.

Plaintiff appeals by right from a judgment dismissing plaintiff's wrongful discharge and due process claims after defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). We affirm.

This Court reviews a trial court's grant of summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) is properly granted when the party opposing the motion "has failed to state a claim upon which relief can be granted." MCR 2.116(C)(8); *Radtke v Everett*, 442 Mich 368, 373; 505 NW2d 155 (1993). A motion under this subrule tests the legal sufficiency of a claim by the pleadings alone, unsupported by any other documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). A motion for summary disposition under MCR 2.116(C)(8) should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Abb Paint Finishing, Inc v National Union Fire Ins*, 223 Mich App 559, 561; 567 NW2d 456 (1997).

In evaluating a motion under MCR 2.116(C)(10), we consider all the evidence in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Plaintiff first claims that the trial court erred in granting summary disposition because the evidence demonstrated that defendant lacked just cause to terminate his employment.

Specifically, plaintiff admits that he violated certain aspects of the University Procurement Card Policy but contends that defendant has selectively enforced the policy, and therefore is precluded from terminating plaintiff for such violations. We disagree.

Ordinarily, where an employer has agreed that an employee may only be discharged for cause, the trier of fact decides as a matter of fact whether the employee was discharged for cause. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 620-621; 292 NW2d 880 (1980). Without substituting its opinion for that of the employer, generally the trier of fact may determine whether the employee actually committed the specific misconduct at issue, whether there was pretext or good cause for the termination, and whether the employer selectively applied the rules in terminating the employee. *Toussaint, supra* at 622-624.

Viewed in the light most favorable to plaintiff, the evidence established that plaintiff had been authorized to execute certain multiple-swipe transactions above the $1,000 limit established by the University Procurement Card Policy, or that at a minimum, his former supervisor and the purchasing department had acquiesced in the practice; that plaintiff's purchase of the disputed tools constituting the basis for plaintiff's termination was not within the scope of that exception; that the tools purchase at issue also violated defendant's policy requiring written bids for purchases over $2,500; and that plaintiff failed to follow specific instructions to prepare an inventory of existing tools before purchasing the new tools. The evidence further established that the violations of the written policies at issue constituted insubordination, subjecting plaintiff to discipline up to and including termination after review of the circumstances by the human resources department, and that plaintiff was not terminated until after such review was conducted by the human resources department. The evidence also established that while at least three other employees who violated the card policy were terminated by defendant, there was no contrary evidence that there had been other employees who committed substantially similar violations of the policy but were not terminated by defendant. On the record before us, there is no genuine issue of material fact on the questions whether the policies were violated, whether the violations at issue constituted good cause for termination, and whether the defendant applied its policies in a consistent fashion. Accordingly, we cannot conclude that the trial court erred in granting summary disposition of plaintiff's wrongful termination claim pursuant to MCR 2.116(C)(10).

Next, plaintiff claims that defendant deprived him of his property interest in public employment without due process under the Fourteenth Amendment to the United States Constitution and under Article 1, § 17 of the Michigan Constitution. Both provisions state that no person may be deprived "of life, liberty, or property, without due process of law." US Const, Am XIV; Const 1963, art 1, § 17. Due process requires that an individual be given notice and a meaningful opportunity to be heard. *Traxler v. Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Whether a party was afforded due process of law is a question of law that we review de novo. *Hanlon v. Civil Service Com'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002).

We conclude that plaintiff was afforded due process and that his constitutional rights were not violated. Plaintiff had a meaningful pre-termination hearing on August 4, 2000. Plaintiff met with his supervisor, discussed his procurement card usage, and had the opportunity to say anything that he wanted to say in regard to the purchases in dispute. While this hearing was limited, in that it did not involve the opportunity for discovery prior to the hearing, a limited pre-termination hearing is acceptable if coupled with adequate post-termination review. *Tomiak v Hamtramck School Dist*, 426 Mich 678, 701; 397 NW2d 770 (1986).

We also conclude that while he did not take advantage of it, plaintiff had available to him an adequate post-termination review procedure. This post-termination process included three levels of appeal to the human resources department, a university vice president, and finally, the president of the university. A grievant is expressly permitted under the policy to retain legal representation during the process. Plaintiff did not file a timely grievance under this policy, but now asserts that he failed to do so only because one of the termination decision-makers allegedly told him at the time of his discharge that he had no recourse. However, plaintiff cites to no authority establishing that, even if this alleged statement was made by this individual, such a statement renders defendant's grievance procedure constitutionally inadequate, and we will not search for authority to support it. *Flint City Council v. Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2003). Moreover, we reject plaintiff's argument that the post-termination procedure was faulty because the reviewers of the grievance were involved to some degree in plaintiff's termination. While due process requires an impartial arbiter, *Vander Toorn v Grand Rapids*, 132 Mich App 590, 598;348 NW2d 697 (1984), plaintiff's failure to exhaust the administrative remedies available to him precludes him from now contending that his due process rights were violated. *Mollett v. City of Taylor*, 197 Mich App 328, 344-345; 494 NW2d 832 (1992).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray