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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1541**

Paul Vollkommer, individually
and on behalf of the taxpayers of Baldwin Township,
Appellant,

vs.

Baldwin Township, et al.,
Respondents,

Cathy Stevens,
Respondent.

**Filed June 15, 2010
Affirmed
Lansing, Judge**

Sherburne County District Court
File No. 71-CV-08-1320

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respondent Cathy Stevens)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Harten, Judge.*

UNPUBLISHED OPINION

LANSING, Judge

The district court granted summary judgment dismissing Paul Vollkommer's taxpayer action against Baldwin Township that alleged improper expenditure of public funds to create a dive team within the township's fire department. The district court also granted summary judgment, for failure to present a prima facie case, on Vollkommer's claims that his employment as an on-call firefighter was terminated in violation of Minnesota's whistleblower act and 42 U.S.C. § 1983 (2006). Because the district court did not err in applying the law and the record does not raise genuine issues of material fact, we affirm.

FACTS

Paul Vollkommer joined the Baldwin Township fire department as a paid on-call firefighter when it was established in 2002. Vollkommer was elected to Baldwin Township's Board of Supervisors in March 2006. During his tenure on the board, Vollkommer lodged objections with the state auditor, the county sheriff, and several elected officials about the township's expenditures for a dive team within the fire department. In October 2006 Vollkommer took a leave of absence from his position as a firefighter for shoulder surgery. After six months elapsed, the fire department attempted

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

to determine whether Vollkommer intended to return to his job. When Vollkommer failed to respond to the department's inquiry, the fire chief asked the township board to discharge Vollkommer from his firefighter position. Following an open meeting on July 24, 2007, at which Vollkommer presented his case, the board voted to discharge Vollkommer.

In July 2008 Vollkommer filed a taxpayer suit against Baldwin Township; the fire department; the township board supervisors individually; and Baldwin Township's clerk-treasurer. His complaint alleged five claims: that the township board had appropriated funds for an unlawful purpose by creating and funding the dive team; that the township board made allowances of township funds without proper documentation or audits; that the township clerk-treasurer improperly prepared and paid claims for disbursement against the township; that Vollkommer was suspended and terminated in violation of Minnesota's whistleblower act; and that Vollkommer was suspended and terminated in violation of 42 U.S.C. § 1983, for exercising his First Amendment rights and without due process of law. Vollkommer sought reimbursement of the township funds spent on the dive team plus interest from the township board supervisors and the clerk-treasurer. He also sought compensation for his lost income and benefits and for emotional distress due to his suspension and termination.

The township, the township board supervisors, the clerk-treasurer, and the fire department moved for summary judgment on all claims, and the district court granted the motion. Vollkommer moved to vacate the summary-judgment order on the ground that it was based on facts that are "plainly extraneous and prejudicial, or clearly erroneous at

least by false innuendo if not express statement, or genuinely disputed on this record.” The district court denied the motion, concluding that it was an improper motion for reconsideration.

On appeal, Vollkommer argues that summary judgment was inappropriate because material facts are in dispute. He also argues that the district court erred in applying the law when it concluded that the dive team was authorized by statute; that the board and the clerk-treasurer complied with the statutory requirements for allowing and auditing expense claims against the township; and that Vollkommer’s employment was terminated for legitimate reasons unrelated to any protected conduct.

D E C I S I O N

In Minnesota, a state or local taxpayer has sufficient interest to maintain a challenge to illegal public expenditures. *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977) (contrasting standing in state court to standing in federal court). And a taxpayer may sue to restrain unlawful disbursements of public moneys; to recover illegally disbursed money for the public subdivision entitled to it; and to restrain illegal action of public officials. *Oehler v. City of St. Paul*, 174 Minn. 410, 417-18, 219 N.W. 760, 763 (1928).

On appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law. *Yang v. Voyagaire Houseboats, Inc.*, 701 N.W.2d 783, 788 (Minn. 2005). We view the evidence in the light most favorable to the party against whom judgment was granted. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists when “the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *Frieler v. Carlson Mktg. Group*, 751 N.W.2d 558, 564 (Minn. 2008).

I

We first address Vollkommer’s argument that the township board lacked authority to create a dive team and, therefore, that any funds spent on the dive team must be returned to the township. Vollkommer asserts that the report by the Office of the State Auditor, issued in response to his inquiry, created a genuine issue of material fact of whether the board followed the appropriate procedure in creating the dive team and whether the dive team was created for an unauthorized purpose.

According to minutes from the township board meetings, Fire Chief Mark Bennett informed the board that the fire department, in December 2004, was exploring the creation of a dive team for “rescue and recovery.” In March, Bennett reported that the team started underwater training and was setting up “a county[-]wide emergency[-] response dive team that would specialize in body recovery [and] bringing up wrecks.” In deposition testimony, Bennett stated that the dive team was formed as an emergency-rescue unit that could also recover bodies or vehicles at the direction of the county sheriff if rescue efforts failed. Bennett discussed the activities of the dive team with the

township board at many of its regular meetings. A successive fire chief, Brian Torborg, stated in his affidavit that the equipment purchased by the township for the dive team was “compatible for use in water rescue as well as water recovery.”

The Office of the State Auditor concluded that the township had authority to provide rescue services, including water rescue, through the fire department. But it also concluded that the sheriff’s office has exclusive jurisdiction over body recovery and the township did not have authority to create a dive team to recover bodies. The auditor’s report noted that no resolution or action by the board formally approved the dive team, but it also stated that the board was regularly updated on the dive team’s activities. The auditor’s report did not draw any conclusions from the absence of formal action.

Several Minnesota statutes and township policies govern the activities and expenditures that created the dive team. Minnesota Statutes section 368.01, subdivision 9 (2004), provides that “[t]he town[ship] board may establish a fire department, appoint its officers and members and prescribe their duties, and provide fire apparatus.” Baldwin Township’s fire department’s handbook, in turn, includes the duty of effecting rescues and providing emergency medical services. Also, the “political subdivision” that has jurisdiction over the location of a submerged vehicle is responsible for vehicle removal if the owner fails to act. Minn. Stat. § 86B.107, subd. 2(c) (2004); *see also Great N. Bridge Co. v. Town of Finlayson*, 133 Minn. 270, 272, 158 N.W. 392, 392-93 (1916) (describing township as political subdivision of state). It is the county sheriff, however, and not the township, who bears the responsibility for taking charge of bodies in cases in which a coroner or medical examiner is called. Minn. Stat. § 390.32, subd. 7 (2004).

The dive team's purpose, as communicated by the fire chief to the board, was rescue and recovery, and the chief described its function as an emergency response team. The team's purpose of rescuing individuals is authorized by statute, and the township, not the county sheriff, must recover vehicles in its waters. The record indicates that the equipment used in these activities is identical to the equipment that would be used for body recovery. There is nothing in the record indicating that any dive-team expense was exclusively for the unauthorized purpose of body recovery, rather than the authorized purposes of rescuing individuals and recovering vehicles.

Vollkommer also argues that the board's failure to authorize the dive team's creation in a formal resolution is sufficient to show that expenditures to support it were unlawful. But no statute requires a formal motion and formal approval to expend money for a statutorily authorized purpose. The Minnesota statute setting out the township board's general powers states that "[t]he supervisors shall have charge of all town[ship] affairs not committed to other officers by law. They shall draw orders on the treasurer to disburse money to pay the town[ship] expenses, and to disburse money raised by the town[ship] for any other purpose." Minn. Stat. § 366.01, subd. 1 (2004). Vollkommer's argument fails because no procedural formality is required to spend money for the township's legitimate expenses.

Finally, the state auditor's report does not create a genuine issue of material fact because the record shows that the dive-team equipment was appropriate for the statutorily authorized purposes of water rescue and vehicle recovery. The district court, therefore, did not err in concluding that the expenses for the dive team were authorized by

Minnesota law and that Vollkommer failed to produce sufficient evidence to suggest otherwise.

II

In addition to challenging the township board's authority to create the dive team, Vollkommer argues that the township board and clerk-treasurer did not comply with the statutory requirements for allowing and auditing expense claims against the township.

Several statutory provisions establish the requirements for a township to pay and audit claimed expenses. Minnesota Statutes section 471.38, subdivision 1 (2004), provides that the required itemization of all expenses that can be done "in the ordinary course of business" must be in writing, and the person claiming payment must sign a declaration that the claim is "just and correct and that no part of it has been paid." Minnesota Statutes section 366.20 (2004) requires the township board to meet annually as a board of audit and permits it to meet at other times to settle charges against the township. It provides that "[n]o allowance of an account shall be made which does not specifically itemize the account." *Id.* When the township board acts as a board of audit, it cannot allow "any account which does not specifically give each item, with its date, amount, and nature." Minn. Stat. § 366.21 (2004). Finally, after verifying the claim, the board "may receive and consider it, and allow or disallow the same, in whole or in part, as shall appear just or lawful." Minn. Stat. § 471.40 (2004). Taken together, these provisions require claims against the township to be in writing and to state the item, date, amount, and nature of the expense. Also, only those claims deemed just and correct by the claimant and board can be paid.

The Minnesota Supreme Court addressed these statutory requirements in *Leskinen v. Pucelj*, which involved a similar action by a taxpayer to recover money to the township fund from treasurers who had disbursed funds based on estimated expenses and without itemization. 262 Minn. 461, 462, 115 N.W.2d 346, 348 (1962). The court held that the claims for reimbursement did not conform to the requirements of Minn. Stat. §§ 366.20, 471.38, because the contents of each expense were not specified and because they were based on estimates. *Leskinen*, 267 Minn. at 465, 115 N.W.2d at 350. It stated that “[t]he purpose of the statute[s] is to permit an audit of the claims and is frustrated by a failure to specify the precise expenses which were incurred or to establish the basis for compensating employees for services rendered.” *Id.* The supreme court, however, reversed the district court’s decision not to allow the township treasurers to amend the claims for reimbursement to comply with the statutes and remanded the case. *Id.* at 466, 115 N.W.2d at 351.

The report from the Office of the State Auditor recommended several improvements to Baldwin Township’s process for receiving and reviewing reimbursement claims. It stated that “[d]etailed documentation was not consistently provided as support for submitted claims” and cited examples of credit-card statements and personal checks without the original receipts. In a letter to Vollkommer, the state auditor also stated, “We believe that in the past, the [t]own[ship] [b]oard failed to properly review claims and invoices.” The letter highlighted those specific expenses paid out without the detailed documentation recommended by the office but also advised that the township not seek reimbursement of those expenses.

The record indicates that the township has changed its reimbursement process and instituted a preapproval process for expenses greater than \$300. The township board supervisors and clerk-treasurer submitted all of the documentation associated with expenditures for the dive team. This record shows that the vast majority of disbursements for the dive team were based on claims that included detailed receipts and clearly met the statutory requirements. The date, amount, and general type of expense are also clear from the documents submitted to the clerk-treasurer and presented to the board. Several of the claims with less documentation included a handwritten note by Bennett, a township officer, describing what item was purchased. We conclude that sending the few remaining claims back for more documentation as the court did in *Leskinen*, is not necessary because the township has changed its processes going forward; the claimant, a township officer who took an oath when assuming office, declared the expenses to be “just and correct”; and, after extensive investigation by the county sheriff and the Office of the State Auditor, there is no allegation that the expenses were for personal or unauthorized use. Consequently, summary judgment against Vollkommer was appropriate on this claim.

III

Vollkommer argues that he was terminated in violation of Minnesota’s whistleblower act, Minn. Stat. § 181.932, subd. 1(a) (2006), which prohibits an employer from discharging or disciplining an employee because the employee, in good faith, reports a violation or suspected violation of any federal or state law or rule to an employer, governmental body, or law enforcement official.

Vollkommer was elected as a township supervisor in March 2006 and contacted the Office of the State Auditor one month later about the dive-team expenditures. On January 7, 2007, Vollkommer contacted the county sheriff's office to complain about the allegedly unlawful spending. On April 11, 2007, Vollkommer contacted the Attorney General's office and the Sherburne County Commissioner's Office to report the expenditures to create the dive team. Vollkommer and others petitioned the district court for appointment of a special prosecutor on December 10, 2007.

Vollkommer requested a leave of absence from his position as a firefighter to begin October 12, 2006, and continue for an unspecified amount of time. Vollkommer stated in his deposition that the fire chief at the time, Brian Torborg, told him to take "six, eight, nine months, whatever it took."

The fire department's employee handbook states that an initial request for a leave of absence shall not exceed six months, that an additional six months may be granted if requested at least ten days before the original period expires, and that it is the employee's obligation to know when the leave term expires. The handbook also states that dismissal is justified for violation of the provisions in the handbook.

Vollkommer testified at his deposition that he was on medical leave, which was different from a leave of absence, and that there was no established time period for medical leave. Vollkommer agreed that there was no reference to medical leave in any of the editions of the handbooks and that the leave-of-absence provisions in all of the editions of the handbook were for six months. Vollkommer submitted an affidavit from

Gene Ludwig, a former firefighter, stating that he had taken a month or two of leave without formally requesting it and received no disciplinary action.

The assistant fire chief stated in an affidavit that he talked to Vollkommer in person after a township board meeting on March 13, 2007, to ask him to inform the department of his intentions when his leave expired. He also stated that he left a phone message for Vollkommer and the affidavit included his phone records indicating that the message was left on April 12, 2007, the day Vollkommer's leave expired.

Vollkommer agreed that he received a certified letter from Chief Torborg. The record indicates that the letter was dated April 24, 2007. In the letter, Chief Torborg requested a written response from Vollkommer by May 2, 2007, stating his intentions, and informed him that otherwise Torborg would ask the board to dismiss Vollkommer. On June 4, 2007, Vollkommer wrote a letter asking for an additional six months of leave.

On May 4, 2007, Torborg wrote to the board chair and requested the board to approve Vollkommer's dismissal. At the board meeting held to consider whether Vollkommer's employment should be terminated, Vollkommer stated that he "stalled as long as possible to find out what the condition of the fire department would be. Whether I come back would be whether the department got fixed. And since the [b]oard has failed to render any action whatsoever, based on firefighters leaving one after another, I have to make a decision whether I want to go back to a fire department [when] the rest of the dayside people decided they didn't." The board chair asked if Vollkommer had made that decision and Vollkommer replied, "No, I have not. I'm still hoping that this fire

department can get turned around.” Later in the meeting, Vollkommer denied stalling and stated that he did wish to return to his position.

In the course of the meeting the board decided that the allegations that Vollkommer did not comply with the leave requirements were true; that they did not need any more information to make a decision; that there was just cause for Vollkommer’s dismissal; and that Vollkommer had not presented information that led the board to believe dismissal was not appropriate. The board voted to dismiss Vollkommer.

To establish a prima facie case of retaliatory discharge, the employee must show statutorily protected conduct by the employee, adverse employment action by the employer, and a causal connection between the two. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). If the employee establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nonretaliatory reason for its action, after which the employee may demonstrate that the employer’s articulated reasons are pretextual. *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001) (adopting *McDonnell Douglas* burden-shifting test for Minnesota whistleblower claims), *review denied* (Minn. May 15, 2001).

Vollkommer’s reports to the state auditor’s office and other officials constitute protected conduct under Minn. Stat. § 181.932, subd. 1(a). Vollkommer’s employment was terminated, a clearly adverse employment action. Vollkommer argues that a causal connection was established because the board supervisors needed to terminate Vollkommer’s employment to avoid the consequences of their unlawful expenditures. This argument is facially unsupported because Vollkommer was elected to the township

board in 2006 for a period of three years. Minn. Stat. § 367.03, subd. 1 (2004). There is no reason to believe he would stop pursuing his claims of unlawful dive-team expenditures that he had begun when he was elected to the board simply because he was terminated from his firefighter employment in the middle of his board tenure. *See generally Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (stating that mere speculation is insufficient to raise genuine issue of material fact).

Even if Vollkommer's assertions could be viewed as establishing causation for the purposes of summary judgment, the board demonstrated legitimate, nonretaliatory reasons for the termination of Vollkommer's employment. Although Ludwig's statement provides some evidence that Vollkommer's disciplinary employment termination might have been pretextual, Ludwig's statement does not discuss the circumstances of his leave or any informal conversations he had during that time. The affidavit also shows that Ludwig responded to requests to inform the fire department of his intentions. Vollkommer's employment was not terminated at the expiration of his leave, but only after he had been contacted several times, refused for six weeks to reply to requests for a response, and was informed of the consequences of his failure to respond. The record taken as a whole could not lead a rational trier of fact to find for Vollkommer. *Frieler*, 751 N.W.2d at 564. The district court did not err in concluding that Vollkommer failed to state a prima facie case of retaliation, and that, even if Vollkommer had, he failed to introduce sufficiently probative evidence to raise a genuine issue of material fact that the board's reasons for the termination were pretextual.

IV

Finally, Vollkommer claims that his employment was terminated in response to his exercise of his First Amendment right to free speech and, thus, in violation of 42 U.S.C. § 1983. The district court granted summary judgment against Vollkommer on this claim.

A public employer may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697-98 (1972). The threshold question in evaluating a public employee's claim is whether the employee was speaking on a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S. Ct. 2891, 2897 (1987). Vollkommer's challenges to the township expenditures meet this threshold.

An employee must also demonstrate that his constitutionally protected conduct was a substantial factor or motivating factor for the adverse employment action. *Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675, 116 S.Ct. 2342, 2347 (1996). Vollkommer did not meet this burden for the same reasons that he failed to make a sufficient showing of causation in his whistleblower claim. Additionally, an employee's claim is defeated if the employer can show by a preponderance of the evidence that it would have taken the same action absent the employee's protected conduct. *Id.* at 685, 116 S.Ct. at 2352. The township board met this burden by producing the undisputed evidence of Vollkommer's nonresponsiveness after his leave expired.

The district court did not err in concluding that Vollkommer failed to raise a genuine issue of material fact on his section 1983 claim and that “the record supports the conclusion that Vollkommer’s conduct merited [employment] termination, regardless of his First Amendment speech.”

Affirmed.