IN THE COURT OF APPEALS OF IOWA

No. 5-345 / 94-1281

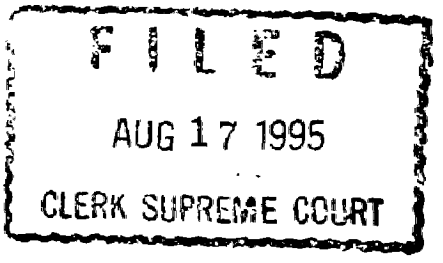
IN RE THE MARRIAGE OF CHARLES R. SROKA AND KATHRYN SROKA

Upon the Petition of
CHARLES R. SROKA,

Petitioner-Appellee,

And Concerning
KATHRYN SROKA,

Respondent-Appellant.



Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Kathryn Sroka appeals from a denial of her petition for modification of child support in the parties' dissolution decree. **AFFIRMED.**

William A. Lansing of Lansing Law Office, Dyersville, for appellant.

Charles R. Sroka, Epworth, pro se.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

The question in this appeal is whether the trial court was correct in determining respondent-appellant Kathryn Sroka failed to meet the burden to have child support petitioner-appellee Charles R. Sroka was ordered to pay her in their dissolution decree increased. We affirm.

The marriage of Kathryn and Charles was dissolved in June 1990. The trial court in its decree approved an agreement of the parties that primary care of Sara, then nine years old, be awarded to Kathryn and that Charles pay child support to Kathryn of $45 per week until Sara reached the age of eighteen. In July 1993, Kathryn filed a petition to modify the decree seeking additional child support. Charles denied the child support should be modified and requested his payments be reduced to $23 per week. The trial court dismissed Kathryn's petition and denied Charles's request for relief. Kathryn filed this appeal.

On appeal, Kathryn contends (1) she showed the necessary change of circumstances to have the decree modified; (2) the trial court erred in not discounting depreciation taken by Charles on his tax returns; and (3) the trial court should have applied the child support guidelines.

Charles, a farmer, claimed annual income as defined for child support

guideline purposes of $25,079 [1] in 1990, and $20,496 in 1989. He claimed a loss of $9728 in 1988, a loss of $24,973 in 1993, and income of $3617 in 1992, and $2411 in 1991.

Kathryn contends these are not the income figures for Charles that the trial court should have considered. She contends the trial court gave Charles the benefit of both accelerated and straight-line depreciation. The figures above exclude accelerated depreciation; consequently, there is no basis to Kathryn's argument accelerated depreciation should be discounted. Kathryn has failed to show us the straight-line depreciation Charles has taken does not represent a fair cost of doing business. Depreciation is a legitimate cost of doing business. There is no evidence showing it is not equitable to consider depreciation in this case or that depreciation taken exceeds the actual depreciation of the farm items. *See In re Marriage of Gaer*, 476 N.W.2d 324, 326-29 (Iowa 1991); *In re Marriage of Worthington*, 504 N.W.2d 147, 151-52 (Iowa App. 1993); *In re Marriage of Cossel*, 487 N.W.2d 679, 682-83 (Iowa App. 1992).

Kathryn contends the trial court failed to consider the child support guidelines and failed to determine an average income from a fair period. We recognize the trial court order does not make a specific finding of net income for child support guideline

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[1] These figures represent income items and add-back depreciation in excess of straight-line depreciation and deductions for FICA, federal and state income tax, health insurance, and the health deduction per the guidelines.

purposes. However, averaging Charles's income over three years and applying the child support guidelines to this average would result in a child support figure that is less than the current support Charles is paying. Consequently, Kathryn has failed to show that applying the guidelines would result in a ten percent increase in Charles's child support obligation. We, therefore, find no merit in this argument.

Kathryn contends the facts show a substantial change of circumstances which justify the increase. Kathryn contends the expense of raising the child has increased. Kathryn's income has increased. Charles's income has decreased and he shows a decrease in total income for 1991, 1992, and 1993 due to a decrease in milk prices, a decrease in milk production, and crop failures. Charles has been required to increase his debt and has used borrowed money to replace machinery. His borrowing is possible because of appreciation of his land in the past thirty years, but this is not unlimited. Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987).

The principles enumerated in *In re Marriage of Vetternack*, 334 N.W.2d 761 (Iowa 1983) and applied in *Kern* are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

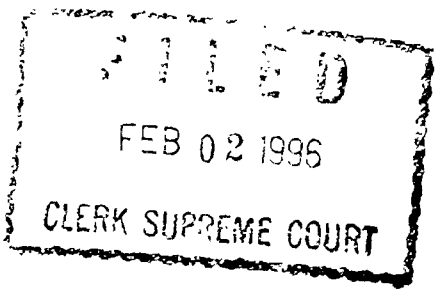
Vetternack, 334 N.W.2d at 762. Kathryn has not shown the required change. We affirm.

We award no attorney fees on appeal.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 5-646 / 94-1281



THOMAS SIMMS VAN BAALE,

Appellant,

vs.

CITY OF DES MOINES, WILLIAM MOULDER, Individually and in His Official Capacity as Chief of Police of the City of Des Moines, and KAYNE ROBINSON, Individually and in His Official Capacity as Assistant Chief of Police of the City of Des Moines,

Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Thomas Simms Van Baale appeals the district court's dismissal of his common law claims and claim for equal protection. **REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.**

Alfredo Parrish and Maggi Moss of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Terrence A. Hopkins and Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines, and Becky S. Knutson of Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines, for appellees Moulder and Robinson.

Bruce E. Bergman and Nelda Barrow Mickle, City Solicitors, Des Moines, for appellee City of Des Moines.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

Thomas Van Baale appeals the district court's order dismissing his common law claims and denial of equal protection. On our review, we reverse and remand in part and affirm in part.

Van Baale was employed by the Des Moines police department for seventeen years. In 1991, Van Baale's former wife filed a domestic abuse complaint against him. An arrest warrant was issued. As a result of his actions at the time of his arrest, he was additionally charged with interference with official acts. In February 1992, Van Baale pled guilty to the interference charge and allowed a finding of guilt to be entered on his domestic abuse charge based on the Minutes of Testimony in the Trial Information. He received deferred sentences on both charges.

In June 1992 the Des Moines police department terminated Van Baale's employment. Van Baale appealed the termination under Iowa Code chapter 400 (1993) to the civil service commission. The commission affirmed the termination. On appeal from the commission, the district court again affirmed the termination. On appeal, this court affirmed by operation of law the district court's decision. *Van Baale v. Civil Service Comm'n*, Sup. Ct. No. 93-1393 (Iowa App. 1994).

Prior to our decision, Van Baale filed a petition at law against the City of Des Moines, police chief William Moulder, and assistant chief Kayne Robinson, alleging breach of oral contract, promissory estoppel, negligence, violation of equal protection, and intentional infliction of emotional distress. In his petition, Van Baale alleged

Moulder and Robinson each made repeated assurances to him prior to the guilty plea proceeding he would not be fired and would only receive a suspension, yet due to media coverage and political pressure surrounding the incident, changed their minds and terminated his employment. The petition also claimed he pled guilty and stipulated to the minutes in reliance on the express guarantees he would not lose his job. The petition stated Robinson and Moulder failed to treat Van Baale the same as other police officers. It further alleged as a result of Robinson and Moulder's willful and outrageous actions, Van Baale suffered extreme humiliation, embarrassment, emotional suffering, and mental anguish, as well as the loss of his job.

The City, Moulder and Robinson filed a pretrial motion to dismiss the petition contending the civil service statute preempted the common law counts and Van Baale failed to state an equal protection claim. The trial court granted the motion and dismissed the petition.

Van Baale appeals contending the trial court erred in ruling Iowa Code chapter 400 preempts common law claims brought by civil servants. He also argues the trial court erred as a matter of law in ruling he was not a member of a protected class for equal protection claims.

I. Standard of Review

We review actions at law for correction of errors of law. Iowa R. App. P. 4; *Vernan v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994). A district court's order

sustaining a motion to dismiss is subject to review to decide whether the ruling was legally correct. *Id.*

II. Common Law Claims

Iowa Code chapter 400 provides employees covered by the civil service provisions may "not be suspended, demoted, or terminated arbitrarily except as otherwise provided by this chapter . . ." Iowa Code § 400.18. The civil service commission has jurisdiction to hear and determine the matters under this chapter. Iowa Code § 400.27.

With situations involving a potential wrongful termination of a civil servant, the remedy lies in an appeal to the civil service commission, and thereafter, an appeal of the commission's decision to the district court. *Schultz v. City of Davenport*, 444 N.W.2d 479, 481 (Iowa 1989); Iowa Code § 400.27.[1] We recognize the language used in § 400.18 evidences an "intent by the legislature to make the procedures the sole means by which the propriety of a civil service employee's dismissal may be determined." *Devine v. City of Des Moines*, 366 N.W.2d 580, 582 (Iowa 1985) *superceeded in part by* Iowa Code § 20.18; *Jones v. Des Moines Civil Serv. Comm'n*, 430 N.W.2d 106 (Iowa 1988). *But See Bogue v. Ames Civil Serv.* Comm'n, 368

[1] An exception to this remedy has been carved out by Iowa Code § 20.18, which provides a public employee who is also covered under a collective bargaining agreement has the opportunity to choose to follow either Iowa Code chapter 400 or the grievance procedure provided in the collective bargaining agreement. Iowa Code § 20.18. Van Baale's situation does not fall under section 20.18.

N.W.2d 111, 113-14 (Iowa 1985) (statutory procedure for judicial review not found to be the exclusive remedy especially in light of no language specifically providing for the exclusivity of the remedy).

Van Baale's petition would clearly fall under the exclusive remedy provisions of the civil service statute if it was based on the wrongful termination from the police force. However, his claims for breach of an oral contract, promissory estoppel, negligence, and intentional infliction of emotional distress do not relate to the reason responsible for his termination, but to actions allegedly committed by Moulder and Robinson prior to and after the termination. Nowhere in Van Baale's petition does he allege he was "removed, demoted, or suspended arbitrarily."[2]

We find nothing in Iowa Code chapter 400 to indicate it intended to provide the exclusive remedy for a civil servant's common law tort or contractual claims against an employer which are separate and distinct from the actual termination itself. Van Baale's petition does not assert a claim for wrongful termination, but rather claims the actions he took in response to his criminal charges were done in reliance upon prior representations made to him by Moulder and Robinson. It is based on

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[2] We note Van Baale sought reinstatement to his position as a Des Moines police officer in his petition. While this may appear to relate to a wrongful termination claim, we find he seeks this remedy since keeping his job was the subject matter of the alleged representations made to Van Baale. We also observe he also seeks compensatory, punitive and other monetary damages.

their failure to keep the promises. He does not bring any common law claim dealing with the specific reasons for his termination, such as wrongful discharge.

We disagree with the trial court that Iowa Code chapter 400 preempts Van Baale's common law claims against the City of Des Moines, Moulder and Robinson. Accordingly, we reverse the trial court's dismissal of his claims for breach of oral contract, negligence, promissory estoppel, and intentional infliction of emotional distress, and remand the case for further proceedings. Our ruling expresses no opinion concerning the merits of the claims. We only hold the claims are not preempted.

III. Equal Protection Claim

Van Baale further argues the trial court erred in dismissing his equal protection claim. He claims he received disparate treatment as a member of a class of police officers subject to intense media coverage for alleged misconduct.

The equal protection clause generally requires the government to treat similarly situated persons alike. *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994). Equal protection claims are not self-enforcing. *Zentgraf v. Texas A & M University*, 492 F. Supp. 265, 270-71 (S.D. Tex. 1980). Instead, 42 U.S.C. section 1983 provides a procedure for claimants to allege a violation of equal protection claims. *Allen v. Anderson*, 490 N.W.2d 848, 853 (Iowa App. 1992). *See also Harden v. State*, 434 N.W.2d 881, 885 (Iowa 1989) *cert. denied* 493 U.S. 869, 110 S. Ct. 194, 107 L. Ed.2d 149 (1989) (Iowa courts interpret both federal and state equal protection

clauses similarly). Section 1983 requires a person claiming a violation of equal protection to allege he or she is a member of a protected class and was "singled out because of [his or her] membership in the class." *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992) *aff'd* 114 S. Ct. 807, 127 L. Ed.2d 114 (1994). A State's act of singling out a person for different treatment does not in and of itself create a protected class. *Id.*

In his petition, Van Baale never described the class of which he was a member, specified he was in a class of police officers subject to intense media coverage, or even generally stated he was a member of a protected class. At the hearing for the motion to dismiss, counsel for Van Baale argued equal protection need not come from his membership in a special protected group. Counsel never asserted nor addressed Van Baale's membership in a class of police officers subjected to intense media coverage due to alleged misconduct before the district court. Instead, Van Baale's contention he was a member of a protected class was presented to this court for the first time on appeal. *See In re Estate of Day*, 521 N.W.2d 475, 479 (Iowa App. 1994) (issues must be raised and decided in the trial court before they may be raised and decided on appeal).

We find no error in the district court's order to dismiss Van Baale's claim of

equal protection, since he never pled nor argued he was a member of a protected class. We affirm the district court's dismissal of Van Baale's equal protection claim.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.