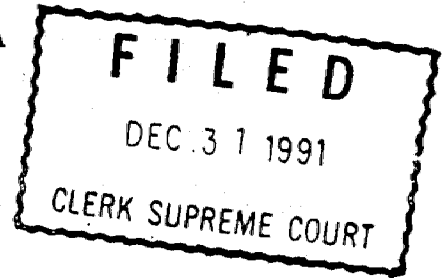


IN THE COURT OF APPEALS OF IOWA

No. 1-445 / 91-59



MICHELLE FRAZIER,

Appellant,

vs.

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JOB SERVICE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County,
Glenn E. Pille, Judge.

Michelle Frazier appeals the district court's grant of
summary judgment in favor of defendant Job Service of Iowa
on her breach of contract claim. **AFFIRMED.**

Thomas M. Werner, Des Moines, for appellant.

Walter F. Maley, Des Moines, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The plaintiff, Michelle Frazier, began employment with Job Service of Iowa on June 26, 1987. Frazier was placed on a six-month probationary period as a Job Service aide. At the time of Frazier's employment, Job Service had a personnel manual outlining the permissible number of hours of sick leave. Pursuant to this policy, employees using more than fifty-six hours of sick leave in a twelve-month period must have their attendance reviewed by a supervisor. An employee with more than ninety-six hours of sick leave would be required to submit a doctor's statement for any additional sick leave. However, any sick leave taken for work-related injuries was not computed in the total number of hours.

Frazier suffered neck and back pain several months after starting her employment with Job Service. On December 1, 1987, she picked up a box of mail and experienced pain in her left shoulder and arm. She was attended to by her physician, who removed her from her job until December 7, 1987. On December 2 Frazier called her supervisors and advised them her doctor had removed her from work until December 7. She alleges her supervisors told her to take care of herself. On December 5 Frazier was called by her supervisors and informed her employment had terminated effective December 4, 1987, due to absence in excess of fifty-six hours in her first twelve months on the job.

Frazier filed the present action on September 7, 1990, alleging Job Service had breached its contract with her by violating its own rules providing for discharge. She also alleged her discharge was precipitated by a worker's compensation injury and her discharge was therefore in violation of public policy.

Thereafter, Job Service filed a motion for summary judgment. It argued Frazier's two separate claims were subject to dismissal under Iowa Code chapter 19A, since she was terminated during her probationary period and thus was without right of appeal. As to Frazier's other claim of breach of implied contract, it maintained the State had not waived its sovereign immunity as to such claims. Job Service also argued Frazier had failed to exhaust the administrative process mandated by the State Tort Claims Act, Iowa Code chapter 25A.

Frazier subsequently dropped the claim involving public policy and filed a resistance to Job Service's motion for summary judgment. Hearing on the motion was held. The district court sustained Job Service's motion and entered summary judgment. Frazier has appealed.

Frazier contends Job Service's own personnel policies provide the basis for her claims of breach of contract and Iowa Code chapter 19A does not preclude her from alleging a breach of contract. She has dropped her claim of breach of implied contract.

Frazier points out recent trends in case law suggest a breach of contract claim can be founded upon an employer's violation of its own personnel policies. She contends chapter 19A does not prohibit her from claiming breach of contract, since she is not seeking to avail herself of the protections afforded under chapter 19A, but rather is claiming wrongful discharge on the basis of violations of the Jobs Service's own employment manuals. Frazier argues section 19A.9(8) simply provides probationary employees should have no right to resort to the grievance regulations under state merit principles. She insists this section does not prevent a party from seeking other available remedies.

Summary judgment is appropriate "if 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 the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Miline, 242 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Miline, 242 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced

from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissan, 179 N.W.2d 336, 339 (Iowa 1970).

A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Gott, 387 N.W.2d at 343; Miline, 242 N.W.2d at 423. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). However, a trial court's conclusions of law and interpretation of statutes are not binding upon the appellate court.

We turn to the issues raised. Viewing the facts in the light most favorable to the nonmoving party, we will assume without deciding the employee handbook wording amounted to a contract by creating a reasonable expectation on the part of employees. See Canon v. National By-Products, Inc., 422 N.W.2d Iowa 638, 640 (Iowa 1988). However, the critical question presented here is whether Frazier's reasonable expectations under the employee handbook overrode her status as a probationary employee.

We look first to determine if Frazier was aware she was a probational employee. In her petition, she admits "At the time of her hire, Plaintiff [Frazier] was placed on a six-month probationary period." No where does Frazier

allege or argue she did not understand what probationary status signified.

Next, we turn to the evidence before the trial court. The evidence submitted consists mainly of three documents: 1) the employee handbook; 2) a collective bargaining agreement; and 3) statutory law, namely Iowa Code section 19A.9(8) and other relevant portions of chapter 19A. No other evidence or affidavits appear to have been filed in resistance to Job Service's summary judgment motion. Since the conflict in the record consists only of the legal consequences from undisputed facts, we may decide this case as a matter of law.

Iowa Code section 19A.9(8) provides in pertinent part:

For a probationary period of six months, excluding educational or training leave, before appointment may be made complete, and during which period a probationer may be discharged or reduced in class or rank, or replaced on the eligible list. . . . If the employee's services are unsatisfactory, the employee shall be dropped from the payroll on or before the expiration of the probationary period. If satisfactory, the appointment shall be deemed permanent. The determination of the appointing authority shall be final and determinative.

Thus, under the statute, as a probationary employee, Frazier could be terminated for any reason at any time up to six months after her initial hiring. See Iowa Code § 19A.9(8). The statute is clear the decision of the appointing authority is final and conclusive.

Further, the employees' collective bargaining agreement, in which Frazier was included, specifically provided:

Section 10 Exclusion of Probationary Employees

Notwithstanding Section 9 above, nor any other provision(s) of this Agreement, the release of probationary employees shall not be subject to the grievance procedure.

This collective bargaining agreement governed relations between the employer, Job Service, and Frazier and her fellow employees. It also makes separate provision, similar to the statute, for probationary employees.

We determine, as did the trial court, these documents can and should be construed harmoniously with each other. We hold the employee handbook in no way preempts the statutory provisions regarding probationary employees. Rather, the employee handbook supplements the pertinent code provisions. In supplementing the pertinent code sections, the rights outlined in the handbook do not fully vest, if indeed they "vest" at all, until the employee has become a permanent rather than a probationary employee.

Our holding here is consistent with the provisions of the collective bargaining agreement and the undisputed facts before the trial court. The collective bargaining agreement specifically states the release of probationary employees is not subject to grievance procedures. The undisputed facts of the case show Frazier knew she was a probationary employee at the time of her termination.

Finally, this construction is consistent with the rationale in the cases cited by Frazier, namely Hamilton v. First Elderly Housing, 436 N.W.2d 336 (Iowa 1989); Canon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988); and Young v. Cedar County Work Activities Center, Inc., 418 N.W.2d 844 (Iowa 1987). In none of those cases was it alleged the employee discharged was a probationary rather than a permanent employee. This difference is critical. Indeed, if Frazier had been a permanent employee, the result of this case might well have been different.

We agree with the trial court there is no genuine issue of material fact. No representations other than those contained in the documents are alleged. Frazier admits she was a probationary employee. As a probationary employee she could be dismissed at any time for any reason.¹ Thus, any expectation she may have had to the contrary is not supported by the facts.

Frazier's performance was evidently deemed unsatisfactory prior to the expiration of the six-month probationary period. The appointing authority's decision is final and determinative, without right of appeal. The appointing authority was within its right in acting as it did. No contract was violated, due to Frazier's probationary status.

1. Frazier does not argue on appeal she was terminated for any illegal reason. See, e.g., Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 684-85 (Iowa 1990).

Job Service's motion was properly supported as required under the rule. We determine Frazier, as the resisting party, has not shown the existence of a genuine issue of material fact. We affirm the trial court's grant of summary judgment in favor of Job Service of Iowa.

Costs of this appeal are taxed to Frazier.

AFFIRMED.