United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7113 **September Term, 2015**

FILED ON: JANUARY 13, 2016

ALFRED M. WINDER,
APPELLANT

v.

LOUIS ERSTE, INDIVIDUALLY, AND AS CHIEF OPERATING OFFICER OF THE DIVISION OF TRANSPORTATION, DISTRICT OF COLUMBIA PUBLIC SCHOOLS, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:03-cv-02623)

Before: ROGERS, TATEL, and SRINIVASAN, *Circuit Judges*.

J U D G M E N T

This appeal from the order of the United States District Court for the District of Columbia was presented to the court and briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed.

Appellant Alfred Winder served as the General Manager of the District of Columbia Public School's (DCPS) Transportation Division from August 1999 until April 3, 2003, when DCPS's Chief Operating Officer, Louis Erste, fired him. Winder subsequently filed this suit against the District, Erste, and others. Relevant here, he alleged that the District violated the D.C. Whistleblower Protection Act, D.C. Code §§ 1-615.51 et seq. (2001), that the District and Erste breached his employment contract, and that the two also violated his Fifth Amendment due process rights. The district court granted summary judgment in the defendants' favor on each of these claims. For the reasons set forth below, we affirm.

Winder first contends that he was fired in response to several disclosures he made about the District's efforts to comply with court orders in *Petties v. District of Columbia*, No. 95-148 (D.D.C. closed Dec. 19, 2012), a class action lawsuit related to the District's failure to provide

adequate transportation for special education students. Although Winder asserted in the district court that he made countless disclosures over a number of years that ultimately led to his firing, on appeal he takes issue with the court's disposition of only three of them—namely, his purported disclosures: (1) to Erste and others that Erste "diverted" $1.2 million from the transportation budget to programs that primarily served non-special education students; (2) to a D.C. City Council committee that Erste was to blame for a two-day "sick out," during which approximately forty percent of the district's bus drivers did not show up to work, because Erste discontinued a long-standing practice of paying drivers for accrued leave at the end of each calendar year; and (3) to Erste and the Inspector General's Office that Erste and DCPS's Operating Officer, Kennedy Khabo, filed false affidavits in the *Petties* case. Winder's characterizations of his disclosures, however, are not borne out by the record, and his brief fails to point to sufficient evidence from which "a reasonable juror with knowledge of the essential facts known to and readily ascertainable by the employee" could conclude that these disclosures evidenced an "objectively serious governmental act of gross mismanagement, gross misuse or waste of public funds, abuse of authority, a material violation of local or federal law, or a substantial and specific danger to public health and safety." *Coleman v. District of Columbia*, 794 F.3d 49, 58 (D.C. Cir. 2015) (internal quotation marks omitted); *see* D.C. Code § 1-615.52(a)(6); Fed. R. App. P. 28(a)(8)(A) ("The appellant's brief must contain . . . citations to the authorities and parts of the record on which the appellant relies . . . .").

With respect to the first, for instance, we agree with the district court that "Erste's allocation of budgetary priorities within DCPS cannot reasonably be considered evidence of 'gross mismanagement.'" *Winder v. Erste*, 905 F. Supp. 2d 19, 36 (D.D.C. 2012). It appears that Winder merely disagreed with Erste about the amount of money that should be spent on transportation, and disclosures to that effect are not protected. *See Zirkle v. District of Columbia*, 830 A.2d 1250, 1260 (D.C. 2003) (internal quotation marks omitted) ("A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct."). Winder, for his part, offers little more than conclusory assertions that a jury could find he had a reasonable basis to believe the reallocation violated the *Petties* orders. But he does not point to any evidence that the District was required to spend the $1.2 million on transportation, that the money was spent on anything improper, or that a lack of funds was the reason for the District's inability to comply with the *Petties* orders. Indeed, it seems money was not the problem. *See* Appellees' Br. 29 (citing DCPS Schedule of the Division of Transportation Budgets, Expenditures & Variances, FY 1999 through FY 2003, and Winder Dep. 36:20–22, Aug. 3, 2005) (explaining that the District spent $12 million more than was budgeted for transportation, which amounted to over $10,000 per special education student). For these reasons, Winder has also failed to show that he disclosed evidence of a gross misuse of public funds. *See District of Columbia v. Poindexter*, 104 A.3d 848, 857 (D.C. 2014) ("Gross waste of public funds is a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.").

With respect to his second alleged disclosure—i.e., that Erste was to blame for a two-day

"sick out" in January 2003—Winder has failed to put forth sufficient evidence from which a reasonable juror could infer that he disclosed evidence of gross mismanagement or other government wrongdoing. Although the evidence suggests he told a D.C. City Council committee that Erste was responsible for the "sick out" because he abruptly decided to stop paying drivers for accrued vacation leave, he could not have reasonably believed that such information alone was evidence of "gross mismanagement." As the District explains in its brief, the District had no obligation to pay drivers for accrued leave. And although the policy change might have been ill-advised, the change was not such a "serious error[] . . . that a conclusion the agency erred is not debatable among reasonable people." *Wilburn v. District of Columbia*, 957 A.2d 921, 925 (D.C. 2008).

Winder's brief can also arguably be read to suggest that he disclosed to the City Council committee that Erste failed or refused to take any action to prevent a work stoppage, despite Winder having repeatedly warned him that the change in policy would lead to labor problems. If true, such disclosure may have warranted protection under the Act. The District was, after all, under a court order to improve driver attendance, and a high-level official's failure to take any action to avert a "sick out" or to ensure the District's continued ability to provide adequate transportation in the event of a "sick out" could qualify as evidence of an objectively serious error. Yet even assuming Winder's brief can be read to make this argument, it fails to identify evidence to support a finding that he disclosed *this* information to the City Council committee.

Finally, although Winder told Erste and the Inspector General's Office that Erste and Khabo filed false and misleading affidavits in connection with the *Petties* litigation, the statements Winder says were false and misleading are so subjective that they almost defy proof of having been false, and he could not have reasonably believed he was disclosing evidence of a violation of the law or other government misconduct. To take just one example, he claims Erste falsely averred that "improving the transportation system ha[d] become the top priority of the agency, and [that Erste was] committed to working hands-on with others at DCPS and other relevant agencies to meet that goal." Winder Decl. ¶ 41 (2013) (internal quotation marks omitted). Although Winder may have genuinely and fervently believed this statement was untrue, the Act is not intended to protect disclosures about mere differences of opinion. *See Zirkle*, 830 A.2d at 1260. Because he offers nothing from which a reasonable jury could conclude that he had a reasonable basis to believe he was disclosing the filing of false affidavits, this aspect of his whistleblower claim fails as well.

One final note on Winder's whistleblower claims is in order. In the background section of his brief, Winder mentions a meeting at which Erste purportedly asked him to sign a false declaration in connection with the *Petties* case and Winder refused. *See* Appellant's Br. 12. Later, in the argument section, Winder makes a cursory suggestion that Erste also violated the DC-WPA by retaliating against him for refusing to comply with an illegal order. *See id.* at 18, 33. The DC-WPA would certainly protect an employee against such behavior. *See* D.C. Code § 1-615.53(a) ("A supervisor shall not take, or threaten to take, a prohibited personnel action or otherwise retaliate against an employee . . . because of an employee's refusal to comply with an

illegal order."). Winder's cursory treatment of this point, however, is insufficient to raise it on appeal, *see Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997), and, in any event, Winder has failed to direct the court to any evidence that Erste knew he was asking Winder to lie in a declaration.

Turning to Winder's breach of contract claim, he argues he had a one-year employment contract beginning July 22, 2002, and that the District and Erste breached it when they fired him roughly four months shy of its expiration date. The district court found that Winder did not have an enforceable contract because under municipal regulations pertaining to procurement and negotiated service contracts, Erste had no authority to execute the contract, and it is well established that "a contracting official cannot obligate the District to a contract in excess of his or her actual authority." *Winder v. Erste*, 60 F. Supp. 3d 43, 48 (D.D.C. 2014) (quoting *District of Columbia v. Greene*, 806 A.2d 216, 222 (D.C. 2002)). On appeal, Winder contends that those regulations are irrelevant because he was appointed under the Career Service provisions. If Winder was, however, part of the Career Service, he must have been a temporary appointee, *see* D.C. Mun. Regs. tit. 6, § 899.1 (2002) (defining a temporary appointment as "[a]n appointment with a specific time limitation of one (1) year or less"), and temporary appointees may be "separated without notice prior to the expiration date of the appointment," *id.* § 826.5. Erste thus lacked the authority under the Career Service provisions to bind the District to a one-year term contract, and Winder could be fired at will.

Last, Winder contends that Erste and the District violated his due process rights by firing him without a hearing. As the preceding analysis shows, Winder did not have a protected property interest in his contract. *See Orange v. District of Columbia*, 59 F.3d 1267, 1274 (D.C. Cir. 1995). Yet even if that were not so, his due process claims would still fail. Erste is entitled to qualified immunity because his actions in firing Winder without a hearing did not violate "clearly established . . . rights of which a reasonable person would have known." *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In particular, Winder's right to continued employment for the full year was far from clear—the vacancy notice for Winder's position indicated that he would serve at will; Erste had asked DCPS's General Counsel and its Human Resources Office what steps were necessary to fire Winder and both indicated he could be fired at will; and, as the past twelve years of litigation have demonstrated, Winder's employment status was difficult to discern. Erste is therefore shielded from liability. *See id.* ("The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." (internal quotation marks omitted)).

Winder has, moreover, failed to show that the District could be held liable for any conceivable due process violation. Although he contends that Erste was a final policymaker whose decisions could subject the District to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), he has failed to show that Erste had authority to set employment policy for the District. *See Singletary v. District of Columbia*, 766 F.3d 66, 73 (D.C. Cir. 2014).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is

directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk