COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1740

CHARLES H. MATTAR[1] & others[2]

vs.

ANDREA CABRAL[3] & another.[4]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiffs in this wrongful termination action are or were Suffolk County correction officers who claim that the defendants, the current and former sheriffs of Suffolk County, retaliated against them in violation of G. L. c. 152, § 75B (§ 75B), because the plaintiffs applied for and received workers' compensation benefits, terminated their employment without due process of law in violation of 42 U.S.C. § 1983, and should be ordered to reinstate them with back pay and benefits.

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[1] "As is our custom, we use the name of the [plaintiff] as it appears in the caption of the complaint." Turner v. Community Homeowner's Ass'n, 62 Mass. App. Ct. 319, 319 n.1 (2004).

[2] Michael Balzarini; Alfred Botticelli; Maria Lao Carrasquillo, administrator of the estate of Gerado Carrasquillo; William T. Gunning; David A. Hurvitz; Albert Mancini; Luther Miles; John Muriad; James J. O'Brien; Erik Shea; and Joseph Sollis.

[3] Individually and in her capacity as Suffolk County sheriff.

[4] Steven Tompkins, individually and in his capacity as Suffolk County sheriff.

On cross motions for summary judgment, a Superior Court judge granted summary judgment for the defendants, reasoning that the undisputed evidence showed that the plaintiffs were terminated due to economic necessity and were not entitled to a pretermination hearing in that circumstance. The plaintiffs appeal, arguing, among other things, that the judge failed to view the evidence in the light most favorable to them. We affirm.

Background. We summarize the undisputed material facts. In 2010, administration of the Suffolk County sheriff's department (department) was transferred from Suffolk County to the Commonwealth of Massachusetts. See St. 2009, c. 61. As a result, all of the department's employees became employees of the Commonwealth, and their health insurance was provided exclusively by the Commonwealth's insurer, the Group Insurance Commission (GIC). Prior to the transfer, the department's contribution to employee health insurance costs was included in its annual budget as a funded expense. After the transfer, as required by G. L. c. 32A, § 8A, the GIC charged the department for the cost of health insurance for employees who were on a leave of absence for more than one year. In 2012, the estimated annual cost of the charge back was $140,000.

Because this additional $140,000 was not in the department's budget and the department wanted to avoid the cost

in future years, the department administratively terminated all employees who had been on a leave of absence for more than one year. This included the plaintiffs, who were out on disability leave.[5] The department notified the plaintiffs that their employment was being administratively terminated. Ten of the letters stated, "You have been out of work on a medical leave of absence, currently receiving workers' compensation . . . benefits, for more than one year . . . [and] are currently incapable of returning to your former position." The other two letters referred only to the length of the plaintiffs' medical leave and their inability to return to work as reasons for the terminations. All of the letters stated that the plaintiffs would be rehired if their conditions improved. In 2013, one plaintiff did return to work. Nine others were approved for accidental disability retirement (ADR) benefits under G. L. c. 32, § 7, one plaintiff's application for ADR benefits was denied, and another was pending at the time the cross motions for summary judgment were filed.

The plaintiffs' employment was governed by a collective bargaining agreement (CBA) between their union and the

[5] Carrasquillo, Gunning, Hurvitz, Mattar, Miles, Muriad, O'Brien, and Sollis were terminated in February of 2012; Mancini in June of 2012; Botticelli and Shea in August and September of 2013, respectively; and Balzarini in January of 2017.

department which provided that the plaintiffs could only be terminated for "just cause." Pursuant to the CBA, the union challenged the terminations (except Balzarini's) through a two-step grievance process.[6] A hearing officer denied the grievances after a full hearing, reasoning that the plaintiffs were not capable of returning to their former positions. On June 13, 2012, the union submitted the grievances to arbitration.

In October of 2013, the plaintiffs filed their complaint. After the defendants moved to dismiss the complaint for failure to state a claim, the action was stayed to allow the parties to participate in arbitration. The union withdrew the plaintiffs' arbitration requests on August 21, 2014, over three years before the summary judgment motion was filed.

Discussion. Summary judgment is appropriate if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "We review the allowance of a motion for summary judgment de novo to determine whether the moving party has established that, viewing the evidence in the light most favorable to the opposing party, 'there is no genuine issue as to any material fact and that the moving party is entitled to a

[6] Balzarini was not terminated until 2017, long after the union had withdrawn its requests for arbitration.

judgment as a matter of law'" (citation omitted). Scarlett v. Boston, 93 Mass. App. Ct. 593, 596-597 (2018).

1. Retaliation. Plaintiffs seeking to recover for retaliatory discharge in violation of § 75B must make a prima facie showing that "1) [they] engaged in an activity protected by the Workers' Compensation Act, 2) the defendant was aware of that protected activity, 3) the defendant thereafter took an adverse employment action against the plaintiff and 4) but for the plaintiff's activity the defendant would not have taken such an adverse employment action." Canfield v. Con-Way Freight, Inc., 578 F. Supp. 2d 235, 242 (D. Mass. 2008) (applying Massachusetts law). The first three elements are not in dispute. The plaintiffs contend that their termination letters raise a triable issue with respect to the fourth element because the letters identify the plaintiffs' receipt of workers' compensation benefits as the reason for termination. We disagree.

The letters do not "admit," as the plaintiffs claim, that the terminations were based on their receipt of workers' compensation benefits. Two of the termination letters do not mention workers' compensation benefits at all. The other letters, considered in context and in a common sense fashion, imply that the terminations were the result of the plaintiffs' absence from work for over a year with no prospect of returning,

not by their receipt of workers' compensation benefits. This interpretation is supported by the undisputed evidence that the health care costs for the department's employees on leave for over one year had shifted to the department. It is uncontested that the burden of paying an additional $140,000 annually for the plaintiffs' health insurance would have a negative impact on the department's operating budget. In this circumstance, "a good faith administrative determination of lack of funds . . . is a valid basis for the consequent termination of employment." Shaw v. Board of Selectmen of Marshfield, 36 Mass. App. Ct. 924, 925 (1994).

Moreover, there is no dispute that the plaintiffs had claimed and received workers' compensation benefits for years before they were terminated. Nothing in the record suggests that the payment of workers' compensation benefits to the plaintiffs imposed any financial burden on the department. Rather, the financial burden was the result of the transfer of health care costs for any employee out of work for over one year. These undisputed facts negate any inference that the terminations were motivated by the plaintiffs' workers' compensation benefits. See Sullivan v. Raytheon Co., 262 F.3d 41, 50 (1st Cir. 2001), cert. denied, 534 U.S. 1118 (2002) (discussing § 75B). "The mere fact that one event followed another is not sufficient to make out a causal link."

MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996). Simply put, we agree with the judge's conclusion that, even when the facts are viewed in the light most favorable to the plaintiffs, no reasonable trier of fact could find that the department terminated the plaintiffs in retaliation for collecting workers' compensation benefits.

2. Due process. To succeed on their due process claim, the plaintiffs must show that the defendants' actions deprived them of a constitutionally protected property right and the deprivation occurred without due process of law. Senra v. Smithfield, 715 F.3d 34, 38 (1st Cir. 2013).[7] Due process does not require a fixed procedure, but calls for "such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976), quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972). We look to the totality of the pretermination and posttermination proceedings to determine if the plaintiffs received sufficient procedural due process. See Senra, supra at 38-39.

The judge concluded that the plaintiffs were not entitled to pretermination hearings because the terminations were based

[7] In resolving this issue, we assume, as did the judge, that the plaintiffs had a protected property right in their continued employment. See Perkins v. Board of Directors of Sch. Admin. Dist. No. 13, 686 F.2d 49, 51 (1st Cir. 1982) (employee who can be removed only for cause has constitutionally protected property interest).

on economic necessity. See Jermain v. Board of Regents, 23 Mass. App. Ct. 428, 435 (1987). The plaintiffs claim error in that ruling, arguing that the record did not establish economic necessity. There is no dispute that the transfer of the plaintiffs' health insurance to the GIC added an annual expense of approximately $140,000. It is also undisputed that the $140,000 was not part of the department's operating budget. It is reasonable to infer from these uncontested facts that the additional expense would have a negative impact on the department's operations. The plaintiffs have offered no contrary evidence. Thus, there was record support for the judge's conclusion that the terminations were based on economic necessity. But, even were we to conclude that there was a genuine issue of material fact as to whether the terminations were financially necessary, the plaintiffs' rights to procedural due process were not violated.

Before terminating the plaintiffs, the department provided the union with notice of the potential termination of employees who had been on medical leave for over one year and explained the reason for the change in policy. Employees who were physically able to do so were given the opportunity to return to work. The department's notice invited union leaders to contact counsel for the department to discuss the policy change, and union officials did so. After the plaintiffs were terminated,

the union filed grievances challenging the terminations as discriminatory and without just cause. A hearing officer twice denied the grievances after full hearings, concluding that there was just cause for the terminations under the CBA. The union then submitted the plaintiffs' grievances to arbitration. Thus, the plaintiffs received constitutionally adequate procedural safeguards. See Wojcik v. Massachusetts State Lottery Comm'n, 300 F.3d 92, 102 (1st Cir. 2002) (pretermination opportunity to respond and posttermination opportunity to arbitrate satisfied due process).[8]

3. Mandamus. The plaintiffs also sought relief in the nature of mandamus pursuant to G. L. c. 249, § 5. Specifically, the complaint demanded that the department comply with G. L. cc. 152 and 32, and reinstate the plaintiffs with back pay and benefits.[9] Mandamus relief is an extraordinary remedy, granted only to prevent a failure of justice and in instances where there is no other adequate remedy. See Coach & Six Restaurant,

[8] We are not persuaded by the plaintiffs' claim that their due process rights were violated because posttermination arbitration was limited to issues covered by the CBA and was available only to the union, not to the plaintiffs individually. Nothing in the summary judgment record suggests that the plaintiffs' individual interests were not adequately represented by the union.

[9] The plaintiffs concede that defendant Cabral is no longer a government official and that the claim of mandamus is not available as to her.

Inc. v. Public Works Comm'n, 363 Mass. 643, 644 (1973). A party seeking mandamus relief must first exhaust all administrative remedies. Holbrook v. Board of Selectmen of E. Bridgewater, 354 Mass. 769, 770 (1968).

Here, with respect to the claim that the department violated G. L. c. 152 by retaliating against the plaintiffs for seeking and receiving workers' compensation benefits, the plaintiffs abandoned their arbitration claims and therefore failed to exhaust their administrative remedies.

The plaintiffs' argument that the terminations violated the retirement statute because the department failed to implement an early intervention plan (EIP) pursuant to G. L. c. 32, § 5B (§ 5B), fares no better. First, most of the plaintiffs applied for ADR, indicating that they were incapable of performing the duties of their jobs.[10] As to the plaintiffs who were granted ADR,[11] any order requiring the department to implement an EIP to assist with rehabilitation would be moot because those plaintiffs no longer have a personal stake in the outcome.[12] See Delaney v. Commonwealth, 415 Mass. 490, 492 (1993). Second, the

[10] Officer Miles did not apply for ADR. He returned to work in April 2013.

[11] All applications for ADR were approved with the exception of Officer Gunning.

[12] We note that the plaintiffs who are receiving ADR benefits presumably are engaged in rehabilitation services as a condition of receiving those benefits. G. L. c. 32, § 8.

development and implementation of an EIP under § 5B must be undertaken "in consultation with appropriate officials of the governmental unit and representatives of the unions in the governmental unit." G. L. c. 32, § 5B (a). In other words, it is subject to collective bargaining. See Foresta v. Contributory Retirement Appeal Bd., 453 Mass. 669, 678 n.10 (2009). Since the department cannot unilaterally implement an EIP under § 5B, mandamus is not an appropriate remedy.

Finally, to the extent that the plaintiffs claim violations of § 5B related to retirement and therefore not subject to arbitration under the CBA,[13] the plaintiffs must look first to the retirement board for a remedy. See G. L. c. 150E, § 7 (e) ("The retirement board shall review collective bargaining agreements for compliance with chapter 32"); Fernandes v. Attleboro Hous. Auth., 470 Mass. 117, 121 (2014) (discussing doctrine of primary jurisdiction). For all of these reasons, the extraordinary relief of mandamus was not available to the

[13] The CBA provides that "[a]ny matter which is subject to the jurisdiction of . . . any Retirement Board established by law shall not be a subject of grievance or arbitration hereunder."

plaintiffs, and summary judgment was properly granted.[14]

Judgment affirmed.

By the Court (Green, C.J.,
Kinder & Englander, JJ.[15]),

Joseph F. Stanton

Clerk

Entered: February 10, 2021.

[14] Deciding the case as we do, we need not address the defendants' argument that they are entitled to qualified immunity.

[15] The panelists are listed in order of seniority.