20180336
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 29, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Aaron L. Cockfield, Petitioner and Appellant, vs. City of Fargo, Respondent and Appellee,	Supreme Court No. 20180336 District Court No. 09-2018-CV-00386

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JULY 24, 2018, ORDER ON SUMMARY JUDGMENT AND THE JUDGMENT OF AUGUST 14, 2018

CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN E. MCCULLOUGH

Leo F.J. Wilking (ND ID 03629)
WILKING LAW FIRM
P. O. Box 3085
Fargo, North Dakota 58108-3045
Phone: (701) 356-6823
E-Service: lwilking@wilkinglaw.com
ATTORNEY FOR APPELLANT AARON L. COCKFIELD

[¶ 1] **TABLE OF CONTENTS**

Paragraph Number

[¶ 2] **TABLE OF AUTHORITIES**

Cases **Paragraph Number**

[¶3] **STATEMENT OF FACTS**

[¶4] In its Brief, the City of Fargo maintains that "Ludlum…discussed the incident and information he obtained during an investigation including Cockfield's email dated August 1, 2017, and interviews of other solid waste employees." (Brief of Appellee, p. 4, ¶10) To the contrary, nothing of the kind occurred as regards "the information [Ludlum] obtained" or the "interviews of other solid waste employees," and the City of Fargo has admitted as much.

[¶5] In the "Stipulated Facts" submitted to the district court, the City of Fargo conceded that "Ludlum did not advise Cockfield as to what employees had been interviewed, what employees had provided written statements or what the employees had stated." (App. 37-38, ¶13)

[¶6] Ludlum telling Cockfield "…we visited with other people that were in the room" and "That's not what we're hearing from other parties" is hardly a "discussion." (App. 48, line 11 and App. 49, line 4) It's more of a sermon, especially as Ludlum never identified the "other people" in the break room with whom he had visited and didn't share with Cockfield what he was "hearing from other parties."

[¶7] Later in its Brief, the City of Fargo casually admits that the statement dated August 24, 2017, from Patrick T. English, "[o]bviously…could not have been provided to [Cockfield] at the pre-termination meeting on August 22, 2017, as it was not obtained until after such meeting and termination of Cockfield's

employment." (Brief of Appellee, p. 16, ¶39) Appellee is apparently untroubled that evidence which didn't even exist at the time of Cockfield's termination was later presented to the Civil Service Commission and City Commission in support of that termination.

[¶8] But of even greater concern is the assertion that Patrick's statement was essentially meaningless because it only stated that he "witnessed the incident on July 28" and the "rest of the statement is nothing more than a personal opinion expressed by Mr. English and does not contravene the uncontroverted facts." The City of Fargo goes on to state that "[u]ltimately, Cockfield presented to the Civil Service Commission a transcript of a recorded interview Cockfield had with Mr. English on August 27, 2017. (App. 62)."(Brief of Appellee, p. 16, ¶39)

[¶9] First, there was no recorded interview with Patrick English. The recorded interview at Appendix 62 was with Mark Steffens.

[¶10] Secondly, the statement contains much more than a "personal opinion expressed by Mr. Patrick." Patrick asserts that Cockfield "used physical assault and verbal violence on Shawn Eckre, his immediate supervisor…" The City of Fargo clearly included this statement in the evidence submitted to the Civil Service Commission and City Commission to bolster its case that Cockfield had engaged in workplace violence.

[¶11] Finally, and most significant of all, if Cockfield had been provided with this statement before he was terminated, he would have told Ludlum that

shortly after the incident on July 28, 2017, English admitted to Cockfield that he was in the hallway leading to the break room and did not see what occurred in regard to the altercation between Eckre and Cockfield. (App. 6, ¶13)

[¶12] **ARGUMENT**

[¶13] **I. The District Court abused its discretion in holding that Cockfield was provided with adequate pre-termination due process in connection with the termination of his employment.**

[¶14] The City of Fargo admits – as it must – that both the U.S. Supreme Court and the U.S. Court of Appeals for the Eighth Circuit have decreed that pre-termination due process must include "an explanation of the employer's evidence." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Sutton v. Bailey*, 702 F.3d 447 (8th Cir. 2012); (Brief of Appellee, pp. 10-11, ¶¶ 25, 27)

[¶15] But the City of Fargo then embarks on a tortured argument that Cockfield was in fact given an adequate explanation of the employer's evidence because he was not entitled to receive materials such as "an investigative transcript" or "investigative report" or "all the details underlying the charges against [Cockfield]." (Brief of Appellee, p. 12, ¶30) The crux of this argument and allegedly supporting case law is on Page 12 of the Brief of Appellee.

[¶16] Leaving aside the fact that there was no "investigative transcript" or "investigative report" in this case, while Cockfield may not have been entitled to

"all the details" of the evidence in the City of Fargo's possession, he was at least entitled to the critical details.

[¶17] For example, Ludlum didn't tell Cockfield that in Eckre's statement, Eckre contended that "[Cockfield] took a step toward me and pushed me with both his armes [sic] into the wall." (App. 57) Nor did Ludlum share with Cockfield that Mark Steffens, the only individual who witnessed the altercation, said nothing in his statement about Cockfield taking a step toward Eckre and instead stated "Shawn started at him at little more than a foot walk. Aaron got up out of his chair and used both hands to Shawn's chest to push [Eckre] back…." (App. 59, emphasis supplied) This contradicted Eckre's version of events but was entirely consistent with what Steffens later told Cockfield in a recorded interview: "You were sitting in your chair. You got up and you pushed him with both hands on his chest." (App. 62, emphasis supplied)

[¶18] Can the City of Fargo seriously dispute that there is an enormous difference between a supervisor rapidly advancing toward an employee and the employee standing up to protect himself by pushing the supervisor away, on the one hand, and on the other hand, the employee advancing toward the supervisor and then giving him a push? Would it not have been helpful to Cockfield to know what Eckre had told Ludlum and that Eckre had been contradicted by Steffens?

[¶19] Even more damaging to the City of Fargo's argument is that the cases it cites do not support its position.

[¶20] In *Groenewold v. Kelley et al*., 888 F.3d 365 (8th Cir. 2018), Plaintiff was the Director of the Energy and Environmental Research Center at the University of North Dakota. His employment was terminated by UND President Robert O. Kelley on multiple grounds. Groenewald filed suit in Federal court, alleging that UND had violated his First Amendment free speech rights and his right to due process under the Fourteenth Amendment.

[¶21] In affirming U.S. District Judge Ralph Erickson's grant of UND's motion to dismiss, the Eighth Circuit noted the extensive amount of "evidence" which Groenewald was provided as to the grounds for his termination, including a letter from President Kelley that cited Groenewold providing false information, Groenewold directing his employees to submit false information, and Groenewold creating an abusive work environment. The letter set forth 25 examples of Groenewold's improper conduct. *See*, *Groenewold*, 888 F.3d at 369-370.

[¶22] Whereas Groenewold was provided with 25 examples of the alleged behavior justifying his termination, Cockfield was simply told he had failed to obey a directive from his supervisor and had engaged in "workplace violence."

[¶23] The City of Fargo's citation to *Krentz v. Robertson*, 228 F.3d 897, 903 (8th Cir. 2000) is a mystery as the opinion contains no discussion of the employer's duty or lack of duty to disclose all relevant facts. Its reference to *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977) is equally puzzling as in that case the court found that "the petitioner was provided in advance of the hearing with copies of all proposed exhibits, a list of all proposed witnesses,

the identity of the government employees who had investigated the case and copies of memoranda reflecting petitioner's own statements to administrative representatives." That is far more evidence than Cockfield was provided.

[¶24] The City's citations to inapposite cases go on. In *Sutton v. Bailey*, 702 F.3d 447 (8th Cir. 2012), Sutton was terminated in the first week of November 2010 for placing on his Facebook page the following post: "Toby Sutton hopes this teaching gig works out. Guess I shouldn't have cheated through mortuary school and faked people out. Crap!"

[¶25] In finding that the November 2010 meeting with Sutton satisfied the minimal pre-termination requirements set forth in *Loudermill*, the Eighth Circuit noted as follows:

> Appellants provided Sutton oral notice of the charge and the employer's evidence against him when Bailey read his June 2010 Facebook statement aloud. Sutton admitted to posting the statement, obviating the need for Appellants to provide further evidence that he was guilty of the alleged misconduct.

702 F.3d at 448.

[¶26] The City of Fargo also cites *Larson v. City of Fergus Falls*, 229 F.3d 692 (8th Cir. 2000), which does indeed state that "the employer [is not] required to provide all the details of the charges against the employee." But *Larson* is not helpful in the context of this case because it doesn't spell out what "details" the employee was not provided.

[¶27] As to the trio of cases near the bottom of Page 12 of the Brief of Appellee – *Rana v. United States*, 812 F.2d 887 (4th Cir. 1987); *Myrick v. City of Dallas*, 810 F.2d 1382 (5th Cir. 1987); and *Jones v. Board of Education*, 651 F.Supp. 760 (N.D. Ind., 1986) – neither *Rana* nor *Myrick* address the proposition for which they are cited, i.e. "there is no requirement that an employee must be furnished with all evidence at a pre-termination hearing."

[¶28] With regard to *Jones*, in which a physical education teacher was accused of using excessive force on one of his students, it is true that the court rejected the teacher's argument that he should have been supplied with the statements of the student witnesses. But note how the court couched that decision in its opinion:

> Finally, Jones' due process rights were not impinged upon by Garber's failure to provide him with the actual written statements of the student-witnesses before his suspension. *Loudermill* required only that Garber explain the evidence against Jones to him—as he unquestionably did (see the post-*Loudermill* decision in *Leftwich v. Bevilacqua*, 635 F.Supp. 238, 241 (W.D.Va.1986)).

651 F.Supp. at 765-766.

[¶29] In contrast, Cockfield maintains that Ludlum "unquestionably" did not explain the evidence against him as that evidence was reflected in various written statements.

[¶30] In its Brief, the City of Fargo does not even try to distinguish this Court's seminal, landmark case on the required pre-termination due process owed to a public employee with a constitutionally protected property interest in

continued employment: *Rudnick v. City of Jamestown*, 463 N.W.2d 632 (N.D. 1990). In *Rudnick*, the Jamestown police officer was given written notice of the charges against him before he was demoted, received a copy of the written investigation report on his alleged misconduct, and was given a pre-demotion hearing before the Discipline Review Board.

[¶31] In its decision, this Court cited the following language from *Loudermill*:

> …the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action....

463 N.W.2d at 639.

[¶32] On July 28, 2017, Cockfield pushed away a man who was walking "rapidly" toward him, with "body language that seemed threatening," "nose flaring," and with "spittle" flying out of his mouth. (App. 43) Was Cockfield's action "workplace violence" or would it more accurately be described as self-defense? Without access to the key evidence utilized by the City of Fargo – the contents of the written statements of Eckre, Steffens and English – Cockfield could not effectively argue that Ludlum's decision to terminate him was a "mistaken decision."

[¶33] **CONCLUSION**

[¶34] For all the reasons cited herein, Petitioner Cockfield respectfully submits that he was deprived of his Fourteenth Amendment right to due process in connection with the termination of his employment by the City of Fargo.

Dated this 29thth day of November, 2018.

/s/ Leo F.J. Wilking
Wilking Law Firm, PLLC
3003 32nd Ave. S., Ste. 240
P. O. Box 3085
Fargo, North Dakota 58108-3085
Phone: (701) 356-6823
lwilking@wilkinglaw.com

[¶35] **CERTIFICATE OF COMPLIANCE**

[¶36] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 13-point font, proportional typeface and that the total number of words does not exceed 2,000 from the portion of the brief entitled "Statement of Issues" through the signature block. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

[¶37] Dated: November 29, 2018.

/s/ Leo F.J. Wilking
Leo F.J. Wilking (ND # 03629)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Aaron L. Cockfield, Petitioner and Appellant, vs. City of Fargo, Respondent and Appellee.	Supreme Court No. 20180336 District Court No. 09-2018-CV-00386 **CERTIFICATE OF SERVICE**

[¶1] I, Marlene Schumacher, hereby states that she is of legal age and that on November 29, 2018, the following documents were served on all individual Parties:

- **Appellant's Reply Brief.**

[¶2] Service was completed by sending true and correct copies to the following address(es):

Howard Swanson - hswanson@swlawltd.com

[¶3] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[¶4] I declare under penalty of perjury that everything I have stated in this document is true and correct.

_/s/Marlene Schumacher_____
Marlene Schumacher