

HELEN E. KING,)
)
 Plaintiff/Appellant,)
)
 VS.)
)
 METROPOLITAN GOVERNMENT)
 OF NASHVILLE AND DAVIDSON)
 COUNTY, TENNESSEE,)
)
 Defendant/Appellee.)

Davidson Circuit
No. 93C-2150

Appeal No.
01A01-9511-CV-00529

FILED

July 31, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

HONORABLE HAMILTON GAYDEN, JUDGE

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AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE

SEPARATE CONCURRING OPINION
WILLIAM C. KOCH, JR., JUDGE

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OPINION

Plaintiff, Helen E. King, has appealed from an unsatisfactory non-jury judgment in her suit against the captioned municipality for wrongful discharge.

The complaint prayed for judgment for “back pay and benefits” and reinstatement.

The judgment of the Trial Court contains the following findings:

- (1) Plaintiff was a 14 to 15 year employee who was given an immediate separation notice and was an employee at will;

The Trial Court awarded plaintiff judgment for \$13,600, but did not order reinstatement.

Plaintiff presents two issues for review, of which the first is:

- 1. Did the trial court err in finding that the plaintiff was an employee at will?

The complaint states and the answer admits:

- 3. Plaintiff was employed by the defendant Metropolitan Government on or about January 16, 1978 and was assigned to work in the Mayor’s Employment & Training Resources Agency, (METRA) a division of the Metropolitan Government of Nashville, Davidson County, Tennessee where she worked up to the time of her termination on October 14, 1992. . . .

The complaint asserts, and the answer does not deny, that plaintiff's employment contract was Executive Order No. 91-02 which is exhibited to the complaint. It contains the following:

Employment practices of the Metropolitan Government shall be administered in such manner as to comply fully with the Civil Rights Act of 1964 as amended. Guidelines on discrimination, applicable laws concerning equal employment opportunity, and provisions for a utilization analysis are set out and attached as Exhibit "A" to this Executive Order and are considered to be a part of this Equal Employment Opportunity Policy.

"Exhibit A" to the foregoing quotation is not included in this record.

Section 12.08 of the Charter of defendant states:

Sec. 12.08 Positions in classified service and in unclassified service. (Footnote omitted.)

All positions in the metropolitan government shall be in the classified service except the following, which are hereby declared to be in the unclassified service.

(a) All officers of the metropolitan government and of the county elected by popular vote, and officers appointed to fill vacancies in any such elective position.

(b) The director of finance, private secretaries of directors as designated herein, the administrative assistants to the mayor, the metropolitan attorney, the deputy metropolitan attorney, the assistant metropolitan attorneys, and employees in the office of the mayor, exclusive of any such employees who may have otherwise attained a civil service status prior to the effective date of this Charter. . . .

There is no evidence that plaintiff had "otherwise attained a civil service status."

Therefore, plaintiff's rights to continued employment were contained only in Executive Order No. 91-02 and its "Exhibit A," the Civil Rights Guidelines. Neither brief cites or discusses the Civil Rights Act of 1964 as amended.

Plaintiff's brief cites testimony that plaintiff was "protected by the Civil Service Rules and Regulations" of the defendant, which were incorporated into the rules and regulations of METRA (the division of the mayor's office in which plaintiff was employed.)

The powers of the mayor of a municipality depend wholly on the charter thereof. *Weil Roth & Co. v. Town of Newbern*, 126 Tenn. 223, 148 S.W. 680, LRA 1915 A 1009, Ann. Cas. 1913 E. 25.

A municipal officer has only such powers as are expressly or impliedly conferred upon him by constitutional, statutory charter provisions, ordinances or other provisions. 62 C.J.S. Municipal Corporations §62, pp. 541-42.

Certainly, a subordinate of a mayor has no power by testimony to supersede provisions of the Charter of the City.

The record contains no competent evidence that plaintiff's employment was subject to any civil service regulation, and the only limitation shown upon the power of discharge is the reference to the "Civil Rights Act" in Executive Order 91-02, quoted above.

As already indicated, the Trial Judge found that plaintiff was an employee at will, but that she had not initially been accorded her rights to a grievance procedure, and granted her damages for the delayed grievance procedure. The defendant does not challenge this finding on appeal.

The finding by the Trial Judge of "employment at will" was coupled with a finding of a right to a "grievance procedure" which was delayed in its grant to plaintiff.

No error is found in the finding that the plaintiff's employment was "at will - subject to a grievance procedure." In this light, the first issue presents no reversible error.

Plaintiff's second issue complains that she was terminated without a hearing. The record shows the following events:

- October 14, 1992: Letter of Termination
- October 26, 1992: Meeting of Plaintiff's superior with plaintiff and her representative.
- October 29, 1992: Letter to plaintiff reaffirming discharge and explaining grievance procedure.
- December 2, 1992: Letter to plaintiff stating reasons for termination.
- (Date Unstated): Hearing before the Chairman of the "Private Industry Committee" appointed by the Mayor to monitor the operation of the division in which plaintiff was employed.

It does appear that plaintiff was accorded a hearing.

The second issue also complains of the finding that defendant had cause to terminate plaintiff. The cause was deficiency in the performance of plaintiff in her relations with the Employment Training Division of the Tennessee Department of Labor, the source of funding for the division in which plaintiff was employed.

Plaintiff's issue suggests some defect in the proceedings in utilizing an "after discharge discovery" such as that involved in *McKennon v. Nashville Banner Publishing Co.*, 6th Cir. 1993, 9 F.3d 539. However, plaintiff's brief states:

. . . The *McKennon* case had nothing to do with the rights of an employee growing out of contract but simply dealt with the application of the *Age Discrimination in Employment Act of 1967*, 29 U.S.C. §621 *et seq* to cases where evidence of wrongdoing was discovered after a discharge which violates the Act. . . .

Moreover, plaintiff's deficiency was known to her superior at the time of her initial discharge, but was not revealed to plaintiff at that time in the mistaken belief that cause was not needed for discharge. It was this delay in disclosing the true cause of discharge and providing a hearing thereon that induced the Trial Judge to award the \$13,600 judgment.

Plaintiff argues that she was not accorded the benefit of procedures set out in the Civil Service Manual which, she alleges, was delivered to her at her employment. As already

pointed out, only an amendment of the Charter of defendant would make the Civil Service Regulations applicable to plaintiff.

Plaintiff also complains that the person who heard her appeal from discharge was not a city official, but was a private businessman who chaired a public surveillance committee to keep watch on the division of the mayor's office where plaintiff worked. No breach of due process is found in the designation of such a person to hear plaintiff's appeal.

In summary, the record shows that plaintiff has been recompensed for any legitimate complaint as to unreasonable discharge, and that she has no grounds for additional relief.

The judgment of the Trial Court is affirmed. Costs of this appeal are taxed against the plaintiff. The cause is remanded to the Trial Court for any necessary, further proceedings.

Affirmed and Remanded.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

SEPARATE CONCURRING OPINION:
WILLIAM C. KOCH, JR., JUDGE