STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. ANDERSON,

Plaintiff-Appellee,

v

DETROIT PUBLIC SCHOOLS and MARTHA SUTTON,

Defendants-Appellants,

and

ROSIE MARIE EVANS, GEORGE PIERCE, GEORGE KIMBROUGH, GORDON ANDERSON, DAVID SNEAD, DEBORAH MCGRIFF, LAWRENCE BOYER, and BEVERLEI OWENS, jointly and severally,

Defendants.

UNPUBLISHED
October 9, 2001

No. 215054
Wayne Circuit Court
LC No. 96-621258-NO

Before: Holbrook, Jr., P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendants Detroit Public Schools (DPS) and Martha Sutton appeal as of right from a judgment entered in plaintiff's favor following a jury trial. The jury awarded plaintiff $382,644.25 in past and future damages against Sutton, and $500,000 in past damages against DPS. The court reduced the award against Sutton to a present cash value of $362,387.26. Plaintiff was also awarded $53,558.39 in mediation sanctions. We reverse and remand.

Plaintiff began working as a teacher for DPS in the Fall of 1964. In 1967, plaintiff began coaching various after-school sports. After receiving his masters degree in guidance and counseling from the University of Michigan, plaintiff also began to work as a counselor for DPS. In 1989, he was assigned to work as a counselor at Northwestern High School. In 1991, Sutton, Northwestern's principal, removed plaintiff from the positions of head football coach and boy's tennis coach. Plaintiff never resumed his coaching duties at Northwestern.

In June 1992, plaintiff filed a request for transfer to Kettering High School. Although plaintiff did not renew the request for the following year, Sutton informed plaintiff when he reported back to school for the 1993 academic year that he had been transferred to Kettering. Plaintiff filed a grievance over the transfer. During the grievance procedure, plaintiff learned that three "Undesirable Incident Reports" (UIRs) were contained in his employment record. The first report, dated September 3, 1993, indicated that plaintiff had been spotted at 8:00 PM two days prior "removing boxes and other items from the [Northwestern] counseling center," and that he had gained entry via possession of a set of unauthorized building keys. The second report, dated September 9, 1993, stated that plaintiff had entered Northwestern at 12:35 PM the day before. The third report, dated October 19, 1993, lists the type of incident being reported as "larceny from a building." The report states that two counseling staff members discovered that a "student alpha list" was taken from Northwestern's counseling center. This list apparently includes student names, phone numbers, addresses, and dates of birth. Although the report does not specifically so indicate, it implies that plaintiff was involved in the unauthorized removal of the list.[1] Plaintiff testified that subsequent to learning about the UIRs, individuals outside of the grievance process, including a next door neighbor, came up to him and asked about the allegations contain therein. Ultimately, plaintiff's grievance was settled and he returned the following year to his position at Northwestern.

Plaintiff also complained of an incident involving a union bulletin board at Northwestern. Plaintiff was elected union representative at Northwestern for the 1995-1996 school year. In a DPS memorandum dated August 29, 1996, Sutton wrote to plaintiff the following: "Please refrain from posting information on the Union bulletin board. Northwestern does not have a Union representative at this time. NO ELECTION WAS HELD LAST YEAR." In response, the Detroit Federation of Teachers sent a letter to Sutton informing her that plaintiff was the union representative at Northwestern, and he should not be stopped from posting material on the bulletin board.

Plaintiff retired from employment with DPS at the end of the 1996-1997 school year. Plaintiff filed his multi-count lawsuit in March 1996.

Defendants first argue that because the graveman underlying all of plaintiff's claims was contractual, not tortious, the lower court erred in denying defendants' motion for summary disposition because plaintiff's claims were exclusively remediable by the collective bargaining agreement. We disagree. When a party brings a motion for summary disposition, courts "look

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[1] The third UIR reads in pertinent part:

> The center was enter[ed] by key entry (not a break in). Former counselor Mr. Anderson has been alleged to be still calling students at home even though he is no longer counselor over them at Northwestern High School. During evening school Mr. Anderson has been observed by staff in the bldg. Thur. Oct. 14, and Fri. Oct. 15, 93. It is reason to be Mr. Anderson can still be in possession of grand master duplicate key due to him being observed in the area of the fourth floor counselor center after regular school hours, has no reason to be on 4th floor, last payroll check has been pick up by Mr. Anderson for over (1) month ago [sic].

beyond the face of a plaintiff's pleadings to determine the gravemen or gist of the cause of action contained in the complaint." *Sankar v Detroit Bd of Education*, 160 Mich App 470, 474; 409 NW2d 213 (1987).

> It is axiomatic that an employee contesting his rights under a collective bargaining contract must insofar as possible exhaust the grievance procedures set forth in that contract before turning to the courts for relief. The reason for the rule is both apparent and sound. A collective bargaining contract fashions certain rights between an employer and employee and also creates a method for resolving any future disputes arising out of these rights . . . . In the event of a disagreement over these particular contractually created rights, it is only reasonable and equitable that the parties settle their differences by the mutually agreed upon method specified in the labor contract before looking to the judiciary for assistance. The language and factual context of the cases in this area coupled with the foregoing rationale of the exhaustion rule, however, patently indicate *that the exhaustion requirement is applicable only when an employee alleges a violation of his rights created under the labor contract*. [*Barry v Flint Fire Dep't*, 44 Mich App 602, 606; 205 NW2d 627 (1973)(citations omitted)(emphasis added).]

Regarding Sutton, plaintiff's argument below was that she had engaged in a pattern of behavior that was tortious in several ways, including (1) removal from his coaching positions, (2) removal as chair of the Scholastic Aptitude Test (SAT), (3) an "illegal transfer" to Kettering, (4) false statements in the three UIRs, and the subsequent publication of these defamatory falsehoods, and (5) interfering with his union responsibilities. Each of these involve responsibilities Sutton possessed vis-à-vis her employment, and each involve harms related to plaintiff's employment. However, an employer or its agent cannot hide from liability for tortious behavior simply because the individual elements, individual incidents that make up the pattern of behavior at issue are related to the employee's job. This would, in effect, immunize a defendant in such situations from the consequences stemming from what is, essentially, tortious behavior.

In short, Sutton had a duty of reasonable care that arises because of the relationship between her and plaintiff. Conceptually, the duty alleged by plaintiff to have been breached is in addition to the contractual breaches that defined it; plaintiff is not claiming that Sutton simply failed to perform a contractual promise. Accordingly, we conclude that the trial court correctly denied defendants' motion for summary disposition of plaintiff's claims against Sutton. However, we agree with DPS that plaintiff cannot, and should not have been allowed to maintain his constitutional cause of action against DPS because of the availability of adequate alternative remedies. *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000).

Next, we find no merit in defendants' argument that the trial court erred in denying defendants' motion for summary disposition on the tort claims brought against Sutton because such claims were barred by the doctrine of governmental immunity. Sutton has failed to show that plaintiff's intentional tort claims were barred by governmental immunity before July 7, 1986. MCL 691.1407(3); *Sudul v Hamtramck*, 221 Mich App 445, 487; 562 NW2d 478 (1997)(Murphy, J., concurring in part and dissenting in part). Accordingly, Sutton alleged "intentional torts are not shielded by [Michigan's] governmental immunity statute." *Id.* at 458.

We also reject defendants' assertion that the trial court erred in denying the motion for

summary disposition on plaintiff's claim of gross negligence against Sutton because that claim was barred by MCL 691.1407(2). Defendants argued below that summary disposition under MCR 2.116(C)(7) was warranted because no reasonable juror could find that the transfer to Kettering and the retention of the UIRs amounted to grossly negligent conduct given that each action fell within Sutton's scope of authority. Plaintiff alleged, however, that his transfer had not been requested for that school year, and that the allegations contained in the UIRs were both wrong and defamatory and had spread throughout the community. He also claimed that these two incidents were just a part of a pattern of harassment undertaken by Sutton. Plaintiff asserted that this pattern of harassment was also evidenced by a letter of warning that addressed plaintiff's alleged absences from several graduation ceremonies, his replacement as a presenter at graduation ceremonies, the incident regarding the union bulletin board, his allegedly wrongful removal from his coaching positions and the subsequent refusal to reinstate him, and his removal from the chair of the SAT. Considering all the documentary evidence submitted up to the time of the motion, and accepting all of plaintiff's well-pleaded allegations as true and construing them in plaintiff's favor, we believe defendants failed to establish that plaintiff claim of gross negligence should be summarily dismissed. See *Dampier v Charter Co of Wayne*, 233 Mich App 714, 720; 592 NW2d 809 (1999).

However, we do agree with defendants that the trial court erred in denying their motion for judgment notwithstanding the verdict (JNOV).[2] We review de novo a trial court's denial of a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999).

> In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party. If reasonable jurors could have reached different conclusions, the verdict must stand. Only if the evidence fails to establish the claim as a matter of law is JNOV appropriate. [*Barrett v Kirtland Community College*, 245 Mich App 306, 311-312; 628 NW2d 63 (2001).]

After reviewing the evidence in the appropriate light, we conclude that plaintiff's tortious interference with contract claim against Sutton fails as a matter of law because the evidence shows that Sutton is not a third-party interloper with respect to the contract and plaintiff's employment. *Dziera v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986).

We also conclude that plaintiff's claim of tortious infliction of mental distress fails as a matter of law. While evidence was presented from which reasonable minds could conclude that Sutton had acted either intentionally or recklessly, the evidence does not show that these actions were so extreme and outrageous that they "went beyond all bounds of common decency in a civilized society." *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). For example, while Sutton did tell plaintiff he could not put items on the union bulletin board, there is no evidence that Sutton persisted with this position once the union informed her of plaintiff's

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[2] Defendants also argue that the trial court erred in denying their motion for a directed verdict on these claims. We are unable to review the court's ruling, however, because the record provided does not contain that portion of the transcript where the directed verdict motion was raised, argued, and ruled upon.

status as Northwestern's union representative. It is also true that while plaintiff had not requested a transfer from Northwestern in 1993, he did request one approximately fourteen months before. As for the UIRs, while plaintiff may challenge the accuracy of the reports, Sutton cannot be faulted for following the reporting procedures in dealing with these documents. There is also no evidence that Sutton was responsible for the subsequent spreading of the information found in the UIRs. Nor do we believe that the removal of plaintiff from his coaching responsibilities can be labeled "utterly intolerable." *Id.*

Finally, while we believe sufficient evidence was presented to withstand a motion for summary disposition on the claim of gross negligence, we do not believe plaintiff satisfied his burden of proof on this claim. The actions complained of, either alone or in the aggregate, do not rise to the level of being "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c).

Reversed and remanded for entry of judgment in accord with this opinion.[3] We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Janet T. Neff

[3] Although defendants have not raised the issue of mediation sanctions, *sua sponte* we note that entry of a judgment in accord with this opinion would necessarily mean that the award of mediation sanctions should be reversed as well.