STATE OF MICHIGAN

COURT OF APPEALS

JACK H. KAUFMAN, M.D.,

Plaintiff-Appellee,

v

MICHIGAN FAMILY INDEPENDENCE AGENCY,

Defendant-Appellant.

UNPUBLISHED
May 10, 2012

No. 303452
Oakland Circuit Court
LC No. 2010-114455-CZ

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant Michigan Family Independence Agency (FIA) appeals from the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(7) (governmental immunity). Because we find that the FIA was entitled to the protection of governmental immunity, we reverse and remand.

Plaintiff is a physician who is licensed to practice medicine in Michigan. Plaintiff began employment with FIA as a medical consultant in 2003. The agency did not renew plaintiff's employment contract when it expired in 2008. Plaintiff thereafter brought suit, alleging that he was terminated by non-renewal of his contract because he refused to violate state and federal laws when conducting his reviews of FIA claimants' medical. It is not disputed that a cause of action for wrongful discharge may lie where the employee is terminated because of failure or refusal to violate the law in the course of employment, or is terminated in retaliation for the exercise of a statutorily-conferred right. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982).

Nevertheless, where the defendant is a governmental entity, such a suit may be barred by governmental immunity and the applicability of governmental immunity is a question of law that is reviewed de novo on appeal, *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 117-118; 782 NW2d 784 (2010). Absent disputed facts, whether the claim is barred by immunity is for the court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

A claim for wrongful discharge from employment in violation of public policy sounds in tort. See *Dunbar v Dep't of Mental Health*, 197 Mich App 1, 10; 495 NW2d 152 (1992).

Retaliatory discharge in violation of public policy is an intentional tort and plaintiff asserts that the right to sue a governmental agency for an intentional tort was preserved by MCL 691.1407(1)'s reference to the nonalteration of governmental immunity as it existed before July 1, 1965. This argument was, however, explicitly rejected by our Supreme Court in *Smith v Dep't of Pub Health*, 428 Mich 540, 593-594; 410 NW2d 749 (1987). In *Smith* the Court explained that a claim of direct tort liability against a governmental agency, including intentional tort claims, is barred unless it falls within a statutorily enumerated exception to governmental immunity or arises out of an activity that is not a governmental function, i.e., "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003). The trial court erred in concluding that this rule was set aside by the Supreme Court in *Odom v Wayne Co*, 482 Mich 459, 760 NW2d 217 (2008). *Odom* neither ruled upon, nor altered the law governing direct liability of a government agency. Rather, it reaffirmed and clarified the three-part qualified immunity standard to be applied in intentional tort suits against governmental *employees*. See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624-625; 363 NW2d 641 (1984).

The determination of whether an activity should be considered a governmental function must focus on the general activity and not the specific conduct involved at the time the injury occurred. *Ward v Mich State Univ* (*On Remand*), 287 Mich App 76, 84; 782 NW2d 514 (2010). The general activity of reviewing claims for disability benefits is authorized by law. Indeed, plaintiff's complaint sets forth at length the statutory and regulatory provisions under which this activity is conducted. Accordingly, plaintiff's allegations of direct liability against the FIA are barred by governmental immunity.

Plaintiff also argues that defendant agency may be held vicariously liable for intentionally tortious acts of its employees. However, the government is immune to suits brought under a theory of vicarious liability if the alleged tort was committed during the discharge of a government function. *Ross*, 420 Mich at 624-625. *Odom* did not alter this rule; it provides for liability of individual government employees, not governmental agencies. As discussed above, the allegedly tortious acts in this case occurred during the discharge of a governmental function, so the agency is also immune to claims brought under a respondeat superior theory of liability.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro