

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0998

CHRISTOPHER J. GURBA

VS.

**STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT, JOHN BRADBERRY, ALAN LEVASSEUR,
MICHAEL HELMSTETTER, & TERRY RUTHERFORD**

JUDGMENT RENDERED: DEC 23 2008

jmm
**ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 544,361, DIVISION M, SECTION 26
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA**

THE HONORABLE KAY BATES, JUDGE

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Appellant
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Appellees-State of Louisiana
Department of Transportation and
Development, John Bradberry, Alan
Levasseur, Michael Helmstetter, and
Terry Rutherford

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs.

JJ, PETTIGREW, J. concurs

McDONALD, J.

This is an appeal from a judgment granting a peremptory exception raising the objection of no cause of action. Plaintiff, Christopher J. Gurba, was a police officer at the Crescent City Connection Police Department (CCCPD). Mr. Gurba was unhappy with the management of CCCPD, so he voiced complaints and filed a number of grievances under the administrative code. Thereafter, Mr. Gurba was recalled to active duty with the United States Air Force. Pursuant to La. R.S. 29:405(A)(1), which authorizes any public or private employers to continue to pay compensation to employees who left employment to perform service in the uniformed services, Mr. Gurba continued to receive payments from the CCCPD.

Some time thereafter the payments ceased, and the CCCPD demanded repayment, claiming it had overpaid Mr. Gurba. On October 2, 2005, the State of Louisiana, Department of Transportation and Development (DOTD), through attorney Mark Falcon, filed suit in the Twenty-Fourth Judicial District Court against Mr. Gurba, seeking reimbursement for overpayments. On March 21, 2006, the State, DOTD, dismissed the suit.

On June 16, 2006, Mr. Gurba filed suit in the Nineteenth Judicial District Court, asserting that DOTD, John Bradberry (DOTD Secretary) Alan Levasseur (Executive Director of the Crescent City Connection Division), Michael Helmstetter (Chief of the CCCPD), and Terry Rutherford (Lieutenant in the CCCPD), owed him wages and damages, and in the alternative, owed him the difference between his military base pay and his state base pay, and also in the alternative, pay for hours spent in training, recertification, court, and business meetings with department officials, agents, and representatives. He also sought damages for violation of the employee reprisal prohibition statutes, specifically La.

R.S. 23:967(A),¹ and La. R.S. 42:1169(A) and (B),² and for abuse of process, malicious prosecution, intentional infliction of emotional distress, negligence and attorney fees. By amended petition Mr. Gurba added Mr. Falcon as a defendant in the suit.

Mr. Falcon filed a peremptory exception raising the objection of no cause of action, asserting that the petition failed to allege facts that, if accepted as true, constituted an abuse of process, malicious prosecution, or intentional infliction of emotional distress by Mr. Falcon, and further, asserting that the petition failed to

¹ Louisiana Revised Statute 23:967 provides:

- A. An employer shall not take reprisal against an employee who in good faith, and after advising the employer of the violation of law:
 - (1) Discloses or threatens to disclose a workplace act or practice that is in violation of state law.
 - (2) Provides information to or testifies before any public body conducting an investigation, hearing, or inquiry into any violation of law.
 - (3) Objects to or refuses to participate in an employment act or practice that is in violation of law.
- B. An employee may commence a civil action in a district court where the violation occurred against any employer who engages in a practice prohibited by Subsection A of this Section. If the court finds the provisions of Subsection A of this Section have been violated, the plaintiff may recover from the employer damages, reasonable attorney fees, and court costs.
- C. For the purposes of this Section, the following terms shall have the definitions ascribed below:
 - (1) "Reprisal" includes firing, layoff, loss of benefits, or any discriminatory action the court finds was taken as a result of an action by the employee that is protected under Subsection A of this Section; however, nothing in this Section shall prohibit an employer from enforcing an established employment policy, procedure, or practice or exempt an employee from compliance with such.
 - (2) "Damages" include compensatory damages, back pay, benefits, reinstatement, reasonable attorney fees, and court costs resulting from the reprisal.
- D. If suit or complaint is brought in bad faith or if it should be determined by a court that the employer's act or practice was not in violation of the law, the employer may be entitled to reasonable attorney fees and court costs from the employee.

² Louisiana Revised Statute 42:1169 provides in pertinent part:

- A. Any public employee who reports to a person or entity of competent authority or jurisdiction information which he reasonably believes indicates a violation of any law or of any order, rule, or regulation issued in accordance with law or any other alleged acts of impropriety related to the scope or duties of public employment or public office within any branch of state government or any political subdivision shall be free from discipline, reprisal, or threats of discipline or reprisal by the public employer for reporting such acts of alleged impropriety. No employee with authority to hire, fire, or discipline employees, supervisor, agency head, nor any elected official shall subject to reprisal or threaten to subject to reprisal any such public employee because of the employee's efforts to disclose such acts of alleged impropriety.
- B. (1) If any public employee is suspended, demoted, dismissed, or threatened with such suspension, demotion, or dismissal as an act of reprisal for reporting an alleged act of impropriety in violation of this Section, such employee shall report such action to the board.
 - (2) An employee who is wrongfully suspended, demoted, or dismissed shall be entitled to reinstatement of his employment and entitled to receive any lost income and benefits for the period of any suspension, demotion, or dismissal.

identify or describe Mr. Falcon's legal status or the relationship between Mr. Falcon and DOTD. Further, Mr. Falcon asserted that the petition failed to describe actions taken by Mr. Falcon that minimized or denied Mr. Gurba's alleged grievances, and the petition failed to state facts in support of the legal conclusion that Mr. Falcon acted improperly in demanding reimbursement for overpayments. Mr. Falcon prayed that the petition be dismissed with prejudice.

After a hearing, the trial court granted the peremptory exception raising the objection of no cause of action and further ordered that Mr. Gurba had 30 days to amend his petition, or in default thereof, all claims against Mr. Falcon would be dismissed with prejudice. Mr. Gurba filed a second amended petition, and Mr. Falcon filed another peremptory exception raising the objection of no cause of action. After a hearing, the trial court granted the exception and dismissed Mr. Gurba's suit against Mr. Falcon, with prejudice. Mr. Gurba is appealing that judgment.

The peremptory exception pleading the objection of no cause of action is a procedural device used to test the legal sufficiency of the petition. In making the determination, all well-pleaded facts in the petition must be accepted as true, and no reference can be made to extraneous supportive or controverting evidence. The court must then determine whether the law affords any relief to plaintiff if the factual allegations of the petition are proven at trial. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. **Dietrich v. Apex Elec.**, 632 So.2d 795, 796-797 (La. App. 1 Cir. 1993).

Mr. Gurba's first cause of action is for wages due, however, he admits in brief that he does not have a cause of action for wages against Mr. Falcon. The second and third causes of action are for violation of the public employee reprisal

protection statutes La. R.S. 23:967(A) and La. R.S. 42:1169(A) and (B). Specifically, Mr. Gurba refers to La. R.S. 42:1169(A), which states in part that “No employee with authority to hire, fire, or discipline employees, supervisor, agency head, nor any elected official shall subject to reprisal or threaten to subject to reprisal any such public employee because of the employee’s efforts to disclose such acts of alleged impropriety.” There is no showing of an employee-employer relationship between Mr. Gurba and Mr. Falcon. Mr. Gurba asserts that Mr. Falcon is an agent and an employee of his employer; however, there are no further facts to establish the relationship and explain why Mr. Gurba would have a cause of action against Mr. Falcon.

The fourth and fifth causes of action are for malicious prosecution. It has repeatedly been maintained that “Actions of this sort have never been favored, and, in order to sustain them, a clear case must be established” **Johnson v. Pearce**, 313 So.2d 812, 816 (La. 1975). To prevail in a malicious prosecution case, the following elements must be satisfied: (1) The commencement or continuance of an original criminal or civil proceeding; (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) Its bona fide termination in favor of the present plaintiff; (4) The absence of probable cause for such proceeding; (5) The presence of malice therein; and, (6) Damage conforming to legal standards resulting to plaintiff. The malice element can be inferred in cases where there is wanton and reckless disregard of the rights of a party, evincing utter absence of that caution and inquiry a man should employ. **Onwukwe v. Kroger Co.**, 380 So.2d 148, 150 (La. App. 1 Cir. 1979). There are no facts given to show that Mr. Falcon acted with malice or with wanton and reckless disregard of the rights of Mr. Gurba.

The sixth cause of action is for intentional infliction of emotional distress for filing the lawsuit. Intentional infliction of emotional distress was adopted as a viable cause of action in **White v. Monsanto Company**, 585 So.2d 1205, 1209 (La. 1991). One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. In order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. **Richardson v. Home Depot USA**, 2000-0393, p. 4 (La. App. 1 Cir. 3/28/01), 808 So.2d 544, 547.

The supreme court in **White v. Monsanto** pointed out that the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities are not enough to trigger liability; rather, persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are inconsiderate and unkind. **Richardson**, 2000-0393, p. 4, 808 So.2d at 547.

The facts asserted against Mr. Falcon are that he caused intentional infliction of emotional distress against Mr. Gurba by filing the lawsuit against him. This does not allege facts that rise to the level of extreme and outrageous conduct, causing severe emotional distress, and does not show that Mr. Falcon desired to inflict severe emotional distress or knew that severe emotional distress would be

certain or essentially certain to result from his conduct. Thus, there is no factual basis for an action for intentional infliction of emotional distress.

The seventh cause of action listed is for negligence. Mr. Falcon is not mentioned in the cause of action for negligence. The eighth cause of action is for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A. §4311. Mr. Falcon is not mentioned in this cause of action either.

After a thorough review, we find that Mr. Gurba has failed to state a cause of action against Mr. Falcon, and we affirm the trial court judgment granting the peremptory exception raising the objection of no cause of action and dismissing Mr. Gurba's suit against Mr. Falcon with prejudice. Costs are assessed against Mr. Gurba.

AFFIRMED.