STATE OF MICHIGAN

COURT OF APPEALS

JAMES G. OLSEN,

Plaintiff-Appellant,

v

COUNTY OF MUSKEGON,

Defendant,

and

14TH JUDICIAL CIRCUIT COURT and CHIEF JUDGE OF THE 14TH JUDICIAL CIRCUIT COURT,

Defendants-Appellees.

UNPUBLISHED
November 19, 2002

No. 233258
Muskegon Circuit Court
LC No. 99-039692-NZ

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) for failure to state a claim on which relief can be granted.[1] On appeal, plaintiff challenges only the dismissal of his claims premised on tortious interference with employment relations and retaliatory discharge in violation of the First Amendment of the United States Constitution. This case arises out of the termination of plaintiff's employment as a probate court administrator/friend of the court referee following plaintiff's unsuccessful election bid to unseat the sitting probate court judge. We affirm.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

[1] The trial court granted defendant Muskegon County's motion for summary disposition, and it granted plaintiff leave to amend his complaint to add the circuit court and chief judge as defendants. Plaintiff does not appeal the summary disposition ruling regarding Muskegon County; therefore, our reference to "defendants" relates only to the circuit court and chief judge unless otherwise indicated.

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999). Issues of law, including constitutional issues, are also reviewed de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

With regard to plaintiff's tortious interference claim against Chief Judge Hicks, plaintiff argues that it is undisputed that Judge Hicks interfered with his employment contract with defendant circuit court, and that any issue concerning the judge's motive is an issue of fact for trial. Plaintiff further argues that he sufficiently alleged facts in the complaint indicating that Judge Hicks had an improper motive in terminating plaintiff.

We find it unnecessary to determine whether the trial court erred in ruling that plaintiff failed to allege that Judge Hicks was acting solely for his own benefit in firing plaintiff because the tortious interference claim was clearly barred pursuant to immunity granted by law. We recognize that the issue of governmental immunity has not been presented to us by either party; however, our Supreme Court's recent decision in *Mack v Detroit*, 467 Mich 186, 206-207; 649 NW2d 47 (2002), allows us to raise the matter of immunity sua sponte where it is controlling on the legal issues presented regardless whether it was pled or argued.

MCL 691.1407(5) provides that "[a] judge . . . [is] immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial . . . authority." MCR 8.110(C)(3)(d) provides a chief judge the power to "supervise the performance of all court personnel, with authority to hire, discipline, or **discharge such personnel**[.]" Emphasis added.

In *Armstrong v Ypsilanti Charter Twp*, 248 Mich 573, 594; 640 NW2d 321 (2001), this Court, addressing the parameters of MCL 691.1407(5) in relation to legislative immunity and the elimination of the plaintiff's job, held:

> The fact that Armstrong alleged that defendants committed intentional torts, and that they had an improper motive or purpose in eliminating his position along with an unlawful intent, is meaningless . . . because, as we have held, defendants were acting within the scope of their statutory authority in eliminating that position.

Here, Judge Hicks was acting within the scope of his authority pursuant to MCR 8.110 in terminating plaintiff's employment; therefore, the judge's motive and purpose in firing plaintiff, even if driven by an unlawful intent, is irrelevant. Accordingly, Judge Hicks was protected by judicial immunity under MCL 691.1407(5), and plaintiff failed to state a cause of action in avoidance of immunity. See *Mack, supra* at 204.

With regard to plaintiff's First Amendment claim, it fails for numerous reasons as a matter of law. The claim is premised solely on violation of the First Amendment, and the prayer for relief requests monetary damages. Plaintiff's claim is in essence a 42 USC 1983 cause of action. Section 1983 provides a civil remedy to persons deprived of federal constitutional rights by individuals acting under color of state law. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 74; 592 NW2d 724 (1998). Initially, we question whether a §1983 action can be maintained against a judge under MCL 691.1407(5), where "[i]t is well settled that judges are accorded absolute immunity for acts performed in the exercise of their judicial functions." *Diehl v Danuloff*, 242 Mich App 120, 128; 618 NW2d 83 (2000). Regardless, the action fails on other grounds.

In *Bay Mills Indian Community v Michigan*, 244 Mich App 739, 749; 626 NW2d 169 (2001), this Court stated:

> [A] §1983 action for monetary damages for alleged federal constitutional violations may not be brought in state courts against the state or a state official sued in an official capacity. *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Nor may a plaintiff bring such an action by simply giving it another name. . . . Furthermore, because plaintiff sought a monetary award, the suit did not fall within the exception set forth in *Ex parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908), which allows certain suits against state officers for injunctive or declaratory relief.

Here, Judge Hicks, a circuit court judge, is a state official. Const 1963, art 6, §§ 1, 11; MCL 600.515; see also *Judges of the 74th Judicial Dist v Bay Co*, 385 Mich 710, 723; 190 NW2d 219 (1971). Therefore, a §1983 action cannot be maintained.

Furthermore, a §1983 action requires a party to show that (1) the allegedly improper conduct was committed by a person acting under color of state law, and (2) the conduct deprived the party of rights secured by the United States Constitution. *Dowerk*, *supra* at 74. The "color of state law" requirement may be satisfied by establishing that a defendant acted pursuant to a governmental policy or custom, and such custom or policy must be the moving force of the constitutional violation. *Dampier v Wayne Co*, 233 Mich App 714, 738; 592 NW2d 809 (1999). Here, there is no allegation of any custom or policy in relation to plaintiff's termination.

Additionally, in an action brought pursuant to §1983, a government official performing discretionary functions is entitled to good-faith immunity insofar as the official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Thomas v McGinnis*, 239 Mich App 636, 644; 609 NW2d 222 (2000). There is no clearly established law identifying First Amendment rights to candidacy,[2] and in fact

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[2] We note that plaintiff's claim is premised solely on a right to candidacy because there is no allegation that the firing took place as a result of plaintiff's political beliefs or political affiliations, only that he was terminated for running for office. At oral argument, plaintiff maintained that the termination was based on party affiliation, i.e., disloyalty to the Republican Party; however, a thorough review of the complaint reveals no such allegation. The complaint references the fact that Judge Hicks and Judge Pittman are both Republicans, but it contains no

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there is law to the contrary. *Carver v Dennis*, 104 F3d 847 (CA 6, 1997). This provides yet another basis to dismiss plaintiff's First Amendment claim.

Next, in relation to defendant circuit court, in order to succeed on a §1983 claim based on a theory of respondent superior, a plaintiff must prove that the government's agent acted pursuant to official policy. *Dampier, supra* at 739. Here, there is no allegation that Judge Hicks fired plaintiff pursuant to any circuit court policy concerning employees running for office against court incumbents.

In conclusion, the trial court did not commit error in granting defendants' motion for summary disposition albeit for different reasons relied on by us today. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 669; 473 NW2d 790 (1991).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof

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language suggesting that party affiliation or party disloyalty formed the basis for the termination. In the context of a (C)(8) motion, we are constrained to limit our review to the language of the complaint. *Beaudrie, supra* at 129.