STATE OF MICHIGAN

COURT OF APPEALS

NORMAN RIOPELLE,

Plaintiff-Appellant,

v

JEFFREY ZITTEL, ANN MOSS, and LINDA KINGSTON,

Defendants-Appellees.

UNPUBLISHED
May 20, 2008

No. 275403
Genesee Circuit Court
LC No. 05-081732-CZ

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Plaintiff Norman Riopelle appeals as of right an order granting summary disposition for defendants Jeffrey Zittel, Ann Moss, and Linda Kingston under MCR 2.116(C)(7) and (10). We affirm in part, reverse in part, and remand.

I. Facts and Procedural History

Plaintiff is a veteran employee of Grand Blanc Township. Zittel is the township supervisor, Kingston is the township clerk, and Moss is a township trustee. Plaintiff began working for the township in 1973; in about 1993, he became superintendent of the township's Department of Public Works (DPW). The dispute in this case concerns plaintiff's employment as DPW superintendent, while Zittel was township supervisor.

According to plaintiff's deposition testimony, in about June 2003, Zittel decided that plaintiff "was no longer going to be in charge of anything" and began to work around him and "cut [him] out of the loop." Plaintiff contends that Zittel began to work around him because plaintiff attended a meeting with Zittel's political rivals, in contemplation of running for the position of township clerk. In contrast, defendants assert that "[i]n about early 2003, Plaintiff/Appellant stopped performing his job duties." Deposition testimony conflicted regarding whether plaintiff was actually "cut out" of his job responsibilities or whether he simply stopped performing his job duties.

In April 2005, the township board unanimously approved an investigation into the DPW, and plaintiff was placed 30 days' paid administrative leave. A May 17, 2005 letter written to plaintiff from Zittel outlined five misconduct charges: that plaintiff failed to work during his scheduled hours, specifically that he would arrive to work late, leave early, and spend time

during work hours at Tom's Coney Island; that he falsified time reports; that he engaged in a threat or physical assault on a subordinate employee; that he failed to properly perform his assigned duties; and that he failed to follow Zittel's directions. The township board held a special meeting on June 13, 2005, at which it voted to allow plaintiff to return to work on June 14, 2005, under certain conditions. Plaintiff returned to work on June 14, 2005, and that very day he allegedly violated the township's nonsmoking policy,[1] took an unauthorized break at Tom's Coney Island between approximately 10:07 a.m. and 10:40 a.m., and left his office at 1:55 p.m. without complying with the township's request for leave policy. Zittel sent plaintiff a written memorandum of discipline on June 23, 2005 detailing these violations.

On June 15, 2005, April Tyler, D.O., wrote a note recommending that plaintiff "remain off of work for the next 6 months, due to traumatic stress disorder secondary to a hostile work-place." However, two independent psychiatric evaluations negated any contention that plaintiff suffered from a psychiatric condition that warranted time off from work. In spite of the conflicting conclusions, plaintiff apparently was granted some form of sick leave for six months, which may have been extended on at least one occasion. Although the nature of the leave and any possible extensions is not clear from the record, it is clear that plaintiff last worked for the township on June 14, 2005.

Even before plaintiff began his sick leave, he filed suit against defendants. In his first amended complaint, plaintiff's allegations included that Zittel informed plaintiff that he was not loyal and was a political liability because he attended the meeting of Zittel's rival in his bid for reelection, and that soon thereafter Zittel began to ostracize plaintiff and reassign plaintiff's job duties. The complaint also alleged that plaintiff had met with the county prosecutor to report certain conduct on the part of Zittel and that Zittel knew about this meeting when he engaged in "calculated retaliation against" plaintiff. The complaint further alleged that Kingston improperly faxed copies of plaintiff's disciplinary notices to the Flint Journal with Zittel's and Moss's "perceived knowledge and approval," and that this information was publicized in the paper. The first amended complaint contained claims of intentional infliction of emotional distress; invasion of privacy based on violations of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*., and the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d; intentional interference with employment opportunities; defamation by Zittel; and violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.

Defendants moved for summary disposition under MCR 2.116(C)(7) and (10). According to defendants, plaintiff's claims constituted "inflammatory conclusions" that "lack[ed] any factual basis," and plaintiff's tort claims were barred by governmental immunity. The trial court granted summary disposition of plaintiff's tort claims under MCR 2.116(C)(7) based on governmental immunity, MCL 691.1407(5), and granted summary disposition of plaintiff's WPA claim under MCR 2.116(C)(10).

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[1] Testimony established that no other township employee had ever been reprimanded for smoking in the garage in which plaintiff was smoking, even though other township employees had also smoked in the same garage.

II. Analysis

A

We initially observe that the trial court properly granted summary disposition of plaintiff's claims of defamation, intentional infliction of emotional distress and intentional interference with employment opportunities because those claims were barred by governmental immunity, MCL 691.1407(5). MCR 2.116(C)(7).[2] There is no intent exception to governmental immunity. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). Therefore, plaintiff's contention that defendants' conduct was outside the scope of their authority because they acted maliciously and with intent to harm plaintiff is meritless. Similarly, plaintiff's claim that governmental immunity is an affirmative defense that defendants bore the burden of proving is also meritless. Governmental immunity is a characteristic of government, not an affirmative defense, and the party suing a governmental unit must plead in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 202-203; 649 NW2d 47 (2002).

B

We next turn to the propriety of the trial court's conclusion that governmental immunity barred plaintiff's allegation that defendants violated the Bullard-Plawecki act and the HIPAA, which appeared in the invasion of privacy count of the first amended complaint (Count II). The trial court dismissed Count II solely on the basis of governmental immunity, explaining, "Therefore, Plaintiff's claim for invasion of privacy as it relates to Bullard-Plawecki is dismissed. The Court wishes to be clear on this Count that it is the governmental immunity defense which dooms this allegation and not elemental deficiency." The trial court thus would have sustained plaintiff's Bullard-Plawecki claim, but for its determination that governmental immunity barred it.

The Bullard-Plawecki Act provides in relevant part:

> (1) An employer or former employer shall not divulge a disciplinary report, letter of reprimand, or other disciplinary action to a third party, to a party who is not a part of the employer's organization, or to a party who is not a part of a labor organization representing the employee, without written notice as provided in this section. [MCL 423.506.]

The act defines the term "[e]mployer" as follows:

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[2] We review de novo a trial court's summary disposition ruling premised on subrule (C)(7), "consider[ing] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

> . . . an individual, corporation, partnership, labor organization, unincorporated association, the state or any agency or a political subdivision of the state, or any other legal, business, or commercial entity which has 4 or more employees and includes an agent of the employer. [MCL 423.501(2)(b).]

The act's inclusion of "the state, or an agency or a political subdivision of the state," within the definition of "[e]mployer," clearly and unambiguously signifies that the act applies to defendants. Consequently, the plain statutory language reveals that the trial court incorrectly deemed the Bullard-Plawecki claim barred by governmental immunity.

Defendants alternatively assert on appeal that plaintiff "never asserted a direct claim for violation of MCL 423.506," and that no genuine issue of material fact exists in support of a Bullard-Plawecki claim.

With regard to plaintiff's alleged failure to assert a Bullard-Plawecki violation, Count II of plaintiff's first amended complaint is entitled, "Statutory Violations Constituting an Unlawful Invasion of Privacy." After incorporating by reference all factual allegations in the complaint, plaintiff asserted as follows in ¶ 38 of Count II: "The Bullard-Plawecki Employee Right to Know Act, MCL 423.506, precludes disclosure of disciplinary materials, which was clearly violated by the aforedescribed actions, and with apparent malice and tortuous [sic] intent." Paragraph 38 contains no additional legal claims. Paragraphs 39, 40 and 41 of Count II allege a violation of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d. Count II concludes with the following paragraph: "Plaintiff seeks any and all available penalties, damages and remedies afforded by the Bullard Plawecki Act and HIPPA Statutory provisions, which are clearly appropriate for assessment in this case."

Defendants have offered no authority in support of their suggestion that plaintiff had to provide any more elaborate pleading of his Bullard-Plawecki claim, or that the claim had to appear in its own, separate count of the first amended complaint. The Michigan Court Rules require that a complaint include

> [a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend. [MCR 2.111(B)(1).]

A complaint suffices under the court rules if it contains allegations specific enough "reasonably to inform" defendants regarding "the nature of the claim" that they must defend. *Iron Co v Sundberg, Carlson & Assoc's, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997) (internal quotation omitted).

The first amended complaint included a statement of facts that set forth a Bullard-Plawecki violation, and specifically cited the statute. This pleading reasonably informed defendants that plaintiff intended to pursue a claim based on the Bullard-Plawecki Act, flowing from defendants' decision to share disciplinary notices from his personnel file with the Flint Journal. A complaint is not "fatally defective solely because" it sets forth an allegation in the same numbered paragraph as other claims "based on the same transaction or occurrence. Such a narrow interpretation of the court rule … does violence to the basic concept of liberalized

pleadings that is a fundamental principle of our modern civil procedure: that of providing notice to the adverse party of a claim against him." *Butler v Raupp*, 65 Mich App 20, 23; 236 NW2d 748 (1975).[3] See also Corrigan, Givan et al, Michigan Practice Guides: Civil Procedure Before Trial, §5:206 (2008). In conclusion, plaintiff properly pleaded a cause of action under the Bullard-Plawecki Act.[4]

And contrary to defendants' position that no relevant questions of fact exist, we find it clear that some record evidence supports the first amended complaint's allegation that defendants faxed disciplinary notices from plaintiff's personnel file to a newspaper reporter. Our review of the record reveals a fax cover sheet, dated June 14, 2005, initialed by Kingston, directed to "Bob Wheaton" at The Flint Journal, and identifying the documents furnished as "Disciplinary Items From Norman Riopelle's Personnel File." When viewed in the light most favorable to plaintiff, this evidence creates a genuine issue of material fact supporting his adequately pleaded Bullard-Plawecki violation.[5]

As noted above, plaintiff additionally sets forth in the invasion of privacy count that defendants violated the HIPAA, specifically 42 USC 1320d. Because the trial court neglected to address plaintiff's claim under the HIPAA, we remand so that the court may expressly consider whether (1) governmental immunity precludes plaintiff's invocation of the HIPAA, and (2) the purported HIPAA violation supports plaintiff's invasion of privacy claim.

C

Because plaintiff has failed to adequately brief the merits of his allegation of error regarding the trial court's dismissal of his claim that defendants violated the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., we decline to address this issue. Plaintiff's appellate brief fails to identify any issue of fact regarding his claim that defendants violated the WPA. Plaintiff has simply asserted error in a conclusory manner without adequately briefing the merits of his allegation of error. It is not enough for an appellant to simply announce a position or assert an error in a brief and then leave it up to this Court to discover and rationalize the basis

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[3] This Court decided *Butler* under GCR 1963, 113.3, which provided, "Each statement of a claim for relief founded upon a single transaction … shall be stated in separately numbered counts." The current court rules do not contain a similar requirement.

[4] Any ambiguity or discrepancy in Count II of plaintiff's complaint could be easily remedied by entry of an order striking the HIPAA allegations, pursuant to MCR 2.115(B), which contemplates as follows: "On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules."

[5] "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). To the extent that plaintiff has failed to adequately develop his argument or substantiate it with factual references to the record, it is abandoned, and we decline to address it.

We affirm the trial court's dismissal of plaintiff's defamation, intentional infliction of emotional distress, intentional interference with employment opportunity, and WPA claims. We reverse the trial court's grant of summary disposition of plaintiff's Bullard-Plawecki act claim, and remand for further proceedings consistent with this opinion concerning both the Bullard-Plawecki act claim and plaintiff's asserted violation of the HIPAA. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Elizabeth L. Gleicher