# STATE OF MICHIGAN

# COURT OF APPEALS

DYLAN GREER,

Plaintiff-Appellant,

v

COUNTY OF INGHAM,

Defendant-Appellee.

UNPUBLISHED
March 22, 2011

No. 295672
Ingham Circuit Court
LC No. 08-000046-CZ

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

In this case involving allegations of wrongful termination and racial and gender discrimination, plaintiff appeals as of right the trial court's order granting summary disposition to defendant. We affirm.

Plaintiff was employed as an Ingham County Sheriff's deputy, serving as a corrections officer at the Ingham County Jail during the relevant time periods. On August 27, 2005, plaintiff allegedly used unnecessary force against an inmate. Although plaintiff denied the allegations, the inmate and the deputy assisting plaintiff both contradicted plaintiff's denial, with the inmate filing a written report of the incident and the deputy advising a command officer, one Sergeant Shelly Weitzel-Scholl. Sgt. Scholl investigated the incident and, upon examining the inmate, observed red marks around his neck and armpits. Sgt. Scholl advised Lieutenant Joy of her preliminary investigation findings.

On August 30, 2005, a disciplinary pre-determination hearing was held. In attendance, among others, were plaintiff, Undersheriff Matthew Myers, a Fraternal Order of Police union representative, and the FOP union attorney. During the meeting, plaintiff described his activities during the evening of August 27, 2005, including his altercation with the inmate. Undersheriff Myers advised plaintiff that both the inmate and the deputy corroborated that plaintiff had lifted the inmate off the floor by gripping his neck. Plaintiff denied this version of events and opined that the deputy was lying.

Undersheriff Myers reviewed plaintiff's personnel file, which contained 11 prior disciplines occurring just since 2001, including six suspensions without pay, three written reprimands, and two verbal warnings. He also determined that plaintiff made false statements during the disciplinary pre-determination meeting, including that Sgt. Scholl had always had

only negative things to say about him, and that she had always been involved in the disciplinary sanctions against plaintiff. Upon reviewing the records, Undersheriff Myers determined that Sgt. Scholl had not been involved in several of plaintiff's prior disciplinary matters. Further, plaintiff contradicted his own claim that Sgt. Scholl only ever said negative things at the meeting by describing how Sgt. Scholl had been praising plaintiff as to how he ran his post.

Taking these facts in conjunction with the excessive force used on the inmate, plaintiff was terminated on September 2, 2005. Although the termination letter listed plaintiff's disciplinary history going back to 2001 as an additional basis for termination, it noted that the sheriff's department would have been forced to terminate plaintiff's employment based solely on plaintiff's use of excessive force on the inmate.

On November 28, 2007, plaintiff filed a single count against defendant, alleging that his termination was the result of racial discrimination in violation of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2201 *et seq*. Although plaintiff's union had filed a grievance on his behalf, it was found to be automatically withdrawn when he elected to file his civil rights claim. On September 2, 2008, plaintiff filed another single count complaint against defendant, alleging discrimination based on gender, specifically a hostile work environment sexual harassment claim.

The two claims were consolidated and, after extensive discovery, defendant moved for summary disposition as to all claims based on multiple theories. The trial court granted summary disposition on multiple grounds, stating:

> As to the sexual harassment issue . . . Michigan clearly is a notice state, and it does appear that plaintiff did not make formal complaint and even informally did not report to the appropriate person.
>
> I think plaintiff also wants to tell me that I am to somehow either ignore Michigan's constitution or more heavily weigh the statute and federal cases against the Michigan constitution. However, the constitution of Michigan, 1963, article seven, section six, precludes suit against the county for its sheriff's actions. . . .
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> When I look at [plaintiff's discipline] history, I think it's more serious than counsel leads me to believe, and it does appear that there's simply not significant material facts that demonstrate plaintiff was racially or sexually discriminated against. He's provided an incident of a white employee not being terminated because of excessive force charges filed against him, but I have been told, and I have no reason to disbelieve counsel, that the record of discipline, which is also critical here, is far different than that of plaintiff.
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> It does appear that claims would be in violation of the statute of limitations. I'm granting this on (C)(7). I'm granting it on (C)(8). Plaintiff has failed to state a claim upon which relief can be granted. And also in regard to (C)(10), I don't believe there's a genuine issue of material fact, especially against the county in light of the constitution, which this Court will not ignore.

Plaintiff now appeals, arguing: 1) that the county is not insulated from liability for the sheriff's actions as to hiring, firing, and disciplinary decisions; 2) there exists a genuine issue of material fact as to the racial discrimination claim; and 3) there exists a genuine issue of material fact as to the sexual harassment claim, which is not barred by the statute of limitations.

We review de novo a trial court's decision to grant summary disposition. *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010). Defendant moved for summary disposition under MCR 2.116(C)(7), (8) and (10). A (C)(7) is brought when there is an allegation that the statute of limitations has run. MCR 2.116(C)(7). "When determining whether a motion for summary disposition brought pursuant to MCR 2.116(C)(7) was properly decided, we consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other documents presented specifically contradict it." *Shay*, 487 Mich at 656. A (C)(8) motion "tests the legal sufficiency of the complaint on the allegations of the pleadings alone" and is properly granted "if no factual development could possibly justify recovery." *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006). A (C)(10) motion is properly granted when the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [a] the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The trial court granted summary disposition to defendant under (C)(8) based on Const 1963, art 7, § 6, which provides in pertinent part, "The county shall never be responsible for [the sheriff's] acts . . . ." Under the circumstances, we conclude that the trial court properly granted summary disposition on these grounds.[1]

In *Graves v Wayne Co*, 124 Mich App 36, 42; 333 NW2d 740 (1983), this Court recognized that Const 1963, art 7, § 6, "exempts a county from any vicarious liability arising from acts of the county sheriff." It noted, however, that it did not preclude liability for the acts of deputy sheriffs. *Id.* at 42-43. See also *Lockaby v Wayne Co*, 406 Mich 65, 77; 276 NW2d 1 (1979) ("While the county is constitutionally immune from '[responsibility]' for the sheriff's 'act' that immunity does not extend to the acts of others in its employ."). Thus, for the provision to apply, the actions must have been taken by the sheriff.

In the present case, although it was Undersheriff Myers who sent the letter to plaintiff informing him of his termination, the firing itself could only take place through the authority of the sheriff. See MCL 51.70 ("Each sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure, and may revoke those appointments at any time."); *People v Van Tubbergen*, 249 Mich App 354, 367-368; 642 NW2d 368 (2002) (holding that "the plain language of MCL 51.70

[1] Because we find summary disposition proper under (C)(8), we have not addressed plaintiffs' remaining claims on appeal regarding the trial court's decision to grant summary disposition under (C)(7) and (10).

allows the sheriff complete discretion in appointing who will be a deputy"); *Nat'l Union of Police Officers v Wayne Co Bd of Comm'rs*, 93 Mich App 76, 89; 286 NW2d 242 (1979) ("[A]lthough *the sheriff's power to hire, fire and discipline* may be limited by the Legislature, the matter of which of his deputies shall be delegated the power of law enforcement entrusted to him by the constitution is a matter exclusively within his discretion and inherent in the nature of his office, and may neither be infringed upon by the Legislature nor delegated to a third party."); *Gaborik v Rosema*, 599 F Supp 1476 (WD Mich, 1984) ("Among the powers of the sheriff provided by statute are the authority to hire, fire, and discipline deputies . . . ."). The letterhead on which the termination letter was written is from the sheriff's office and lists both the sheriff and undersheriff. Although Undersheriff Myers sent the letter to plaintiff, there is nothing in the letter to indicate that he is anything other than the messenger of the news that the sheriff has elected to fire plaintiff. Indeed, the letter sent to plaintiff states that he is being discharged by the Sheriff's Office:

> A review of this incident alone would leave the Sheriff's Office with no other choice but to terminated [sic] your employment with Ingham County. . . . Upon a total review of your work performance and as a result of the numerous violations of the Ingham County Sheriff's Office Rules and Regulations during the incident on August 27, 2005, you are **terminated from employment** from the Ingham County Sheriff's Office. [Emphasis in original.]

When questioned whether he made the decision to discharge plaintiff, Undersheriff Myers testified that it was the sheriff's decision: "The ultimate decision is with the sheriff. [Discharge] was my recommendation, yes."[2] Thus, legally and factually, it appears that the decision to discharge plaintiff was made by the sheriff, notwithstanding that Undersheriff Myers made the recommendation and wrote the letter informing plaintiff of the decision.[3] Under those circumstances, the constitutional provision precludes liability against the county for that action taken by the sheriff.

Although plaintiff relies on *Gaborik*, 599 F Supp 1476 and *Jackson v City of Detroit*, 449 Mich 420; 537 NW2d 151 (1995) to support his proposition that "the language of Const 1963, Art 7, § 6 is not as absolute as defendant would have it," neither of these cases holds that Const 1963, art 7, § 6 does not preclude the county from vicarious liability for the sheriff's actions in state law causes of action. Rather, the claims involved in both cases are federal claims brought

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[2] Undersheriff Myers also testified, when questioned about a potential transfer plaintiff had sought, that although other individuals would have input into such a decision, "[u]ltimately every decision is the sheriff's."

[3] In addition, we note that plaintiff has not argued that it was not the sheriff that terminated him. Indeed, he appears to have conceded the actions were taken by the sheriff by arguing that defendant "is not insulated from liability for the actions of its sheriff, a county official exercising county authority as to hiring, firing, and disciplinary decisions."

under 42 USC § 1983. Plaintiff acknowledges that these cases involve a federal statute, but fails to recognize the ramifications of that distinction.

Plaintiff asserts that, because the county can be held vicariously liable in a § 1983 action, it should also be held vicariously liable in an ELCRA action. As an initial matter, we note that plaintiff incorrectly characterizes a county's liablility in a § 1983 action. The caselaw is clear that "[a] governmental entity cannot be found liable under § 1983 on a respondeat superior theory. Rather, such liability can be imposed only for injuries inflicted pursuant to a governmental 'policy or custom.'" *Jackson*, 449 Mich at 433, quoting *Monell v Dep't of Social Servs of New York City*, 436 US 658, 694; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Thus, in a § 1983 action, a county is not automatically liable for the unconstitutional actions of its employees. Rather, its liability arises out of its own policies and customs that allowed or gave rise to the individual violation of the plaintiff's constitutional rights.

Plaintiff argues that we should conclude that an analogous "custom or policy" claim may be made under ELCRA. We cannot do so, however, because of the constitutional mandate that a county not be liable for the sheriff's actions. As plaintiff points out, because the sheriff is the only person with the authority to hire and fire, the only way to show a discriminatory practice for which the county could be liable is to base it on the actions of the sheriff. See *Gaborik*, 599 F Supp at 1480 (holding that the sheriff's "nearly unbridled authority over the hiring, firing, disciplining, and regulating of deputies indicates that the sheriff can establish county policy in this regard"). Plaintiff contends that to preclude a county from being liable for the actions of the sheriff is to preclude any liability at all in this context. We disagree.

As is clear from *Gaborik*, plaintiff *could* have brought a § 1983 action against defendant, assuming that he been able to show "the existence of a [discriminatory] policy, connect that policy to [the] county, and show that a particular injury was incurred because of the execution of the policy." *Id.* at 1480-1481. Plaintiff could also have sued the individual officers directly responsible under § 1983. See *Reinhardt v Dennis*, 399 F Supp 2d 803, 806 (WD Mich, 2005) (holding that the county, sheriff and undersheriff cannot be vicariously liable under § 1983 for injuries caused by a deputy sheriff, but that the sheriff and undersheriff, as the deputy sheriff's supervisors, could be liable in their individual capacities "if they actually participated in, condoned, encouraged, or knowingly acquiesced in the alleged misconduct."). Thus, plaintiff was not without a remedy; he was simply without a state law claim.

Although the Michigan Constitution can, and does, preclude a county from having liability for the sheriff's actions, the federal government can, and has, imposed such liability for a federal claim. There is nothing impermissible about state and federal law providing different claims and remedies based on the same actions. Accordingly, we find plaintiff's reliance on § 1983 caselaw unpersuasive in light of the Michigan Constitution's explicit prohibition against the type of state law liability plaintiff attempts to assert against defendant.

Both of plaintiff's claims against defendant are premised on wrongful termination—the racial discrimination claim that he was fired because he was African-American, and the sexual discrimination claim that he was fired based on an investigation initiated by his alleged sexual harasser. Regardless of plaintiff's ability to prove, or even create a question of fact, as to these claims, the fact that both are premised on the termination, an action that only the sheriff has the

authority to take, means that to hold defendant liable under either premise would be in direct contravention of Const 1963, art 7, § 6.[4] Accordingly, summary disposition as to plaintiff's claims was properly granted under (C)(8), as there was no factual development that could justify recovery against defendant.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra

[4] Although plaintiff asserted other instances of sexual harassment in his claim, he conceded that he may not recover for those incidents, as they fell outside the three-year statute of limitations period, and that those other incidents only served to "demonstrate a basis for the event that was *not* outside that period—his termination."