STATE OF MICHIGAN

COURT OF APPEALS

NORMAN MACKERSIE,

Plaintiff-Appellant,

v

PETER DIMMER and MARY KUULA,

Defendants-Appellees.

UNPUBLISHED

No. 164599
LC No. 91-17071-CL

Before: Marilyn Kelly, P.J., and O'Connell and D.A. Teeple,* JJ.

MARILYN KELLY, P.J. (concurring in part and dissenting in part).

I agree with the majority that the trial judge erred in dismissing plaintiff's claim premised on 42 USC 1983. See *Hafer v Melo*, 502 US 21; 112 S Ct 358; 116 L Ed 2d 301 (1991). However, I respectfully disagree with the majority's decision affirming the grant of summary disposition with respect to plaintiff's other claims.

MCL 691.1407; MSA 3.996(107) provides in pertinent part:

> (2) [E]ach officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

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

> (c) The officer's, employee's, member's or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

At issue here is whether defendants were acting within the scope of their authority when they fired plaintiff and whether the agency was engaged in the exercise or discharge of a governmental function.

In *Smith v Dep't of Public Health*,[1] the Michigan Supreme Court held that there is no intentional tort exception to governmental immunity. However, Justice Brickley reasoned that

> [I]ntentional torts are immune from liability if committed within the scope of a governmental function; however, the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function. [*Smith* at 611.]

In *Marrocco v Randlett*,[2] the Supreme Court, citing *Smith*, applied this concept to high ranking government officials to determine whether they acted within their executive authority. Our Court followed this principle in *Gracey v Wayne County Clerk*, 213 Mich App 412; 540 NW2d 710 (1995).

It is true that both *Marrocco* and *Gracey* dealt with high ranking officials, normally entitled to absolute immunity. However, unlike the majority, I do not believe that these cases should be readily dismissed as failing to provide authority for plaintiff's position. The idea advanced by Justice Brickley originated in a case where the defendants were not individuals, but government departments. *Smith, supra*. *Marrocco* expanded this idea and applied it to high ranking government officials.

Likewise, I believe that it can apply to the lower ranking government officials in this case. In *Smith*, Justice Brickley commented that, if it was the intent of a defendant to accomplish illegally what it could not accomplish legally, immunity would be lost. *Smith, supra* at 610. Here, if the facts as alleged by plaintiff are true, defendants used their positions to fire plaintiff and cover illegal activities taking place in their department. Therefore, I would reverse the trial court's grant of summary disposition with respect to plaintiff's remaining claims.

/s/ Marilyn Kelly

[1] *Smith v Dep't of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd on other grounds sub nom *Will v Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989).

[2] 431 Mich 700; 433 NW2d 68 (1988).