STATE OF MICHIGAN

COURT OF APPEALS

ALAN McKEE,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, JAMES POGATS, and ALBERT BORTON,

Defendants-Appellees.

UNPUBLISHED
November 26, 1996

No. 181286
LC No. 94-69117-NZ

Before: Holbrook, Jr., P.J., and Saad and W.J. Giovan,* JJ.

PER CURIAM.

Plaintiff, a white male, was employed by defendant Michigan Department of Corrections as a custodial officer at the State Prison of Southern Michigan. He filed a three-count complaint against defendants, alleging retaliatory action against him in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2701 *et seq.;* MSA 3.548(701) *et seq.*, intentional infliction of emotional distress, and also seeking a determination of his job status. The circuit court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff appeals as of right and we affirm in part, reverse in part, and remand for further proceedings.

In Count II of his complaint, plaintiff alleged that defendants retaliated against him in violation of the Civil Rights Act because he assisted with a departmental civil rights investigation and refused to make a false statement against a black female employee. The trial court granted defendants' summary disposition motion pursuant to MCR 2.116(C)(8), finding that white males were not protected persons under the statute, that it only applied in cases of conspiracy between two or more persons, and that it only applied in cases where the employee was discharged from employment. On appeal, plaintiff contends that these holdings run contrary to the plain language of the statute. We agree.

MCL 37.2701; MSA 3.548(701) provides, in pertinent part:

Two or more persons shall not conspire to, or a person shall not:

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

> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
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> * * *
>
> (f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

The statutory language is clear and must be enforced as written. *Viele v DCMA Int'l Inc*, 211 Mich App 458, 465; 536 NW2d 276 (1995). First, the statute does not exclude white males from its protections. Second, the statute prohibits retaliation or discrimination by a conspiracy of two or more persons *or* by "a person." And, third, an employee who suffers an adverse employment action short of discharge is not precluded from relief under the statute. Accordingly, we reverse and remand for further proceedings on this claim because the trial court erred in finding that plaintiff had failed to state a claim on which relief could be granted.

Furthermore, viewing the pleadings and other documentary evidence in a light most favorable to plaintiff, we find that plaintiff provided sufficient factual support for his retaliation claim to withstand a motion of summary disposition pursuant to MCR 2.116(C)(10). Accordingly, to the extent the trial court's grant of summary disposition was based on this subrule, we find that it erred and that this matter must be remanded for further proceedings.

Next, plaintiff argues that the trial court erred in granting summary disposition to defendants of his claim of intentional infliction of emotional distress. We disagree. Liability for intentional infliction of emotional distress is warranted only where the conduct complained of "has been 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." *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Id.* Here, plaintiff alleged that he was assigned to work other than his normally assigned position as a psychological testing officer or told to report each day for reassignment contrary to his duties as a psychological testing officer. He further alleged that defendants Pogats and Borton attempted to deny him administrative leave to which he was entitled, and that he was subjected to minor incidents of harassment including the suspicious removal of his coffee cup from his desk while he was away on vacation. Such claims were insufficient as a matter of law to withstand a motion of summary disposition. *Stopczynski v Ford Motor Co*, 200 Mich App 190, 196-197; 503 NW2d 912 (1993). Cf. *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 346; 483 NW2d 407 (1991). Consequently, we need not reach the issue of governmental immunity.

Next, plaintiff argues that the trial court did not exercise its discretion appropriately when it effectively denied plaintiff's request for leave to amend his complaint to clarify that defendants Pogats and Borton were being sued in their individual, as well as representative, capacities. After reviewing the record, including the trial court's opinion, we are unable to say that the trial court abused its discretion.

Finally, plaintiff argues that he is entitled to a declaratory judgment regarding his job status and that the trial court erred in granting summary disposition in favor of defendants on this claim. Although we find that the trial court erred in granting summary disposition of this claim on the basis of ripeness, see *Crawford County v Sec'y of State*, 160 Mich App 88, 92-93; 408 NW2d 112 (1987), the claim was properly dismissed on another ground. Plaintiff, as a public employee represented by a union and covered by a collective bargaining agreement, cannot directly pursue a contractual claim against his employer without first prevailing on a fair representation claim against his union. See *Knoke v East Jackson Public School District*, 201 Mich App 480, 485; 506 NW2d 878 (1993); *City of Saginaw v Chwala*, 170 Mich App 459, 464-465; 428 NW2d 695 (1988). As a general rule, an employer is entitled to rely on the finality provision of a grievance and arbitration clause in a collective bargaining agreement. An exception to the rule is created when the administrative process is seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct. *Pearl v City of Detroit*, 126 Mich App 228, 238; 336 NW2d 899 (1983), quoting *Ruzicka v General Motors Corp*, 649 F2d 1207, 1212 (CA 6, 1981). Here, plaintiff did not prevail on his earlier claim that the union breached its duty to represent him fairly. Accordingly, this claim was properly dismissed.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Henry W. Saad
/s/ William J. Giovan