

STATE OF MICHIGAN
COURT OF APPEALS

ROGER BURNEY,

Plaintiff-Appellee/Cross-Appellant,

v

CITY OF DETROIT,

Defendant-Cross-Appellee,

and

ROSE HOLT,

Defendant-Appellant/Cross-Appellee,

and

VIRGINIA B. SALEEM, SANDRA BURNS, and
NEW ST. PAUL HEAD START,

Defendants.

UNPUBLISHED

September 16, 2014

No. 304255

Wayne Circuit Court

LC No. 10-005081-NZ

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Rose Holt, appeals by right the trial court's order denying her motion to dismiss the tortious interference claim by plaintiff, Roger Burney, on the ground that the claim was barred by governmental immunity. On cross-appeal, Burney challenges the trial court's earlier decision to dismiss his Whistleblowers' Protection Act (WPA), see MCL 15.361 *et seq.*, claims against the City of Detroit and Holt. For the reasons more fully explained below, we conclude the trial court erred when it denied Holt's motion to dismiss Burney's tortious interference claim, but did not err when it dismissed his WPA claims. Accordingly, we reverse in part and affirm in part.

I. TORTIOUS INTERFERENCE

A. STANDARD OF REVIEW

Holt contends the trial court erred in denying her motion for summary disposition of Burney's tortious interference claim on the ground that it was barred by governmental immunity. Specifically, Holt argues the trial court erred when it determined that there was a genuine issue of fact as to whether Holt acted in good faith when she requested Burney's dismissal. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013). This Court also reviews de novo whether the trial court properly selected, interpreted, and applied the relevant statutes. *Id.* Finally, this Court reviews de novo the proper interpretation of contracts. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008).

B. GOVERNMENTAL IMMUNITY

A trial court properly dismisses a claim under MCR 2.116(C)(7) when the movant establishes that the plaintiff's claim is barred because of immunity granted by law. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). When, as here, the movant supports his or her motion with evidentiary submissions, the trial court must view the supporting evidence in the light most favorable to the non-moving party to determine whether the undisputed facts show that the moving party has immunity. *Kincaid*, 300 Mich App at 522. If there is an issue of fact as to whether immunity applies, the trial court must deny the motion and submit the dispute to the finder of fact. *Id.* at 523.

"The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Mich (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). In order to establish his tortious interference claim, Burney had to establish, in relevant part, that Holt performed "a lawful act with malice and unjustified in law for the purpose of invading" his business relationship with another. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2004) (quotation marks and citation omitted). To establish that Holt acted "with malice and without justification," Burney had to present evidence that Holt took "affirmative acts", which "corroborate the improper motive of the interference." *BPS Clinical Laboratories*, 217 Mich App at 699. "Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." *Id.* In addition, a contractual party cannot maintain a cause of action for tortious interference against another party to that same contract. *Derderian*, 263 Mich App at 382. In other words, "corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed v Mich Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993).

Under MCL 691.1407(3), governmental employees continue to have the qualified immunity from liability for intentional torts that existed under the common law prior to July 7, 1986. Under Michigan's common law, an employee will not be entitled to governmental immunity unless he or she establishes that he or she was acting or reasonably believed that he or she was acting within the scope of his or her authority. *Odom*, 482 Mich at 473. In addition, the employee must establish that he or she was acting in good faith:

The governmental employee must also establish that he was acting in "good faith." *Ross [v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984)] did not elaborate on this element, relying instead on Prosser on Torts and the cases cited therein. Prosser noted that the "considerable majority of the state courts take the position that there is no immunity where the inferior officer does not act honestly and in good faith, but maliciously, or for an improper purpose." "[O]fficial immunity should not become a cloak for malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of intentional abuse of power. . . ." The cases cited by Prosser indicate that there is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another. [*Odom*, 482 Mich at 473-474 (citations omitted).]

Our Supreme Court recognized that "good faith" means "acting without malice." *Id.* at 474. By contrast, "a lack of good faith" involves " 'malicious intent, capricious action or corrupt conduct' or 'willful and corrupt misconduct' " *Id.* at 474 (citations omitted). The burden is on "the proponent of individual immunity" to "establish that he [or she] acted without malice." *Id.* at 475. "Malice" is defined, in legal contexts as "[t]he intent, without justification or excuse, to commit a wrongful act" or "[r]eckless disregard of the law or of a person's legal rights." *Black's Law Dictionary* (9th ed). Here, there is no dispute that Holt was acting during the course of her employment and within the scope of her authority. See *Odom*, 482 Mich at 480. The dispute centers on whether the trial court properly determined that there was a question of fact as to whether Holt acted in good faith when she requested Burney's discharge.

Burney was hired as the accountant for a Head Start program under a contract between the City, "acting by and through its Department of Human Services", and New St. Paul. The City's purpose was to retain New St. Paul "to render certain technical and/or professional services," "to provide the qualified professional personnel necessary," and "to provide comprehensive Fiduciary Services to a Head Start Program in the City of Detroit. . . ." Although New St. Paul employed the professionals, the City retained the right to request the removal of certain employees and required New St. Paul to ensure certain practices:

6.06 The *City* may request that the Head Start Director and/or Head Start Accountant be removed if in the *City's* reasonable opinion he(she) unsatisfactorily performs the services hereunder. This request shall be in writing. Within fifteen (15) working days of the receipt of the request, [New St. Paul] shall respond in writing as to its action pursuant to that request.

* * *

6.10 [New St. Paul] agrees to abide by the “City of Detroit Accounting and Reporting Procedures” which shall be made available by the *City* to [New St. Paul] upon request. All financial records pertinent to this *Contract* shall also be kept in accordance with generally accepted accounting practices and with the Federal regulations at 45 CFR 92.20; “Standards for Financial Management Systems.” Each Financial Report submitted by the Project Director shall document all project costs and be supported by properly executed payrolls, time records, invoices, contracts or vouchers, or other official documentation evidencing in proper detail the nature and propriety of the charges The reporting form and submission requirements (including due dates) shall be determined by the *City*.

* * *

6.12 For all purposes, *City* employees will remain employees of the *City* and [New St. Paul’s] employees will remain employees of [New St. Paul]. [New St. Paul] is being retained by the *City* as an independent contractor to provide *Services* to the *City*, and is not being retained in any capacity as a joint enterprise or venture with the *City*.

In support of her motion, Holt provided evidence that she acted in good faith when she requested Burney’s termination; specifically, she cited a letter authored by Angela Brown to Burney identifying certain deficiencies in his performance:

“Adjusting and/or correcting entries have been made in the general ledger after the Cost Control Reports is presented to [Department of Human Services]. Entering transactions after the month-end close changes the ending balances reported.”

Holt further relied on a memorandum she authored in October 2009, that she directed to Shenetta L. Coleman, indicating that she had multiple concerns with Burney’s performance:

Mr. Burney failed to close the financial records (or books) each month. When asked why, he stated that the Peachtree Software allowed an option to close the books monthly or annually. Mr. Burney did not seek advice of DHS Accounting staff or other Head Start staff as to which method was to be used; nor did he check prior year records of [Detroit Child Development] DCD . . . determine what had been done in the past. . . .

In addition, Holt relied on her exchange with Burney at the audit readiness meeting in January 2010:

MS. Holt: Okay. At the meeting that we had back in September you shared with us that you had, were going back into the month and were doing general entries, posting general entries to the prior months, that you were not closing out the books each month and so, therefore, and you were providing estimated cost control reports so they didn't balance, and we asked you to go back and make some entries to correct it.

MR. Burney: No, I said that I was making entries to record bank charges and you then told me to go back and do all of that, but I told you I didn't have time to do it and so I thought you sent Mr. Ukandu to do that. . . .

When Holt suggested that perhaps she and plaintiff had a communication problem, Burney disagreed: "No, it's not a communication problem. It's a philosophical difference." When Holt reasserted that the monthly, as well as the year-end, numbers needed to be equal, Burney disagreed. When Holt questioned if he was refusing to follow her instruction, he responded: "I'm telling you that what you're asking me it doesn't matter. I'm saying it doesn't matter. What did it hurt if I didn't close it? Just tell me that." Burney asserted that following this directive would "defeat the purpose of what the Peachtree [computerized accounting] program is designed for." In response, Holt indicated she had asked Burney six months earlier to close the books on a monthly basis and was again instructing him "to close the books of [Detroit Child Development] every single month and to insure that the books balances equal the cost control report balances each and every month throughout the year in addition to cumulatively at the end of the year they should match." Following Holt's explication as to how he should "make [his] journal entries," Burney stated that he did not agree with that procedure: "I don't think that's generally accepted accounting procedures to go back and make adjustments to expenses that don't exist." Burney further stated that he did not "really want to be bothered doing this." Burney continued to insist he did not want to follow Holt's instruction because he did not believe it conformed to "generally accepted" accounting principles.

Holt also produced a memorandum she authored on January 29, 2010, directed to Virginia Burns-Saleem, wherein she noted Burney's "disagreement as to the need for the [Detroit Child Development] general ledger to be balance[d] monthly" and his refusal to comply with her directive. Holt indicated that Burney refused to work with others on Saturday, January 30th or to provide access to his office. Holt characterized Burney's behavior "over the past year" to be "uncooperative, defiant, and insubordinate," failing "to respond to requests for information" or "take advice or recommendations" and suggesting that his "fiscal actions continuously put the [Detroit Child Development] Head Start operations at risk." (Emphasis removed). Holt indicated that Coleman agreed that Burney's employment should be immediately terminated and noted that his contract¹ expired in October 2009 and that there was "no provision which requires

¹ Burney's employment agreement with "Detroit Child Development Head Start" states: "This Employment is for the period beginning November 1, 2008 and terminating October 31, 2009."

continuation if a subsequent agreement is not signed.” She asked that he be discharged on the next business day “to ensure that [Detroit Child Development] fiscal records are not altered or tampered.”

Despite the evidence that Holt acted in a good faith belief that Burney should be terminated, we conclude the trial court should have dismissed Burney’s claim for tortious interference on the alternate ground that Burney’s claim failed as a matter of law. Burney alternatively asserted that he was an employee of both New St. Paul and the City. The trial court opined that, under the economic reality test, Burney might be an employee of both entities. Given the evidence that Holt acted in a good faith belief that she was acting for the City’s benefit, Burney could not maintain a tortious interference claim against Holt if she was his employer’s agent: “[t]o maintain a cause of action for tortious interference, the plaintiff[] must establish that the defendant was a ‘third party’ to the contract or business relationship” or that the corporate agent “acted solely for [his or her] own benefit with no benefit to the corporation.” *Reed*, 201 Mich App at 13. Hence, Burney’s tortious interference claim would fail as a matter of law, if the City were his employer. All the documents submitted by Holt demonstrated that she acted for her employer’s benefit; even assuming that Holt acted with the intent to deceive federal auditors for the City’s benefit, there is no evidence that she acted for personal gain.

Again, even under the assumption that Burney is New St. Paul’s employee, his claim would still fail as a matter of law. The trial court determined that Holt’s motive for terminating Burney was an issue of fact. However, to establish malice on the part of Holt, the onus was on Burney to “demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.” *BPS Clinical Laboratories*, 217 Mich App at 699. Burney’s only suggestion of an improper motive on behalf of Holt is to deceive federal auditors. Burney contends that Holt asked him to alter his accounting practices in violation of 45 CFR 92.20(b)(6), which provides that the accounting records must “be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.” Specifically, he argued that Holt’s mandate to balance the ledger and cost reports on a monthly basis violates the federal regulation because cost reports may contain estimates that do not, as yet, have verification through source documentation. Burney’s expert, however, did not testify that Holt’s request amounted to a violation of that regulation:

Q. Now, when Ms. Holt asked Mr. Burney and numerous other accountants in the City of Detroit or in the Head Start agencies that once they closed the books . . . for a given month, not to go back in and change anything in the books for that given month, would you agree there was nothing improper about that request.

A. Yeah, I would agree.

Notwithstanding anything to the contrary herein, this Agreement shall not be automatically renewable”

Burney's expert opined that Holt's directive could be construed as "unethical" "in the more generic sense of the word" because "it could give the appearance, proper or improper, to an auditor or anyone else doing oversight that the cost reports were entirely correct because they matched the general ledger." However, when asked if, as a result of his review, he had "the impression that anyone was trying to intentionally defraud or mislead the auditors or anyone else," he responded:

Defraud or mislead? No. Prevent findings? Yes, to—I mean that was to me, and maybe I read into things that weren't there, but that was at the root, in my opinion, of Ms. Holt's request. She did not want—she wanted the auditors to be able to take the general ledger and have it agree to the cost report so that there would be no questions asked and no problems, no findings.

Further:

Q. [I]s it conceivable to you that an internal procedure for the City of Detroit, the Detroit Child Development or some other organization could be to include that invoice in the current month as opposed to the previous month and that there would be no intent to defraud or mislead?

A. Yes.

Q. As long as it's well documented.

A. Yeah.

Burney's expert acknowledged that the report prepared by the independent auditor for the fiscal year ending October 31, 2009, indicated that the financial statements were "kept in conformity with Generally Accepted Accounting Principles." When discussing the existence of certain procedures or policies, Burney's expert agreed that the policies were not improper:

Q. [S]o if, in fact, that is an internal procedure established by the City of Detroit for all its Head Start agencies, not just the one that Mr. Burney worked with, that once the Cost Control Report is completed, that any, that there should not be any subsequent posting to that month and that all postings from that point on should go into the current month and not the previous month, is that conceivably reasonable to you, even though that's not the way you would recommend doing it?

A. If that requirement was in place such that the agencies had an opportunity to close their books, I wouldn't consider that an improper policy.

Finally, the topic of source documentation and the role of cost control reports were explored:

Q. I just want to know is that, can that be considered a source document? Let me ask you this way. Can a schedule of adjustments that is accurately reflective of what was done, that schedule being approved and certified and signed and dated by a supervising accountant, can that be considered a source document?

A. Yes.

Q. And I would assume that that would especially be true if the entries on that schedule came from a report that had source documents as the basis of that report.

A. Yes.

Q. In your work have you on occasion for whatever reason prepared a schedule that you considered to be a source document?

A. Yeah.

While Burney's expert had certain concerns with the methodologies used, he did not suggest a truly improper or illegal motive for the accounting change on the part of Holt or the City. Further, Holt's instructions indicate no personal benefit to be derived, but rather that the actions were taken in furtherance of the City's interests. Because Burney failed to demonstrate that Holt's actions were motivated by anything other than "legitimate business reasons," her acts cannot "constitute improper motive or interference." *BPS Clinical Laboratories*, 217 Mich App at 699. Although Burney points to the short time between his refusal to change the accounting method and his discharge, the timing alone was insufficient to establish that Holt had an improper motive for her request. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002).

Also, Burney could not rely on Holt's purported failure to follow the City's progressive disciplinary procedures to establish this element. Holt would only have to follow the City's disciplinary procedures if Burney was the City's employee and, if he was the City's employee, his claim would fail for the reasons already stated. See *Derderian*, 263 Mich App at 382. Burney similarly could not rely on Holt's purported failure to comply with the procedures for requesting his termination under the agreement between the City and New St. Paul. Paragraph 6.06 provided that the City "may request that the Head Start Director and/or Head Start Accountant be removed if in the City's reasonable opinion he/she unsatisfactorily performs the services hereunder. This request shall be in writing." Holt's request was in writing and there was no evidence that her opinion that Burney's insubordination amounted to unsatisfactory performance was unreasonable.

In summary, Burney failed to present evidence to establish the elements of his tortious interference claim. As such, the trial court should have dismissed Burney's claim on that basis.

II. WPA

A. STANDARD OF REVIEW

On cross-appeal, Burney contends the trial court erred in dismissing his WPA claim. He maintains that he met the definition of an employee under the WPA when applying the economic reality test and that the trial court improperly focused on the testimony by his expert in determining whether Holt's directive was illegal. He also asserted in the lower court that he reported the violation of law, qualifying as a whistleblower, through his statements at the audit

readiness meeting to various individuals. We review de novo the trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012).

B. ANALYSIS

Under the WPA, an employer must not “discharge, threaten, or otherwise discriminate against an employee” because the employee “reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation” MCL 15.362. Thus, to establish his claim, Burney had to plead and be able to prove that he was engaged in protected activity under the act, was discharged or otherwise discriminated against, and that there exists a causal connection between the protected activity and the discharge or discrimination. *Anzaldua v Neogen Corp*, 292 Mich App 626, 630-631; 808 NW2d 804 (2011). A “protected activity” is defined to mean: (a) reporting the violation of a law, regulation or rule to a public body, (b) being poised to report a violation to a public body, or (c) being requested by a public body to participate in an investigation. See MCL 15.362.

Here, the trial court determined that there was no evidence that Burney reported an actual or suspected violation of law or regulation. See MCL 15.362. Burney argued that he reported that Holt's directive would amount to a violation of 45 CFR 92.20(b)(6), which provides that the accountings at issue had to have supporting documentation. This regulation, however, does not provide a timeframe for compliance. Contrary to Burney's contention, this conclusion by the trial court was not solely attributable to the failure of Burney's expert to opine that Holt's instructions comprised a legal violation. The trial court relied on the actual language of the cited regulation. Although the evidence established that Burney expressed dissatisfaction and disagreement with Holt's directives premised on “generally accepted accounting practices,” there is no indication in the record that Burney was reporting a violation or suspected violation of law. The evidence showed that he repeatedly opined that he did not see the necessity of the methodology required by Holt and asserted it was not a good accounting practice, but he never alleged or asserted in the audit readiness meeting that conforming to the request would result in a violation of law. Burney never implied to the individuals at the audit readiness meeting that the requested change in his accounting procedures was “a suspected violation of a law or regulation or rule promulgated pursuant to law of this state . . . or the United States. . . .” MCL 15.362. Rather, his reasons for refusing to follow Holt's directive appear to have been associated with his own preferences and time constraints, the convenience and conformance to a computerized accounting program being used, and general disagreement with the necessity and propriety of the request premised on principles of accounting. Burney never referred to the federal regulations as a basis for his concerns. Even in his March 2010 letter to the City's mayor, Burney did not assert a violation of law, but rather alleged that the actions pertaining to his suspension were unreasonable, contrary to personnel policies, and a violation of the rules of accounting. Further, his expert did not opine that Holt's directive was contrary to the regulation; only that it did not conform to general accounting practices and may comprise an ethical concern.

“[W]histleblowing assumes that an employee takes a risk of retaliation for uncovering the public employer's misconduct. Here, there was simply no misconduct or illegality.” *Whitman v Burton*, 305 Mich App 16, 25; ___ NW2d ___ (2014). The City and its employees “did not actually ‘violate’ any law in the sense that ‘violations of law’ have been traditionally understood in whistleblowing lawsuits—i.e., revealing public corruption or malfeasance.” *Id.* at 25-26.

Because Burney failed to present evidence that he was engaged in a protected activity, the trial court did not err when it dismissed his WPA claim.

The trial court erred when it denied Holt's motion to dismiss Burney's tortious interference claim because the undisputed facts establish that Holt's actions did not amount to tortious interference. The trial court, however, did not err when it dismissed Burney's WPA claim.

Reversed in part, affirmed in part, and remanded for entry of an order dismissing Burney's tortious interference claim. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly