

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

SC Court of Appeals

Letitia H. Verdin, Circuit Court Judge

Case No.: 2014-001737

Mark D. Ostendorff.....Appellant,

v.

School District of Pickens County.....Respondent.

INITIAL BRIEF OF RESPONDENT

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I. STATEMENT OF ISSUE ON APPEAL

The only issue presented by this appeal from the order of the Honorable Letitia H. Verdin is whether the Circuit Court properly granted Respondent's Motion to Dismiss Improperly Named Defendants.

II. STATEMENT OF THE CASE

On February 29, 2014, Plaintiff/Appellant Ostendorff filed a Complaint against Pickens County School District ("School District"), Pickens County Board of Trustees ("Board"), Alex Saitta, Judy Edwards, Jimmy Gillespie, Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt, and Robert Folkman. (Complaint R. pp. ____). Thereafter, on April 25, 2014, Respondent filed a Motion to Dismiss Improperly Named Defendants, and on July 10, 2014, the Honorable Letitia H. Verdin granted Respondent's motion. (Order Granting Motion to Dismiss R. pp. ____). On August 9, 2014, Appellant filed this motion to appeal the Circuit Court's decision to Dismiss Improperly Named Defendants. (Notice of Appeal R. pp. ____). Respondent prays that this Court affirm the order entered by the Circuit Court.

III. STATEMENT OF FACTS

Appellant was employed by the District from June 2008 to March 2011 as a Building Project Manager. (Complaint ¶ 10, R. pp. ____). Due to the scheduled completion of Building Fund projects, Appellant was notified in December 2010 that his employment would end on June 30, 2011. (Defendants' Memorandum of Law in Support of Motion to Dismiss Improperly Named Defendants R. pp. ____). However, due to performance concerns, including, taking time off without approval, failing to maintain established work hours, and not completing assigned tasks, Appellant's employment was

terminated on March 1, 2011. (Complaint ¶ 19, R. pp.____.). As a result of this termination, Appellant has asserted the following eleven causes of action: fraud, intentional fraud, civil conspiracy, and false testimony under sworn oath, subordination of false testimony under sworn oath, negligence, gross negligence, reckless (willful) negligence, retaliatory discharge, unequal treatment, and wrongful discharge against the Defendants. (Complaint ¶ 6, R. pp.____.).

Nowhere in Appellant's Complaint are there specific factual allegations to support his claim that the actions of the individual Defendants were "for their own benefit and not to the public school students of Pickens County." (Complaint ¶ 7, R. pp.____.). In fact, in the following paragraphs, Appellant concedes that the Defendants were acting *within* the scope of their employment and in *furtherance* of the School District's business:

- That on Tuesday, March 1, 2011, in the AM, Ostendorff then met with Kelly Pew, then the Director of Human Relations, to ask why Ostendorff had been discharged. Ostendorff was told that Folkman told her that Ostendorff had been discharged because of "failure to complete assignments, failure to maintain regular work hours, and taking unapproved time off." Ostendorff replied that "well, that's the first I've ever heard of it." Pew quickly walked up to Ostendorff, shook his hand and said, "good luck in future employment," and escorted Ostendorff out of her office. Pew made no effort to support what Folkman had told her. (Complaint ¶ 19, R. pp.____.).
- That on March 11, 2011, Ostendorff sent a letter addressed to Alex Saitta, SDPC Board Chairman, appealing his discharge. A copy was also sent to each SDPC Board member. The letter also made a claim for monetary damages. Ostendorff sent the letter as he found no appeal policy from SDPC, but found on the SDPC website that employees being laid off for budget reasons could appeal to the SDPC Board. (Complaint ¶ 27, R. pp.____.).
- That shortly after sending the letter, Trotter called Ostendorff in which he was not aware that Ostendorff was discharged. He said that Judy Edwards called him to ask if he knew anything about Ostendorff's discharge. (Complaint ¶ 28, R. pp.____.).

- That shortly after sending the letter to Saitta, Ostendorff received a voice mail from Saitta informing Ostendorff that Henry Hunt, then SDPC Superintendent, would contact me on the SDPC policy to any appeal. (Complaint ¶ 29, R. pp.____.).
- That Ostendorff later received a voice mail for me to have a conference with Hunt for March 17, 2011. Ostendorff had a discussion with Hunt on that date in Hunt's office. Hunt did not appear of knowledge of my discharge prior to my letter to Saitta of March 11, 2011. In that discussion with Hunt, Ostendorff explained his position of his wrongful discharge. In that discussion, Ostendorff assured that it was the conversation with the friend with the new school board member was the reason for Ostendorff's discharge, not the reasons Kelly Pew provided Ostendorff on March 1, 2011. Ostendorff also stated he was due monetary compensation for the additional 2 years and 4 months as for Ostendorff's assurance of 5 years, up to 7 years, of employment and also the retirement money he would receive after the 5 years of employment. Hunt informed Ostendorff that Hunt would investigate the matter. (Complaint ¶ 30, R. pp.____.).
- That on March 17, 2011, meeting with Hunt, Ostendorff, was given Kelly Pew's letter dated March 16, 2011, addressed to Ostendorff. (Complaint ¶ 31, R. pp.____.).
- That on March 23, 2011, Hunt sent a letter to Ostendorff of Hunt's investigation and findings. (Complaint ¶ 33, R. pp.____.).
- That a letter dated April 6, 2011, from Hunt to Ostendorff informed Ostendorff that Hunt would present Ostendorff's letter requesting an appeal to the Board of Trustees. (Complaint ¶ 36, R. pp.____.).
- That a letter dated April 13, 2011, from Hunt to Ostendorff stating that the Board of Trustees voted in public session to deny Ostendorff's request for a hearing. (Complaint ¶ 37, R. pp.____.).
- That during the May 4, 2011, SCDEW appeal hearing, Folkman gave false testimony under sworn oath. The SCDEW hearing officer asked Folkman of what he (Folkman) said at the time when Folkman discharged Ostendorff. Folkman replied to the affect that "I told him he took time off without authorization. At this point of the Building Program we cannot have employees taking time off." (Complaint ¶ 44, R. pp.____.).

IV. ARGUMENT

A. The Circuit Court Properly Granted Respondent's Motion to Dismiss Improperly Named Parties.

Respondent's Motion to Dismiss Improperly Named Defendants was properly granted, as the Pickens County School Board of Trustees is an elected governing body and not a separate legal entity, and the named Defendants are not proper parties to this action under the Tort Claims Act.

1. Defendants Alex Saitta, Judy Edwards, Jimmy Gillespie, Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew, Henry Hunt, and Robert Folkman Are Not Proper Parties To This Suit.

The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. *See Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998). Section 15-78-70(a) provides in part that “[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).” S.C. Code Ann. § 15-78-70(a). Subsection (b) states: “[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” S.C. Code Ann. § 15-78-70(b).

The Act's definition of an “employee” refers to “any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty.” S.C. Code Ann. § 15-78-30(c). “‘Scope of official duty’ or ‘scope of state employment’ means (1) acting in and about the official business of a

governmental entity and (2) performing official duties.” S.C. Code Ann. § 15-78-30(i). See *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003) (“The Act is intended to cover those actions committed by an employee within the scope of the employee's official duty.”); see also *Wade v. Berkeley Cnty.*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998) (noting that § 15-78-20(f) limits coverage to employees acting within the scope of official duty).

Nowhere in Appellant’s Complaint are there specific factual allegations to support his claim that the actions of the individual Defendants were outside the scope of their official duties. In fact, the essence of Appellant’s Complaint is his assertion that he was wrongfully terminated from his employment with the School District. Accordingly, the actions of the individual Defendants related to the termination of Mr. Ostendorff constituted conduct within the scope of their duties. See *Padgett v. S. Carolina Ins. Reserve Fund*, 340 S.C. 250, 255, 531 S.E.2d 305, 308 (Ct. App. 2000) (“For example, if a person charged with making personnel decisions is accused of discriminating in hiring or firing someone, the alleged discrimination falls within the scope of that person's official duties.”).

This conclusion is supported by the Court of Appeals' decision in *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). In *Flateau*, the plaintiffs, employees of the State Commission for the Blind, alleged that the Commission's board summoned them to the Commission's Board Room where members of the media were present and the plaintiffs were forced to remain for hours for the purposes of awaiting an interview by the Board. Plaintiffs filed suit alleging that the Board would not allow them to leave the room without a security escort and asserted claims against Board members for outrage, invasion of privacy, and civil conspiracy. The trial court granted the Board members’ Rule 12 (b)(6) motion and noted:

The pleadings clearly and unequivocally allege that the Board members were meeting and acting together as the South Carolina Commission for the Blind, discussing matters in executive session, and voting in their capacity as Commissioners to take the actions in question—all official duties and actions that are about the official business of the Commission, which is a public body established by the General Assembly.

Requiring Flateau and Fielding to attend a hearing and holding them there, as Flateau and Fielding maintain in their complaints, may be argued to go beyond the *authority* of the Commission, but it does not bring the Commissioners' actions outside the scope of their official duty. *See Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986) (distinguishing scope of servant's employment from scope of servant's authority and holding acts outside servant's authority are still within his scope of duty if done in furtherance of master's business).

Id. at 205, 584 S.E.2d at 417.

Similarly, in the present case, taking all of the Appellant's allegations in the Complaint as true, even if the procedures that were used in terminating Mr. Ostendorff's employment were arguably beyond the authority of the individually named defendants, these Defendants' actions were not outside the scope of their official duties since Appellant's Complaint pleads that they were at all times acting in furtherance of the District's business. *See Crittenden*, 288 S.C. at 115, 341 S.E.2d at 387 ("If the servant is doing some act in furtherance of the master's business he will be regarded as acting within the scope of his employment, although he may exceed his authority."); *See Id.* at 116, S.E.2d at 387 ("Only if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, does his conduct fall outside the scope of his employment.") Because the Appellant's Complaint against the individually named defendants alleges conduct solely within the scope of their official

duties, there can be no individual liability for these School District officials. *See Flateau*, 355 S.C. at 206, 584 S.E.2d at 417 (“The remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual governmental employee.”).

Further, a comparison of the instant case with various reported decisions from our state's courts that have found that the actions of government employees were not within the scope of their official duties makes it readily apparent that the decision in the present matter should be affirmed. Specifically, the cases where our courts have determined that government employees or officials acted outside the scope of their duties have involved situations where the employee or official blatantly acted with improper personal motives. *See, e.g., Loadholt v. South Carolina Budget & Control Bd.*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000) (sexual misconduct of sheriff with department employees, after summoning employees into his office under pretext of discussing jail or departmental business, outside scope of official duties and not covered by IRF policy); *Doe v. South Carolina Budget & Control Bd.*, 329 S.C. 214, 494 S.E.2d 469 (Ct. App. 1997), *aff'd* 337 S.C. 294, 523 S.E.2d 457 (1999) (police officer who stopped female motorists on suspicion of DUI and gave them the option of being arrested or providing sexual favors acted outside scope of official duties); *Padgett v. South Carolina Ins. Reserve Fund*, 340 S.C. 250, 253, 531 S.E.2d 305, 307 (Ct. App. 2000) (a professor was not acting within the scope of his employment when he sexually harassed a student).

Nevertheless, Appellant asserts various misguided theories in his brief regarding why he believes the individual Defendants should not have been dismissed by the trial judge. For example, Appellant argues that Judge Verdin should not have dismissed the individual Defendants because no affidavits were offered or provided by any of the Defendants with an explanation of how they acted within the scope of their official

duties. Such evidence is not required at the Rule 12(b)(6) stage when the Complaint merely makes generalized declarations, unsupported by any specific factual allegations appearing in the pleadings, that these District officials acted outside the scope of their official duties. This error is fatal to Appellant's claims against the individual Defendants. *See Flateau*, 355 S.C. at 201, 584 S.E.2d at 415 ("Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the fall of the Complaint.").

In addition, throughout his initial brief, Appellant asserts the ruling of the Circuit Court violated his due process and equal protection rights. Again, this argument is without merit. Importantly, the Circuit Court's decision did not end Appellant's claims against the District nor did it decide the merits of the action. Rather, the Circuit Court's decision, in accordance with the law, removed those portions of the Complaint which could not stand under South Carolina law. As noted above, the Tort Claims Act restricts governmental liability - including the prohibition of claims against governmental employees and is to be construed narrowly against liability. S.C. Code Ann. § 15-78-20(f). Indeed, the South Carolina Supreme Court has ruled that claims which contend provisions of the Tort Claims Act are unconstitutional, including allegations that the Act violates the right to a jury trial, the Act impermissibly limits recovery, or that the Act violates the Equal Protection Clause, are without merit. *See Wright v. Colleton Cnty. Sch. Dist.*, 301 S.C. 282, 290, 391 S.E.2d 564, 569 (1990).

2. Pickens County School Board of Trustees Is Not A Proper Party To This Case.

Plaintiff has also named the Pickens County School Board of Trustees as a separate Defendant to this action. In addition to the reasons set forth above, the Board should be dismissed from this action because it is not a separate legal entity subject to

suit. Specifically, South Carolina Code Ann. § 59-17-10 provides that "[e]very School District is and shall be a body politic and corporate, by the name and style ...[and] in that name it may sue and be sued...[.]" The Board is the elected governing body of the School District, not a separate legal entity, and thus, is not subject to suit as a matter of law. *See* S.C. Code Ann. § 15-78-70 (Tort Claims Act requires a plaintiff to name the agency or political subdivision as the party defendant).

V. CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Court should affirm the Circuit Court's order to dismiss the Improperly Named Defendants.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served **RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER** on the *Pro Se* Appellant, by depositing a copy of it in the U.S. Mail, postage prepaid, on February 20, 2015, addressed to Mark Ostendorff, 135 Cedar Creek Circle, Central, SC 29630.



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