STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1070

Betty L. Ellison-Harpole,
Appellant,

vs.

Special School District No. 1
a/k/a Minneapolis Public School District,
Respondent,

Brenda Ring,
Respondent.

Filed April 8, 2008
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-CV-05-005015

Philip G. Villaume, Jeffrey D. Schiek, Villaume and Schiek, P.A., 2051 Killebrew Drive, Suite 611, Bloomington, MN 55424 (for appellant)

Stephen G. Andersen, Ratwik, Roszak & Maloney, P.A., 730 Second Avenue South, Suite 300, Minneapolis, MN 55402 (for respondent Special School District No. 1)

Brenda Ring, 618 25th Avenue North, Minneapolis, MN 55411 (respondent)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HARTEN, Judge

Appellant Betty Ellison-Harpole, a/k/a Betty Tucker, a public school teacher, challenges the summary judgment granted to respondent Special School District No. 1 dismissing appellant's whistleblower and breach of contract claims as unsupported by the evidence and her claims of negligence, negligence per se, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and respondeat superior under the doctrine of vicarious official immunity. We conclude that: (1) appellant's conduct did not constitute a report within the meaning of the Whistleblower Act and evidence does not support the existence of a nexus between her alleged whistleblowing and the district's alleged retaliation; (2) the district court correctly found that no relevant contract existed between the parties; and (3) the school district was entitled to vicarious official immunity. Accordingly, we affirm.

FACTS

Appellant taught second grade for respondent. One of her students in the 2003-04 school year was the son of Brenda Ring, who also had three other children enrolled in the school.[1]

On 3 September 2003, an altercation between appellant and Ring occurred when Ring came to appellant's classroom and demanded that her son attend speech therapy. Appellant and Ring both shouted, and Ring used profanity. On 16 September, Ring again went to appellant's classroom to pick up her son. Appellant was alone in the locked

[1] Ring is identified as a respondent but takes no part in this appeal.

classroom; she did not respond when Ring attempted to get her attention. Ring again used profanity and orally threatened appellant.

An assistant principal heard Ring and escorted her from the building. The school social worker, who witnessed the altercation, wrote a letter to the principal describing the incident and copied appellant on the letter; appellant wrote the principal requesting that Ring's son be transferred to another classroom. The principal telephoned Ring and told her that her son would be moved to a different classroom and that she would no longer be allowed in the building without an escort.

On 24 September, respondent's "behavior team" established new rules for parents entering the building. The rules required parents to use a particular door and to check in; they also indicated that parents who failed to follow the rules would be orally warned, then warned by letter, and then prohibited from entering the school for the remainder of the year.

On 11 November, Ring was outside appellant's classroom door and "glared" at her through the window. On 18 November, appellant petitioned the district court for a harassment restraining order (HRO) against Ring. The district court, without explanation, issued an order that Ring not harass appellant. Appellant's counsel sent a copy of the court's order to the principal, who submitted it to respondent's legal department. The legal department determined that the order did not prohibit Ring from entering the school but only from coming near appellant's classroom area on the second floor. Appellant testified that Ring did not contact her or harass her after the HRO was issued. When Ring thereafter came to the building, appellant avoided or ignored her.

On 4 February 2004, appellant saw Ring in the building. Appellant called 911 to report a violation of the HRO, placed her students in the care of an assistant, and left school for the day. The principal told appellant that Ring had been in compliance with the HRO and warned appellant that leaving her students with an assistant in the future could result in disciplinary action. On 22 March, appellant's attorney wrote to respondent's attorney saying that Ring had been on school grounds in "direct violation of the [HRO]." On 24 March, respondent's attorney replied that Ring did not violate the HRO by entering the school and that, when she entered, she was escorted to her destination. On 31 March, appellant was informed that she would be suspended for three days without pay for "conduct unbecoming a teacher or insubordination or inefficiency in teaching or in the management of a school."

On 28 May, when appellant was escorting her students to the bus at the end of the day, she saw Ring sitting on a bench. She objected to Ring's presence, told the principal to take the children to the bus, collected her things, and left. Respondent later warned her by letter not to make a scene with regard to Ring in the presence of students, staff, or parents.

In March 2005, appellant brought this action against Ring and respondent, alleging negligence, negligence per se, breach of contract, assault, intentional infliction of emotional distress, and negligent infliction of emotional distress against Ring and negligence, negligence per se, breach of contract, assault, intentional infliction of emotional distress, whistleblower violation, negligent infliction of emotional distress, and

respondeat superior against respondent.[2] Respondent denied all appellant's allegations and moved for summary judgment on grounds of official immunity. Following a hearing, the district court granted the motion and dismissed all counts against respondent.

Appellant opposes that dismissal, challenging the district court findings that no nexus existed between respondent's discipline of appellant and her alleged whistleblowing activity and that no relevant contract existed between the parties. Appellant further argues that respondent is not protected by vicarious official immunity.

D E C I S I ON

1. The Whistleblower Claim

The district court found that appellant had not "provide[d] adequate evidence of a causal connection between the incident she reported [Ring's violations of the school harassment policy] and the adverse employment action [appellant's three-day suspension]." This finding is supported by appellant's own testimony. When asked to provide the factual background of her suspension, she said, "I've never been told," and when asked what her understanding was of why she had been suspended, she said, "I don't know." The attorney then asked, "As I understand from your testimony, you don't understand what [the suspension] was for or what that was about?" and appellant answered, "I see it as retaliation, but I don't know what that was for." The attorney asked, "Why do you see it as retaliation? Can you explain that to me?" Appellant replied, "Because – I don't know. Because it was – I think – I look at it as his [the

[2] Prior to a bench trial, appellant agreed to dismiss all counts against Ring except assault. After trial, the district court entered judgment for appellant against Ring for $32,205.

principal's] way of saying I'm in charge." Thus, even in response to repeated questions, appellant never asserted that her suspension was due to her having reported violations of the respondent's harassment policy.[3]

Moreover, we conclude that appellant's alleged whistleblowing activity did not constitute a report within the meaning of Minn. Stat. § 181.932, subd. 1(a) (2006) (providing that a "report" under must notify the employer of a violation of law that is a clearly mandated public policy). In reviewing the dismissal of a whistleblower claim, this court may determine as a matter of law that certain conduct does not constitute a report. *Borgersen v. Cardiovascular Systems, Inc.*, 729 N.W.2d 619, 624 (Minn. App. 2007). Appellant provided no evidence that she notified her employer of any violation of law that was a clearly mandated public policy. Her whistleblower claim stated "[t]hat as a result of [appellant] reporting the violations of the School District's policy against harassment to the appropriate School District Administrators regarding Brenda Ring, the School District took adverse employment action against [appellant] by suspending her for three days." Appellant's conduct in reporting alleged violations of the harassment policy was not a "report" within the meaning of Minn. Stat. § 181.932, subd. 1(a). Her whistleblower claim was properly dismissed.[4]

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[3] We note that the first reference to the harassment policy was made in a letter dated 15 September 2004 from appellant's attorney to respondent's legal department and the principal.

[4] Because we conclude that appellant's whistleblower claim was properly dismissed because it was unsupported by the evidence, we do not address the relationship between whistleblower claims and official immunity. *See Burns v. State*, 570 N.W.2d 17, 18 (Minn. App. 1997) ("[o]fficial immunity is not waived by the Whistleblower Act" and

2. The Contract Claim

Whether a contract exists is generally an issue for the factfinder. *Morrisette v. Harrison Int'l Corp*., 486 N.W. 2d 424, 427 (Minn. 1992). A district court's findings of fact are not set aside unless clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W. 2d 96, 101 (Minn. 1999).

The district court found that "[t]he policies [i.e., respondent's harassment policy and Minn. Stat. § 121A.03, subd. 2 (2006) (requiring schools to adopt harassment policies)] that [appellant] claims were breached do not create a binding contract between [appellant] and [respondent] . . . . The harassment policy provides how harassment will be dealt with after it is reported." Appellant does not allege that respondent violated the policy by failing "to discipline a student or employee" who harassed her or by permitting her to be harassed by "any pupil, teacher, administrator, or other school personnel." Ring's oral harassment of appellant violated no contractual obligation of respondent to appellant.

3. Vicarious Official Immunity

Review of a determination regarding the applicability of vicarious official immunity is de novo. *See Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004) ("The applicability of immunity is a question of law, which this court reviews de novo.").

> Under the official immunity doctrine, public officials, charged by law with duties calling for the exercise of judgment or discretion, are immune from suit for the exercise of that judgment or discretion unless they are guilty of a willful or malicious wrong. Discretion has a broader meaning in the

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that "[a]n action based on the Whistleblower Act is not necessarily barred by official immunity.").

> context of official immunity than in the context of statutory immunity; official immunity protects discretion exercised at the operational level rather than at the policy-making level. The discretion exercised must be more than the performance of ministerial duties, which we have defined as a duty which is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

S.W. v. Spring Lake Park Sch. Dist. No. 16, 580 N.W.2d 19, 23 (1998) (quotation and citations omitted). "Official immunity protects public officials acting in their official capacity from suit, whereas vicarious official immunity protects the governmental entity from suit when the threat of potential liability would unduly inhibit the exercise of discretion required of public officials in the discharge of their duties." *Id.* at 21, n.2 (quotations omitted).

Appellant does not ascribe any willful or malicious wrong to any of respondent's employees or allege any specific discretionary or ministerial act. She claims only that respondent's officials failed to enforce the harassment policy. But the acts of which appellant complains were perpetrated not by an official of respondent but by a parent, and respondent's harassment policy does not apply to parents. It identifies improper behaviors for "any pupil, teacher, administrator, or other school personnel [defined as 'persons subject to the supervision and control of the District']" and "reserves the right to discipline any student or employee" for such behavior, but it does not mention parents. While appellant claims "[i]t is clear that parents would be considered 'persons subject to the supervision and control of [respondent],'" i.e., school personnel, she does not provide any basis for this claim.

In the absence of any allegation of its officials' willful or malicious wrong or any identification of particular conduct alleged to be ministerial, respondent is entitled to vicarious official immunity.[5]

We conclude that there is no basis to overturn the district court summary judgment dismissing appellant's claims against respondent.

Affirmed.

[5] We note that, even if vicarious official immunity did not protect respondent, none of appellant's claims are viable. Her negligence claims fail because she does not show that respondent had or breached a duty with respect to Ring. *See State Farm Fire & Casualty v. Aquila, Inc*., 718 N.W.2d 879, 887 (Minn. 2006) (listing "existence of duty" and "breach of duty" among elements of negligence). Her claim of negligent infliction of emotional distress fails because she does not show that she was in a zone of danger of physical impact. *See Engler v. Ill. Farmers. Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005) (listing being in zone of danger of physical impact among elements plaintiffs need to prove to recover for negligent infliction of emotional distress). Her intentional infliction of emotional distress claim fails because she does not show that respondent's conduct was extreme or outrageous. *See Langeslag v. KYMN, Inc*., 664 N.W.2d 860, 865 (Minn. 2003) (listing defendant's extreme or outrageous conduct among elements of intentional infliction of emotional distress). Her respondeat superior claim fails because she alleged no tort of respondent's employee. *See Fahrendorff ex. rel. Fahrendorff v. N. Homes, Inc*., 597 N.W.2d 905, 910 (Minn. 1999) (stating that respondeat superior applies to hold employer liable for tort committed within the scope of employment by an employee). Finally, her assault claim fails because her alleged assailant was not employed by or connected to respondent.