

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2007-411

APRIL TERM, 2008

Matthew Burgess	}	APPEALED FROM:
	}	
	}	
v.	}	Lamoille Superior Court
	}	
	}	
Thomas M. Salmon	}	DOCKET NO. 81-4-07 Lecv
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals the trial court’s order dismissing his unlawful termination case against defendant, Thomas Salmon, the Vermont State Auditor of Accounts. The court determined that defendant has absolute immunity to plaintiff’s claims. On appeal, plaintiff argues that the trial court: (1) erred as a matter of law in dismissing his claim for declaratory judgment; (2) preemptively granted dismissal because the claim of immunity is fact-dependent; (3) erred in concluding that all of plaintiff’s claims were precluded by defendant’s immunity; and (4) erred in failing to convert defendant’s motion to dismiss into a motion for summary judgment. We conclude that defendant has absolute immunity from plaintiff’s suit and affirm the court’s dismissal.

We take as true the following facts from plaintiff’s complaint. See Amiot v. Ames, 166 Vt. 288, 291 (1997) (“In reviewing disposition of a motion to dismiss, we must assume as true all factual allegations pleaded by the nonmoving party.”). In January 2007, after defendant was elected as Vermont State Auditor, defendant initiated discussions with plaintiff about working for defendant in the State Auditor’s office. On January 10, 2007, plaintiff notified defendant that he had submitted his resignation at his current job in anticipation of working for defendant. In reply, defendant asked plaintiff to “keep it down low” and to “allow[] the process to roll out with deliberation. (Also, we need to say we interviewed a woman for your position) . . . .” Plaintiff’s former employer offered him a salary increase and more vacation time to stay, but plaintiff declined the offer. Defendant sent plaintiff a letter on January 23, 2007, inviting him to join the Auditor’s office as “Administrative Assistant.” The letter explained that plaintiff would be an exempt

employee and entitled to a thirty-day package in the case of separation.\* Plaintiff accepted the offer of employment.

On February 2, four days after plaintiff began working in the Auditor's office, defendant emailed plaintiff and explained that he "heard a disturbing rumor that [plaintiff] described [his] role [at the Auditor's office] as [defendant's] Political Advisor." In the email, defendant warned plaintiff not to make political statements and to remain nonpolitical. On February 9, defendant orally terminated plaintiff's employment because of plaintiff's political profile and over-qualification for the job. Plaintiff requested that defendant provide him with a formal written termination letter confirming the reason for the termination. Eventually, defendant emailed plaintiff and confirmed that plaintiff was terminated due to his high political profile and over-qualification. In response to plaintiff's claim for unemployment benefits, the Department of Labor concluded that plaintiff was not terminated for misconduct and awarded him unemployment benefits.

Plaintiff filed a lawsuit against defendant personally, wherein he alleged that defendant had unlawfully terminated him from his position. His complaint enumerated eight counts including breach of contract, promissory estoppel, fraudulent inducement, negligent representation, interference with contractual relations, breach of the implied covenant of good faith and fair dealing, and wrongful termination. Plaintiff sought a declaratory judgment, compensatory damages, punitive damages and interest.

Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted, claiming that he had absolute immunity from suit. See V.R.C.P. 12(b)(6). Following a hearing, the court granted defendant's motion. The court found that as one of five constitutionally created offices, the Auditor of Accounts has absolute immunity for acts performed within the Auditor's authority. The court concluded that personnel decisions are within the Auditor's authority, and therefore "[e]ach and every act alleged in the Complaint, even those which may be unflattering, occurred in the course of [defendant's] efforts to administer his office by initially hiring Plaintiff as his assistant, and then by summarily terminating him only a short time later."

Although the trial court found that defendant's immunity protected him from suit, the court nonetheless addressed plaintiff's additional arguments. The trial court explained that plaintiff's assertion that governmental immunity pertains to tort and not contract claims was irrelevant in this case because the facts alleged in the complaint did not demonstrate that any employment contract existed between plaintiff and defendant personally. As the trial court explained, "[a] contract for employment, if any existed, would have existed between the Plaintiff and the State of Vermont." In response to plaintiff's assertion that defendant may be liable under the Vermont Tort Claims Act if defendant's actions were grossly negligent, the court concluded that the facts alleged did not amount to gross negligence.

Plaintiff appeals the court's dismissal. "The purpose of a motion to dismiss is to test the law of the claim, not the facts which support it." Powers v. Office of Child Support, 173 Vt. 390, 395 (2002). On appeal, we assume that all factual allegations in the complaint are true and will grant

---

\* As an "exempt" staffer, the terms and conditions of plaintiff's employment were not governed by the classification plan and collective bargaining protections generally applicable to the state's civil service. See 3 V.S.A. § 311(a) (listing types of employees exempt from classified service).

relief if there exist no facts or circumstances that would entitle the plaintiff to relief. Richards v. Town of Norwich, 169 Vt. 44, 48-49 (1999).

Because it is dispositive of the case, we first examine whether the trial court properly concluded that defendant was entitled to absolute immunity. Official immunity “shield[s] public officials from lawsuits against them based on their activities.” Levinsky v. Diamond, 151 Vt. 178, 183 (1989), overruled on other grounds by Muzzy v. State, 155 Vt. 279 (1990). Official immunity may be absolute or qualified. The state’s highest officials have absolute immunity in “cases where the acts complained of were performed within their respective authorities.” Id. at 185. As the State Auditor of Accounts, defendant is protected by absolute immunity as long as his actions were performed within the general authority of his office. See id. at 185 (concluding that the Attorney General and the Commissioner of the Department of Social Welfare had absolute immunity to acts performed within the general authority of their offices). According to the statute setting forth the Auditor’s duties, he is authorized to “employ and set the compensation of such assistants, clerical or otherwise, as he deems necessary for the proper and efficient administration of his office.” 32 V.S.A. § 163(8). Therefore, we agree with the trial court that defendant is shielded from liability against plaintiff’s suit because all of defendant’s actions alleged in plaintiff’s complaint were taken in fulfilling defendant’s role as the Auditor of Accounts.

Plaintiff’s arguments to the contrary are all unavailing. Plaintiff first argues that immunity does not bar a suit seeking declaratory judgment. The cases plaintiff cites in support are inapposite. These cases involve state sovereign immunity, not official immunity, and allow suits for declaratory judgment under certain circumstances. See, e.g., Abelson’s Inc. v. N.J. State Bd. of Optometrists, 75 A.2d 867, 869 (1950) (holding that sovereign immunity did not bar suit where the declaratory action challenged the constitutionality of a statute); Erwin Billiard Parlor v. Buckner, 300 S.W. 565, 566 (1927) (same); Am. Federation of Labor v. Mann, 188 S.W.2d 276, 279 (Tex. Civ. App. 1945) (explaining that the “same rule of state immunity from suit without its consent applies to suits under the Uniform Declaratory Judgment Act as applies to other suits”).

Plaintiff also argues that immunity of a state official is fact-dependent and may not be disposed of under Rule 12(b)(6). Plaintiff is correct that some cases may require factual development before a defendant’s immunity claim is established and therefore cannot be dismissed for failure to state a claim. See Levinsky, 140 Vt. at 602 (reversing dismissal where the complaint alleged that defendant’s actions were beyond the scope of his official duties and thus raised an issue that required more factual development). In other instances, however, a plaintiff’s claims may appropriately be dismissed for failure to state a claim because the facts as alleged establish immunity as a matter of law. See Powers, 173 Vt. at 398 (affirming trial court’s dismissal of plaintiff’s claims against the Office of Child Support because it had sovereign immunity). This case falls into the latter category. The facts alleged in the complaint establish defendant’s immunity as a matter of law because plaintiff’s allegations all involve the hiring and subsequent firing of an employee, a task plainly within the scope of defendant’s authority as the State Auditor.

Plaintiff similarly argues that defendant is only entitled to immunity if he acted within the scope of his authority and he acted in good faith while carrying out a discretionary act. See Long v. L’Esperance, 166 Vt. 566, 570 (1997) (listing the elements of qualified immunity). Plaintiff urges that we remand for further factual development on defendant’s good faith. Plaintiff’s argument misunderstands the type of immunity to which defendant is entitled. The requirement of good faith applies in cases where a state employee claims qualified immunity. In this case, as a high-level

official, defendant has absolute immunity for acts committed within the scope of his duties. Consequently, defendant is not required to demonstrate good faith and there are no further factual issues that preclude dismissal.

Next, plaintiff contends that defendant cannot claim immunity from all of the counts, citing the Tort Claims Act. See 12 V.S.A. § 5601 (listing circumstances in which the State of Vermont may be sued). Plaintiff's argument again confuses the different types of immunity. The Tort Claims Act involves sovereign immunity and applies to claims against the State of Vermont. Plaintiff brought his suit against defendant personally. As explained above, defendant has absolute immunity for acts performed within his authority as Auditor. The type of legal claim that results from the act is irrelevant to whether the official has immunity for the act itself. Thus, it is of no import whether plaintiff's claims sound in tort or contract because all of his claims challenge defendant's act of terminating plaintiff's employment, and this act was part of defendant's official duties.

Finally, plaintiff contends that the trial court erred in failing to convert defendant's motion to dismiss under Rule 12(b)(6) into a motion for summary judgment under Rule 56. Because the court did not consider facts outside the pleadings, there was no reason to treat defendant's motion as one for summary judgment. See V.R.C.P. 12(b) (explaining that if matters outside the pleadings are presented to and considered by the court, the motion is treated as one for summary judgment).

Affirmed.

BY THE COURT:

---

John A. Dooley, Associate Justice

---

Denise R. Johnson, Associate Justice

---

Brian L. Burgess, Associate Justice