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SIXTH DIVISION  
December 16, 2011

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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VALERIE ALLEN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	
	)	No. 07 L 6619
CITY OF CHICAGO and PHILIP CLINE,	)	
Superintendent of the Chicago Police Department,	)	The Honorable
	)	Brigid Mary McGrath,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

**ORDER**

¶ 1 *HELD:* Plaintiff's complaint was properly dismissed where her fraud claim was barred by section 2-201 of the Illinois Local Government and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2008)) and where she failed to present a sufficient claim for negligence involving willful and wanton conduct.

¶ 2 Plaintiff, Valerie Allen, appeals the dismissal of her complaint against defendants, City of Chicago and former Chicago Police Department Superintendent Philip Cline, for fraud and

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"willful and wanton conduct." On appeal, plaintiff contends her fraud claim was not barred by section 2-201 of the Illinois Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2008)) and her "willful and wanton conduct" claim was dismissed in error. Based on the following, we affirm.

¶ 3

#### FACTS

¶ 4 Plaintiff became a member of the Chicago police department in 1985. She initially worked as a patrol officer and then worked on various undercover assignments and on school patrol until 1998. Since 1998, plaintiff has held administrative positions. According to plaintiff's complaint, she was nominated three times for a merit-based promotion, most recently in the fall of 2006, without success. Plaintiff alleged that then-First Deputy Superintendent Dana Starks informed her that she did not receive the merit-based promotion because she lacked "clout." Plaintiff wrote a letter to defendant Cline. Sergeant Raymond Gawne of the personnel division responded in writing, noting that plaintiff's letter demonstrated she did not understand the merit selection process where she repeatedly attempted to use her race and gender to gain favor and stated that she attempted to personally meet with Cline to "circumvent the merit selection process."

¶ 5 On October 8, 2009, plaintiff filed her third amended complaint alleging fraud, willful and wanton conduct, and *respondeat superior*. Defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2008)). In support of their motion to dismiss, defendants attached an affidavit by Lieutenant Cathleen Rendon, the acting commander of the personnel division. Rendon's affidavit described

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the process by which officers were evaluated and selected for merit-based promotion to sergeant. Plaintiff did not challenge Rendon's affidavit or provide anything to contradict the affidavit. The trial court dismissed plaintiff's third amended complaint finding that, although she stated a valid claim for fraud, it was barred by section 2-201 of the Tort Immunity Act and that her "willful and wanton conduct" claim was barred by the doctrine of *res judicata* where the court had ruled that willful and wanton conduct is not an independent tort twice in relation to her prior complaints.

¶ 6

#### DECISION

¶ 7 We review a combined section 2-619.1 motion to dismiss *de novo*. *Gastreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶10. A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of the complaint, but asserts that an affirmative defense or some other matter avoids or defeats the claim. *Id.* In comparison, a motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint by alleging there are defects on the face of the complaint. *Id.* When considering a section 2-615 motion to dismiss, a reviewing court examines the allegations in the complaint in a light most favorable to the plaintiff while accepting as true all well-pleaded facts and drawing all reasonable inferences therefrom in order to determine whether the facts state a cause of action upon which relief may be granted. *Id.*

¶ 8

#### I. Fraud Claim

¶ 9 Plaintiff contends the trial court erred in dismissing her fraud claim pursuant to section 2-619 of the Code on the basis that the claim was barred by section 2-201 of the Tort Immunity

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Act.

¶ 10 Our analysis requires interpretation of section 2-201 of the Tort Immunity Act. The goal of statutory interpretation is to ascertain and give effect to the intent of the legislature by applying the plain language of the statute. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 339, 692 N.E.2d 1177 (1998). We will not read into the statute exceptions, limitations, or conditions that conflict with the expressed legislative intent. *Id.*

¶ 11 Section 2-201 of the Tort Immunity Act provides:

"Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2008).

Moreover, section 2-109 of the Tort Immunity Act provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2008). While interpreting section 2-201 of the Tort Immunity Act, the supreme court has determined the statute requires that the employee at issue hold a position in which he either determines policy or exercises discretion, but that the employee's "act or omission must be both a determination of policy and an exercise of discretion." *Harinek*, 181 Ill. 2d at 341.

¶ 12 Plaintiff initially argues that section 2-201 of the Tort Immunity Act does not extend to defendants' fraudulent acts, namely, corruptly promoting officers to sergeant based on clout,

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because immunity was meant to protect good faith governmental discretion. Despite plaintiff's best efforts to distinguish the supreme court's rationale for refusing to impose an exception to section 2-201 of the Tort Immunity Act for "corrupt and malicious motives" in *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 49-93, 752 N.E.2d 1090 (2001), plaintiff essentially makes the same request here. We, too, decline plaintiff's invitation. The legislature made no express provision excepting any conduct, fraudulent or otherwise. 745 ILCS 10/2-201 (West 2008). The statute contains no reference to intent whatsoever. See *Village of Bloomingdale*, 196 Ill. 2d at 495. We, therefore, refuse to create an exception for fraudulent acts to the immunity afforded defendants pursuant to sections 2-201 and 2-109 of the Tort Immunity Act .

¶ 13 Turning to the next argument, plaintiff apparently concedes that Cline held a position in which he determined policy and/or exercised discretion. Plaintiff, however, argues that fraudulently promoting officers to sergeant is not a protected act of discretion under the Tort Immunity Act where defendants' fraudulent merit selection process was ministerial in nature.

¶ 14 In conjunction with section 2-201 of the Tort Immunity Act, the supreme court addressed the implication of discretionary acts and ministerial acts, stating:

" 'discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.' "

*Harinek*, 181 Ill. 2d at 343, quoting *Snyder v. Curran Township*, 167 Ill. 2d 466,

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474, 657 N.E.2d 988 (1995).

Further highlighting the difference between acts that are discretionary and, therefore, immune and those that are ministerial and not immune, the supreme court explained:

" 'Official action is judicial where it is the result of judgment or discretion. Official duty is ministerial, when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it, prescribes and defines the time, mode and occasion of its performance with such certainty, that nothing remains for judgment or discretion.' " *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 194, 680 N.E.2d 265 (1997), quoting *City of Chicago v. Seben*, 165 Ill. 371, 377-78, 46 N.E.2d 244 (1897).

¶ 15 Cline's decision denying plaintiff a merit-based promotion to sergeant was discretionary within the meaning of section 2-201 of the Tort Immunity Act. No matter if Cline actually applied the established criteria set by the police department, Rendon's affidavit demonstrated that Cline was in the unique position of making the ultimate decision as to who would be promoted. That decision was not exercised in a formulaic manner or by merely applying a rigid set of criteria. Rather, according to Rendon's affidavit, Cline made a "judgment [call] that require[d] balancing the qualifications of the respective nominees, the operational needs of the C.P.D., and the interests of the City of Chicago." Plaintiff did not contradict the merit selection process as described by Rendon in her affidavit. "When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262, 807 N.E.2d 439

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(2004). Consequently, the merit selection process, as described by Rendon, was admitted.

¶ 16 Similarly, Cline's decision not to grant plaintiff a merit-based promotion was a policy decision within the definition of section 2-201 of the Tort Immunity Act. In relation to a public entity, a "policy" decision is one that requires "the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *Harinek*, 181 Ill. 2d at 342. As stated, according to Rendon's affidavit, Cline had to balance the qualifications of the nominees, the needs of the police department, and the interests of the City in order to select the appropriate candidates for merit-based promotion.

¶ 17 The facts demonstrate that Cline's actions constituted discretionary, policy decisions. We, therefore, conclude the trial court properly dismissed plaintiff's fraud claim because defendants' actions, fraudulent or not, were immune from liability pursuant to sections 2-201 and 2-109 of the Tort Immunity Act.

¶ 18 II. Willful and Wanton Conduct Claim

¶ 19 Plaintiff contends the trial court erred in dismissing her claim pursuant to section 2-615 of the Code where she sufficiently pled a cause of action for "willful and wanton conduct." The trial court dismissed plaintiff's claim on the basis of *res judicata* after previously ruling that there was no independent cause of action for "willful and wanton conduct." We may affirm on any basis present in the record. *Studded v. Sherman Health Systems*, 2011 IL 108182, ¶48.

¶ 20 The supreme court has definitively stated that "[there is no separate and independent tort of willful and wanton conduct." *Chron. v. Chicago Transit Authority*, 238 Ill. 2d 215, 235, 938 N.E.2d 440 (2010), citing *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 274, 641 N.E.2d 402

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(1994). Rather, "it is regarded as an aggravated form of negligence." *Id.* Therefore, in order to prove a claim for negligence involving willful and wanton conduct, a plaintiff must demonstrate the defendant owed him a duty, the defendant breached that duty, and the breach proximately caused the plaintiff's injury. *Id.*

¶ 21 We reiterate that plaintiff did not and could not present a claim for willful and wanton conduct here because there is no such tort. *Id.* However, to the extent plaintiff contends she alleged a claim for negligence involving willful and wanton conduct, we review the pleading for its sufficiency. In her third amended complaint, plaintiff alleged defendants had a duty to promote police officers "in accordance with the rules and regulations of the City of Chicago and Chicago Police Department," which defendants breached by "not using the proper merit selection criteria, but instead using its own set of factors with no relation to merit whatsoever." Plaintiff further alleged that as a result of "the willful and wanton conduct" of defendants she suffered damages, "including the costs incurred to fix the damage done to her reputation, loss of time and resources through participating in the promotion process, loss of revenue, and working capital her promotion would have produced."

¶ 22 Plaintiff failed to cite to any authority demonstrating defendants owed her a duty and failed to present anything more than a conclusory argument that she was owed a duty. Plaintiff, therefore, violated Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) .

¶ 23 Notwithstanding, plaintiff failed to demonstrate defendants owed her a duty. The conclusory factual allegations in plaintiff's complaint do not legally establish the existence of a duty. *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶17. Moreover, plaintiff cannot prove

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defendants' promotional policy entitled her to any specified review or subsequent merit-based promotion. In assessing whether the plaintiff had a right to a promotion pursuant to the Chicago police department's written promotion policy, this court said, " 'general statements of company policy or procedures which are discretionary in nature [are] too indefinite to constitute a clear promise which could reasonably be interpreted as an offer.' " *Altman v. City of Chicago*, 224 Ill. App. 3d 471, 474, 586 N.E.2d 698 (1991), quoting *Harrell v. Montgomery Ward & Co.*, 189 Ill. App. 3d 516, 522, 545 N.E.2d 373 (1989). Indeed, when there is discretion as to which candidate to promote, the candidate does not have a vested right in a promotion. See *Schlicher v. Board of Fire & Police Commissioners of Village of Westmont*, 363 Ill. App. 3d 869, 875, 845 N.E.2d 55 (2006); *Brunke v. Board of Fire & Police Commissioners of City of Countryside*, 99 Ill. App. 3d 25, 28, 425 N.E.2d 15 (1981). "By their very nature, assessments of a person's efficiency and merit must be discretionary." *Zuelke v. Board of Fire & Police Commissioners of Broadview*, 79 Ill. App. 3d 1080, 1082, 398 N.E.2d 1080 (1979).

¶ 24 Plaintiff does not contest that the sergeant promotion was within the discretion of defendant Cline; rather, plaintiff acknowledges that the merit selection process is "based on the certain criteria that includes, but is not limited to, the Officer's: work experience, test score, activity, disciplinary record, dependability, problem solving, achievements, intrapersonal skills, education, and valor." Whether the merit selection process was applied properly or not, the merit-based promotion to sergeant was decided using discretion. Plaintiff cannot establish a cause of action for negligence involving willful and wanton conduct where she cannot establish that defendants owed her a duty. We, therefore, conclude that the cause of action was properly

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dismissed.

¶ 25

#### CONCLUSION

¶ 26 We affirm the judgment of the trial court dismissing plaintiff's complaint.

¶ 27 Affirmed.