

No. 1-11-1613

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BRIAN D. ZIMA, ) Appeal from the Circuit  
 ) Court of Cook County.  
Plaintiff-Appellant, )  
 )  
v. ) No. 09 L 13080  
 )  
CITY OF BERWYN and POLICE CHIEF )  
WILLIAM KUSHNER, in his individual and )  
official capacities, )  
 )  
Defendants-Appellees )  
 )  
(Edward Fineran and John Fineran, Defendants). ) The Honorable  
 ) Lynn M. Egan,  
 ) Judge Presiding

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in granting the appellees' motion to dismiss the claims against them pursuant to the Tort Immunity Act.

¶ 2 The plaintiff, Brian Zima, appeals from the circuit court's decision to dismiss his claims against the appellees, the City of Berwyn (City) and Police Chief William Kushner, who he claims improperly forced his retirement from the City's police force. The court concluded that the claims

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against the appellees were barred by the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/1-101 *et seq.* (West 2010)), but it left pending claims against additional defendants Edward and John Fineran, who are not parties to this appeal. On appeal, the plaintiff argues that the circuit court erred in dismissing his claims under the Act and that the circuit court should have allowed him to amend his complaint to cure the defects that led to its dismissal. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 In his second amended complaint, the plaintiff alleged that he was hired as a police officer for the City in February 2007. One week before the second anniversary of his hiring, the plaintiff was informed that his two-year probationary period would be extended because he was on medical leave. On March 3, 2009, during his extended probationary period, the plaintiff received from the City a notice informing him that he would be formally interrogated regarding his misuse of the Law Enforcement Agency Data System (LEADS). That interrogation was conducted on March 20.

¶ 4 At the interrogation, the plaintiff was questioned regarding his providing LEADS information to his friend Richard Barber, who was a Chicago police officer. The plaintiff admitted during the interrogation that he had twice given Barber LEADS information, but he alleged in his complaint that he did not suspect until after the second LEADS search that the information he was giving Barber was for personal use. According to the complaint, after the interrogation, Kushner falsely told the plaintiff's attorney that Barber had used the LEADS information to facilitate an assault. Thereafter, the plaintiff's attorney informed him "that Kushner had given him the option to resign immediately or be fired." The plaintiff chose to resign.

¶ 5 Based on these allegations, the plaintiff raised six claims against the City, Kushner, and

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Edward and John Fineran: claims of wrongful discharge (Count I), "resignation under duress" (Count II), intentional interference with prospective economic advantage (Count III), fraudulent misrepresentation (Count IV), "violation of police officers bill of rights" (Count V), and intentional infliction of emotional distress (Count VI). Each of these counts raised the above factual allegations and repeated the statement that the defendants' actions violated the Illinois Municipal Code and the due process clauses of the United States and Illinois constitutions. Each count ended with a prayer that the plaintiff be awarded damages and attorney fees and be reinstated as a police officer.

¶ 6 The appellees moved to dismiss the plaintiff's complaint on the ground that it was barred by the Act. The circuit court granted that motion but allowed the case to continue against Edward and John Fineran. The court found that there was no just reason for delaying enforcement or appeal of its dismissal order (see Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), which the plaintiff now appeals.

¶ 7 Because all of the plaintiff's arguments on appeal challenge the circuit court's decision to dismiss his claims against the appellees, we begin our analysis by reviewing the well-established guidelines for review of dismissal orders. The appellees' motion to dismiss was filed pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). Section 2-619 provides for dismissal of a claim if, among other things, it is barred by some "affirmative matter." 735 ILCS 5/2-619(a)(9) (West 2010). Statutory immunity is the type of affirmative matter that may be raised in a section 2-619 motion. *Wilson v. City of Decatur*, 389 Ill. App. 3d 555, 558, 906 N.E.2d 795 (2009). In ruling on a section 2-619 motion to dismiss, a court must interpret the pleadings and supporting materials in the light most favorable to the non-moving party. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332, 898 N.E.2d 631 (2008). We review *de novo* a circuit court's

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decision to grant a section 2-619 motion to dismiss. *Abruzzo*, 231 Ill. 2d at 332.

¶ 8 The plaintiff's first argument on appeal is that the circuit court erred in ruling that his claims against the appellees are barred by the Act. The circuit court dismissed the plaintiff's claims pursuant to section 2-201 of the Act, which provides that "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 2010). To the extent this provision immunizes Kushner against the plaintiff's claims, it also immunizes the City for the same acts. See 745 ILCS 10/2-109 (West 2010) ("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.")

¶ 9 In order to avail themselves of the immunity afforded by section 2-201 of the Act, municipal defendants must show both that their challenged action involved a matter of policy and that the actions were discretionary. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 379, 799 N.E.2d 273 (2003). Regarding the "policy decision" element, the supreme court has held that "decisions requiring a governmental entity to balance competing interests and to make a judgment call as to what solution will best serve those interests are 'policy decisions' " within the meaning of the Act. *Van Meter*, 207 Ill. 2d at 379. The plaintiff makes no argument that the actions here were other than policy decisions, and we independently find no reason to question that the type of personnel actions at issue here were matters of policy.

¶ 10 Instead of disputing whether the actions at issue here were policy decisions, the plaintiff challenges the "discretionary" requirement for immunity under the Act. As noted, in order to avail

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themselves of the immunity afforded by section 2-201 of the Act, the appellants' actions must have been discretionary, not ministerial. *Johnson v. Mers*, 279 Ill. App. 3d 372, 380, 664 N.E.2d 668 (1996). Although "the distinction between discretionary and ministerial functions resists precise formulation," courts have recognized that "discretionary acts are those [that] are unique to a particular office, while ministerial acts are those [that] 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." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474, 657 N.E.2d 988 (1995).

¶ 11 The plaintiff avers that the appellees' acts here were ministerial, not discretionary, in that they were required to follow the termination procedures laid out in section 10-2.1-17 of the Illinois Municipal Code (65 ILCS 5/10-2.1-17 (West 1010)). As relevant here, that section states that "no officer or member of the fire or police department \*\*\* shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense." 65 ILCS 5/10-2.1-17 (West 2010). According to the plaintiff, this section required the appellees to afford him a hearing, and their failure to do so constituted a deviation from a ministerial duty. However, as the appellees point out in their brief, the plaintiff was not "removed or discharged." He chose to resign his position. Accordingly, section 10-2.1-17 was never triggered, and we reject his argument that the appellees' failure to follow it is actionable.

¶ 12 The plaintiff also argues that, notwithstanding the above points, the Act cannot defeat his claims against the appellees, because he raised "constitutional torts" beyond the Act's reach. In so arguing, the plaintiff refers us to the decision in *Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 758

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N.E.2d 25 (2001). In *Birkett*, a church brought an action against the City of Chicago (Chicago) alleging that airport jet traffic created a nuisance, and seeking both litigation costs and damages to pay for soundproofing to abate the nuisance. *Birkett*, 325 Ill. App. 3d at 199. Chicago asserted immunity under the Act, and the church argued that the Act was unconstitutional insofar as it immunized public entities from providing just compensation for the taking caused by the jet nuisance. *Birkett*, 325 Ill. App. 3d at 201-02. The appellate court rejected this argument because it "ignore[d] the distinction between a violation of a constitutional right and a tort, and the [Act] applies only to tort actions and does not bar actions for constitutional violations." *Birkett*, 325 Ill. App. 3d at 202.

¶ 13 Based on this passage from *Birkett*, the plaintiff in this case asserts that his is an action based on a constitutional violation, because he alleged in each count of his complaint that the appellees' conduct violated his due process rights. Be that as it may, we agree with the appellees that each count of the plaintiff's complaint sounded in tort. The plaintiff's references to due process did not raise independent constitutional claims; they supported the plaintiff's tort claims. For that reason, we agree with the appellees that *Birkett's* constitutional action-tort action dichotomy is inapposite to this case.

¶ 14 Further, to the extent the plaintiff did assert a constitutional claim beyond the scope of the Act, we conclude that the claim is not viable and thus was properly dismissed. See *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 158, 772 N.E.2d 953 (2002) ("this court may affirm a correct dismissal by the trial court for any reason appearing in the record"). The plaintiff's due process argument relies on two premises: first, that his probationary period had ended and he

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had become a permanent employee with a property interest in his job; and, second, that the appellees deprived him of this interest without providing him the hearing required by section 10-2.1-17 of the Illinois Municipal Code. The difficulty with the plaintiff's argument lies in its second premise. As we have noted above, the plaintiff was not "removed or discharged." Thus, regardless of whether the plaintiff was a probationary or permanent employee, the statutory procedures and protections attendant to a removal or discharge did not apply to him once he resigned his position. For that reason, we reject his argument that the procedures that led to his resignation denied him his right to due process.

¶ 15 The plaintiff's final argument is that, if his complaint was defective for raising only tort claims barred by the Act, and not raising any claims beyond the scope of the Act, the circuit court should have dismissed his complaint without prejudice with an opportunity to replead. The parties do not assert that the plaintiff sought a dismissal without prejudice or leave to replead, but they nonetheless ask us to apply the well-established test for reviewing a circuit court's refusal to allow an amended pleading. Under that test, a court should consider four factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273, 586 N.E.2d 1211 (1992). We will not reverse a circuit court's decision to allow or disallow an amended pleading unless the court abused its discretion. *Loyola Academy*, 146 Ill. 2d at 273-74.

¶ 16 The plaintiff contends that he could have cured the defect in the complaint by revising his

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prayer for relief to seek equitable relief instead of monetary damages. See *Birkett*, 325 Ill. App. 3d at 204 ("the [Act] applies only to tort actions seeking damages \*\*\* and not to actions seeking injunctive relief"). However, even if we were to accept the plaintiff's position that such an amendment would defeat the appellees' tort immunity, the plaintiff offers no reason why he could not have framed his complaint in that way originally. We also note that the plaintiff had twice already been granted leave to amend his complaint. Based on these factors, we find no abuse of discretion in the circuit court's decision to dismiss the plaintiff's complaint with prejudice.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 18 Affirmed.