STATE OF MICHIGAN

COURT OF CLAIMS

CALVIN GAGE,

Plaintiff,

v Case No. 26-000032-MM

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES, Hon. Sima G. Patel

Defendant.
_____ /

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiff, Calvin Gage, raises a constitutional tort claim against defendant, Michigan Department of Health and Human Services (DHHS), seeking monetary damages for defendant's refusal to enter a contract with him in violation of the Petition Clause of Const 1963, art 1, § 3, because plaintiff had filed a lawsuit against defendant in 2022. Defendant responded to the complaint with a motion for summary disposition based on governmental immunity and under MCR 2.116(C)(8). Defendant is not immune from potential liability under these circumstances and plaintiff has pleaded a viable claim. Accordingly, the Court DENIES defendant's motion for summary disposition.

I. BACKGROUND

Plaintiff was previously employed by defendant as a behavior analyst at Kalamazoo Psychiatric Hospital. He alleges that he was constructively terminated in May 2022, leading him

to file federal and state claims against defendant and various of its agents in Kalamazoo Circuit Court, Docket No. 2022-0397-CD. Specifically, plaintiff alleged that in his role as behavior analyst he reported incidents of suspected patient abuse, medical malpractice, and Medicare and Medicaid fraud up the chain of command. This allegedly led plaintiff's coworkers to "sabotage" his work and caused plaintiff's supervisor to revoke the promise of a promotion. As a result, plaintiff alleged he had no choice but to quit, amounting to a constructive discharge.

The 2022 lawsuit was removed to the United States District Court for the Western District of Michigan in Docket No. 1:22-cv-1206. The federal court dismissed plaintiff's federal claims of retaliation in violation of the False Claims Act, 31 USC 3730(h)(1), and retaliation for exercising rights under US Const, Am 1. The federal court concluded that reporting patient abuse, medical malpractice, and Medicaid and Medicare fraud fell within the scope of plaintiff's employment duties. Because plaintiff was not speaking as a citizen, and rather "was performing an obligation at the heart of his professional responsibilities," the federal court determined his speech was not protected by US Const, Am 1.

The federal court returned the state claims to the Kalamazoo Circuit Court. The state-law claims for wrongful discharge in violation of public policy and retaliation for exercising rights under various provisions of Const 1963, art 1, including § 3, remain pending in the Circuit Court.[1] Of note, the Circuit Court denied the defendants' motion for summary disposition of plaintiff's claim that the defendants violated his rights under Const 1963, art 1, § 3, rejecting their position

[1] On August 13, 2025, the DHHS and its agents filed an application for leave to appeal to the Court of Appeals the Circuit Court's denial of their motion for summary disposition of plaintiff's state-law claims in Docket No. 376861. The Court of Appeals granted leave on January 16, 2026, but the matter has yet to be scheduled for oral argument.

that plaintiff was collaterally estopped from relitigating the Petition Clause claim that was summarily dismissed by the federal court. The Circuit Court concluded that the federal court's ruling was irrelevant because it did not analyze or consider whether the claim could survive under the state Constitution.

In the current matter, plaintiff alleges that in 2025, he was "set to enter a contract" with defendant to provide training services, but defendant "later backed out of the deal," "abruptly refused to enter into a contract with" him, and "otherwise refused to deal with him." When plaintiff inquired into the reason, he "was informed that" defendant "and specifically Phillip Kurdonowicz" indicated that defendant would not enter a contract with plaintiff because of his pending lawsuit against defendant and various of its employees.

Plaintiff then filed the current suit, seeking monetary damages and raising a single count—retaliation for the exercise of rights guaranteed by the Michigan Constitution. Plaintiff asserts that Const 1963, art 1, § 3 grants him the right to petition the government for the redress of grievances, and plaintiff had exercised that right by filing a lawsuit regarding his 2022 constructive termination. Plaintiff alleges that this protected activity was a motivating factor in defendant's refusal to contract with him, violating his constitutional rights.

Defendant responded to the complaint with a motion for summary disposition, contending that it is immune from liability for the constitutional tort claim raised by plaintiff. Defendant also contends that plaintiff failed to state a claim upon which relief could be granted. The Court considers this motion on the pleadings without oral argument.

II. ELEMENTS OF THE CLAIM

Const 1963, art 1, § 3 states: "The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to *petition the government for redress of grievances*." (Emphasis added.) The people similarly enjoy the right to petition the government for the redress of grievances under US Const, Am I, *Nyber v Battle Creek*, ___ Mich App ___; ___ NW3d ___ (2026) (Docket No. 369906), slip op at 7, and the federal and state constitutional rights are coterminous, *League of Women Voters of Mich v Secretary of State*, 508 Mich 520, 552-553; 975 NW2d 840 (2022).

> "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . ." *Borough of Duryea, Pa v Guarnieri*, 564 US 379, 388; 131 S Ct 2488; 180 L Ed 2d 408 (2011). "The protections provided by the First Amendment, including the Petition Clause, have been extended to the states by the Fourteenth Amendment." *J & J Constr Co*[*v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 772, 729; 664 NW2d 728 (2003)]. [*Nyber*, ___ Mich App at ___, slip op at 5.]
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> To establish his Petition Clause retaliation claim, plaintiff
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> must show (1) that [he] engaged in constitutionally protected conduct, (2) that defendant[] took adverse action against [him] that would "deter a person of ordinary firmness from continuing to engage in that conduct," and (3) that the adverse action was caused by [] plaintiff['s] exercise of [his] constitutional rights. [*Id.* at 8, quoting *King v Zamiara*, 680 F3d 686, 694-695 (CA 6, 2012) (cleaned up).]

Plaintiff's claim of retaliation for exercising his Petition Clause rights sounds as a constitutional tort claim.

> A cause of action seeking money damages for a violation of state constitutional rights has been coined a "state constitutional tort action." See *Jones v Sherman*, 243 Mich App 611, 612; 625 NW2d 391 (2000). Typically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff. *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000). [*Duncan v State*, 284 Mich App 246, 270; 774 NW2d 89 (2009), rev'd on other grounds 486 Mich 1071; 784 NW2d 51 (2010).]

III. GOVERNMENTAL IMMUNITY

Defendant first contends that it is entitled to governmental immunity, requiring dismissal of plaintiff's constitutional tort claim. MCR 2.116(C)(7) provides for the summary dismissal of an action on governmental immunity grounds. "[G]overnmental immunity is a characteristic of government," *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002), and as such, "a party suing a unit of government must plead in avoidance of governmental immunity." *Id*. at 203. The Court "must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them," and must consider any evidence presented by the parties to determine if it creates any genuine issues of material fact affecting the immunity determination. *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010).

MCL 691.1407(1) extends immunity to governmental agencies as follows: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." It also states: "Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed."

There is no question that defendant was engaged in a governmental function when it considered contracting with vendors to provide training services. And although plaintiff did not expressly allege in its complaint that defendant was not entitled to governmental immunity, he alleged a constitutional tort claim. "The Legislature has never created an exception to immunity for a constitutional tort. Nonetheless, [the Michigan Supreme] Court has recognized that when a plaintiff brings a 'constitutional tort' against the state, in certain instances, the government is not

immune from liability for violations of its Constitution." *Mays v Governor of Mich*, 506 Mich 157, 187; 954 NW2d 139 (2020).

In *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), aff'd on other grounds sub nom *Will v Mich Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), our Supreme Court addressed whether a plaintiff could sue the State for damages for violating the Michigan Constitution. The Court held that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases" and is not protected by governmental immunity. *Smith*, 428 Mich at 544.

The Michigan Supreme Court recently clarified the government's right to immunity in relation to constitutional torts. The Supreme Court held that "money damages are an available remedy for constitutional torts unless (1) the Constitution has delegated to another branch of government the obligation to enforce the constitutional right at issue, or (2) another branch of government has provided a remedy that we consider adequate." *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 687; 983 NW2d 855 (2022) (cleaned up).

Here, neither party contends that Const 1963, art 1, § 3 designates a branch of government to enforce its enumerated rights. In relation to the second alternative, the Supreme Court has stated:

> If the Legislature has already provided an adequate mechanism to remedy a constitutional tort, this Court is not required to duplicate the effort. However, we emphasize that the Legislature's alternative must be at least as protective of a particular constitutional right as a judicially recognized cause of action and must include any remedy necessary to address the harm caused. To be adequate, the legislative remedy should be at least as protective of constitutional rights as a judicially recognized remedy would be. [*Bauserman*, 509 Mich at 705.]

Defendant contends that plaintiff has an adequate alternate remedy: he could file an action under 42 USC § 1983 against individual DHHS employees for retaliation. However, the case upon

which defendant relies, *Jones v Powell*, 462 Mich 329, 337; 612 NW2d 423 (2000), involves claims against municipalities. A municipality is a "person" for purposes of § 1983. See *Holeton v Livonia*, 328 Mich App 88, 106; 935 NW2d 601 (2019). A claim cannot be brought against the state, its agencies, or its departments under § 1983. See *Hardges v Dep't of Social Servs*, 201 Mich App 24, 27; 506 NW2d 532 (1993). Defendant has cited no authority giving the state immunity for a constitutional tort because the plaintiff could file a § 1983 claim against state employees instead. Absent legal authority on point, this Court declines to extend the law in this manner.

Accordingly, the Court DENIES defendant's motion for summary disposition on governmental immunity grounds.

IV. FAILURE TO STATE A CLAIM

Defendant also contends that plaintiff has failed to state an actionable state constitutional tort claim for violation of his Petition Clause rights.

> A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. [*El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019) (cleaned up).]

As previously noted, to establish that a defendant retaliated against a plaintiff for exercising his constitutional right to petition the government for the redress of grievances, the plaintiff must show that 1) he engaged in constitutionally protected conduct, 2) the defendant took an adverse action against him that would deter an ordinary person from exercising his constitutional rights, and 3) the adverse action was caused by the plaintiff exercising his constitutional right. *Nyber*, ___ Mich App at ___, slip op at 8.

In his complaint, plaintiff alleges that defendant retaliated against him for filing the 2022 lawsuit. The United States Supreme Court has held that "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes," holding, "[t]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Duryea*, 564 US at 387 (cleaned up).

Defendant contends that the federal court's dismissal of plaintiff's federal Petition Clause claim in the 2022 lawsuit collaterally estops plaintiff from establishing his protected conduct. The federal court dismissed plaintiff's 2022 federal Petition Clause claim because plaintiff was not speaking as a citizen, but rather "was performing an obligation at the heart of his professional responsibilities." Because plaintiff was not petitioning the government as a citizen regarding a matter of public concern, the federal court determined he was not engaged in protected conduct. However, defendant ignores that the federal court dismissed only plaintiff's federal Petition Clause claim and removed the state Petition Clause claim to the Kalamazoo Circuit Court. The Circuit Court declined to dismiss plaintiff's 2022 state Petition Clause claim, noting that the federal court had not considered the viability of that claim. That decision has been taken up on appeal to the Court of Appeals. At this time, however, no court has made any factual or legal findings regarding plaintiff's 2022 state Petition Clause claim that could bind plaintiff or defendant.

Moreover, when plaintiff filed his 2022 lawsuit, he raised claims as an employee who was constructively terminated by his government employer. In such cases, *Duryea*, 564 US at 382-383, provides that a plaintiff employee must demonstrate that his speech or petition was based on a matter of public concern. But in the current action, plaintiff is *not* filing suit as an employee; he had relinquished his employment more than three years earlier. The public-concern element does not apply in this case. Plaintiff's act of filing the 2022 lawsuit was protected conduct.

Defendant also contends that its refusal to enter a contract with plaintiff is not an "adverse action" for purposes of plaintiff's retaliation claim. Specifically, defendant contends that this was a normal procurement decision and that plaintiff had no property right or interest in entering a contract. This argument conflates the standards applicable in a Due Process challenge with this Petition Clause challenge. Further, this proposition runs counter to United States Supreme Court precedent. In *Perry v Sindermann*, 408 US 593, 597; 92 S Ct 2964; 33 L Ed 2d 570 (1972), The Supreme Court held that a plaintiff nontenured professor could challenge the decision of his state university employer not to renew his contract under the First Amendment even though the professor did not have a vested property interest in renewing the contract:

> [T]his Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. [*Id.*]

Finally, plaintiff pleaded allegations in support of the causation element of his state constitutional tort claim. He alleged that defendant's agent notified him that defendant would not enter a contract with plaintiff because he filed suit against defendant in 2022.

Taking the allegations as true and considering the matter in the light most favorable to plaintiff, plaintiff adequately pleaded that defendant violated his state Petition Clause rights by refusing to enter a contract with him because of plaintiff's constitutionally protected conduct. Accordingly, defendant is not entitled to summary disposition under MCR 2.116(C)(8).

V. CONCLUSION

IT IS ORDERED:

1. The Court DENIES defendant's motion for summary disposition.

2. The Court DIRECTS defendant to respond to the complaint within 21 days of the entry of this order.

3. This is not a final order.

Date: November 19, 2026

Sima G. Patel
Judge, Court of Claims