STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY GREENFIELD,

Plaintiff–Appellee,

v

TRUSTEES FOR MICHIGAN STATE UNIVERSITY, CHRISTOPHER THOMPSON, and JOHN T. MADDEN,

Defendants–Appellants.

UNPUBLISHED
October 29, 1996

No. 180170
LC No. 93-074784

JEFFREY GREENFIELD,

Plaintiff-Appellant,

v

TRUSTEES FOR MICHIGAN STATE UNIVERSITY, CHRISTOPHER THOMPSON, AND JOHN T. MADDEN,

Defendants-Appellees.

No.180425
LC No. 93-074784

Before: Holbrook, PJ, and Saad and W.J. Giovan,* JJ.

PER CURIAM.

In docket number 180425, plaintiff appeals the trial court's order of partial summary disposition in favor of defendants and the order denying plaintiff's motion for leave to file an amended complaint. We affirm.

* Circuit judge, sitting on the Court of Appeals by assignment.

In docket number 180170, defendants appeal the denial of their motion for summary disposition as to plaintiff's retaliation claim and the denial of defendants' motion to amend their answer. We reverse. Neither party appeals the $25,000 jury verdict rendered against Christopher Thompson for battery.

This case arises out of plaintiff's turbulent tenure as a member of the Michigan State University Spartan Marching Band. Plaintiff alleged that, beginning with "drum camp" prior to his freshman year, and extending into his sophomore year, band staff members participated in, tolerated, or had knowledge of the following band member activities: giving and using nicknames of a sexual nature, underage drinking, discussing of masturbation techniques and sexual preferences, requiring plaintiff to participate in "assing"[1] and simulated masturbation, as well as a group "assing" of plaintiff during his sophomore year. Plaintiff also alleged that defendant Christopher Thompson committed a battery upon him by kicking him during band practice. Following the alleged battery, plaintiff filed a written complaint to defendant John T. Madden, director of the Spartan Marching Band.

I

Plaintiff argues that the trial court erred in granting summary disposition to defendants on plaintiff's claim of sexual harassment. Plaintiff also contends that he should have been allowed to amend his complaint as to this issue. We disagree.

Summary disposition under MCR 2.116(C)(8) is available when the plaintiff fails to state a claim upon which relief can be granted. *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion brought under this rule tests the legal sufficiency of the claim based on the pleadings alone. *Id.* All factual allegations in support of a claim are accepted as true, as well as all inferences which can be fairly drawn from those allegations. *Id.* Summary disposition should only be granted when a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* We review the grant or denial of leave to amend a pleading for abuse of discretion. *Reed v Citizens Insurance*, 198 Mich App 443, 450; 499 NW2d 22 (1994).

The Elliott-Larsen Civil Rights Act prohibits:

> sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> * * *
>
> Such conduct or communication has the purpose or effect of substantially interfering with an individual's . . . education . . . or creating an intimidating, hostile, or offensive . . . educational . . . environment. [MCL 37.2103(i); MSA 3.548(103)(i).]

In interpreting this statute, our Court stated that the phrase "of a sexual nature" is limited by the language and examples which precede it. *Koester v City of Novi*, 213 Mich App 653, 669-670; 540 NW2d 765 (1995). They include "unwelcome sexual advances" and "requests for sexual favors." For

conduct to fall under the statute, it must be "of a similar kind, class, character, or nature" as the examples cited in the statute. *Id.* It is not sufficient that a plaintiff plead gender-based discrimination, but must allege "overtly sexual" conduct. *Id.* Although the conduct alleged by plaintiff is crude and offensive, he was not subjected to sexual communication or conduct on the basis of his gender. Thus, plaintiff failed to state a claim upon which relief could be granted and summary disposition was proper under MCR 2.116(C)(8).

Plaintiff's proposed first amended complaint alleged that other band members engaged in "hazing" which was "designed to embarrass, ridicule and humiliate plaintiff because he is a man." However, plaintiff's proposed first amended complaint failed to allege conduct of the same nature as sexual advances or sexual favors, as provided in the Civil Rights Act (CRA). Standing alone, the allegation that harassment of plaintiff was based on his gender was insufficient to state a cause of action under MCL 37.2103(i); MSA 3.548(103)(i). *Koester*, 213 Mich App at 669-670. Plaintiff's proposed amended complaint failed to properly state a claim of sexual harassment, so amendment would have been futile. The trial court properly denied plaintiff's motion for leave to amend. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

II

Plaintiff next asserts that the trial court erred in granting summary disposition as to his claim of gross negligence on the part of defendant Madden. Again, plaintiff contends that he should have been allowed to amend his complaint as to this issue, and again, we disagree.

As a government employee, Madden was entitled to governmental immunity unless his conduct constituted "gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). In his complaint, plaintiff alleged that defendant Madden was aware of alcohol consumption by band members as well as other unspecified "hazing," but failed to "order a stop to this activity." Plaintiff's generalized allegations of "hazing," if true, would not constitute conduct "so reckless as to demonstrate a substantial lack of concern" for whether plaintiff sustained an injury, MCL 691.1407(2)(c), and therefore, summary disposition was properly granted pursuant to MCR 2.116(C)(8).

As with his original complaint, plaintiff's proposed first amended complaint did not allege specific conduct which would constitute gross negligence. Instead, plaintiff merely added the conclusory statement that "Madden's failure to act . . . demonstrates a substantial lack of concern for whether an injury results." Such an unsupported conclusion does not preclude summary disposition. Plaintiff's proposed first amended complaint also failed to state a claim for relief, and the trial court properly denied plaintiff's motion for leave to amend his complaint. *McNees, supra,* 184 Mich App 101, 103; 457 NW2d 68 (1990).

III

Finally, plaintiff argues that the trial court erred in dismissing his claim of intentional infliction of emotional distress against defendant Thompson. As with his previous claims, plaintiff contends that he should have been permitted to amend his complaint as to this issue. We disagree.

The elements of a claim for intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Duran v Detroit News*, 200 Mich App 622, 629, 630; 504 NW2d 715 (1993). The standard for liability under intentional infliction of emotional distress was recently set forth by this Court as follows:

> Liability for intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. It has been said that the case is generally one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" [*Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995).]

Plaintiff bases his claim of intentional infliction of emotional distress on the allegations that Thompson was present during: (1) a discussion regarding masturbation; (2) a male's exposure of his genitals to a female band member; and (3) consumption of alcoholic beverages by students. Although this behavior is juvenile and offensive, and no factual development could render such conduct "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Mills*, 212 Mich App at 91. Moreover, the alleged exposure of male genitals to a female band member cannot support plaintiff's claim of emotional distress since the conduct, outrageous as it may be, was not directed at him. In addition, plaintiff failed to allege that he suffered severe emotional distress as a result of the alleged conduct. Accordingly, plaintiff failed to state a claim upon which relief could be granted, and the trial court properly dismissed the claim pursuant to MCR 2.116(C)(8).

Plaintiff's proposed first amended complaint alleged that defendant Thompson:

> authorized the supplying of large quantities of alcoholic beverages, to underage students who he knew were harassing plaintiff, so that the intensity of the harassment would be elevated and plaintiff would be further intimidated, humiliated, embarrassed and ridiculed.

and that Thompson:

> Authorized or acquiesced to the coercion of plaintiff for the purpose of forcing him into dropping pending criminal charges against him when two students went to plaintiff's room for the purpose of intimidating plaintiff through use of an indirect threat of bodily harm.

As with his original complaint, plaintiff's proposed first amended complaint failed to allege conduct "so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Mills*, 212 Mich App at 91. At best, plaintiff's proposed first amended complaint alleged that defendant Thompson authorized the conduct of two students who threatened and intimidated him. As specifically stated by this Court, mere threats and indignities do not rise to the level of an intentional infliction of emotional distress. *Mills*, 212 Mich App at 91. Plaintiff's proposed amendment would have been futile as to the issue of intentional infliction of emotional distress. The trial court properly denied plaintiff's motion to file the amended complaint. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

IV

In their first claim of error, *defendants* claim that summary disposition should have been granted to defendant University on plaintiff's claim of illegal retaliation. We agree and reverse.

MCL 37.2701(a); MSA 3.548(701)(a) forbids retaliation against a person who has opposed a violation of the act. Although plaintiff drafted a letter complaining of defendants' conduct, defendants argue that because plaintiff's letter failed to allege any violations of the CRA, he failed to satisfy the "opposition" requirement of MCL 37.2701(a); MSA 3.548(701)(a).

Defendants' motion for summary disposition was brought under MCR 2.116(C)(10). When deciding this motion, the trial court relied exclusively on its ruling in defendants' earlier motion for summary disposition under MCR 2.116(C)(8). In its earlier decision, the trial court found that plaintiff made sufficient allegations to create a prima facie argument that the "opposition" requirement was satisfied. However, this prior finding did not support dismissal of defendant's motion under MCR 2.116(C)(10), so the trial court's exclusive reliance on its earlier ruling was improper.

While the trial court failed to properly address defendants' motion for summary disposition, we may decide, as a matter of law, whether plaintiff's September 1, 1992 letter satisfied the "opposition" requirement of the CRA. *Verbison v Auto Club*, 201 Mich App 635, 641; 506 NW2d 920 (1993).

Plaintiff's letter of September 1, 1992, stated in part:

> I was kicked and humiliated publicly by a faculty member, Chris Thompson, in full view of the entire percussion unit.
>
> This action, which occurred last Thursday, was totally unprovoked and culminated after a year of hazing and harassment
>
> * * *
>
> Mr. Thompson's actions are illegal, constitute assault and battery, and are contrary to written University policy. I have suffered physical, psychological and emotional abuse.

While the charges made in plaintiff's letter are serious, the letter did not allege any conduct which was prohibited by the CRA. Nowhere in the one-page letter did plaintiff allege any "conduct or communication of a sexual nature," MCL 37.2103(i); MSA 3.548(103), or allege any other type of discrimination. Therefore, plaintiff did not satisfy the "opposition" requirement of the statute, MCL 37.2701(a); MSA 3.548(701)(a), and summary disposition should have been granted. Accordingly, we reverse the trial court's order denying defendants' motion for summary disposition and the trial court's October 19, 1994, judgment incorporating plaintiff's jury award on the claim of retaliation.

V

Finally, defendants argue that the trial court abused its discretion in failing to grant defendants' motion to amend their answer. In light of our reversal of the trial court's denial of defendants' motion for summary disposition, we need not address this issue.

Affirmed in part and reversed in part.

/s/ Donald E. Holbrook, Jr.
/s/ Henry William Saad
/s/ William J. Giovan

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[1] "Assing" consists of removal of one's pants and underwear and wiping the exposed anal area on another person.