

STATE OF MICHIGAN
COURT OF APPEALS

KATHLEEN M. BURKE,

Plaintiff-Appellant/Cross-Appellee,

v

DETROIT PUBLIC SCHOOLS,

Defendant-Appellant,

and

RONALD GENE ALEXANDER,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

May 2, 2006

No. 262983

Wayne Circuit Court

LC No. 03-329066-CD

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order granting partial summary disposition in favor of defendants. Defendant Ronald Gene Alexander cross appeals, challenging the trial court's denial of his motion for summary disposition of the single remaining claim. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

This action arises out of plaintiff's employment by defendant Detroit Public Schools (DPS) as a kindergarten teacher at Spain Elementary School, where she began teaching in 1994. Defendant Ronald Gene Alexander (Alexander) was appointed as principal of Spain Elementary in 1997. Plaintiff claims that beginning in 1999, and escalating during the 2000-2001 school year, Alexander began to discriminate against her and harass her in an attempt to force her out of Spain Elementary because she is a Caucasian woman. She claims that, among other acts, Alexander regularly "berate[d]" her concerning insignificant issues, "arbitrarily" revoked his previous grant of permission for her to use her class as a control group for her master's thesis, and repeatedly asked plaintiff to transfer to another school "because he had other people who wanted her job." Further, he referred to her as "white c---" and "white b----." Alexander also told another employee that he was motivated by a desire to rid the school of white teachers, specifically including plaintiff. He said that "[if] I had my way it [sic] wouldn't be any [white

teachers] in here” but that he would “keep some” because he “ha[d] to.” Moreover, his stated plan to remove the teachers included reassigning them to the seventh or eighth grade where the “kids will eat them alive.”

In January and February of 2001, plaintiff complained to her union and DPS regarding Alexander’s behavior. She claimed that DPS did not adequately address the complaint. She further alleged that, after she complained, Alexander retaliated against in the following ways: revealing to staff a confidential letter from the DPS “Office of Human Rights” concerning plaintiff’s complaint, reassigning plaintiff to teach seventh or eighth grade science in the fall of 2001, and by recommending that plaintiff transfer to another school if she was concerned about the reassignment.

During the 2000-2001 school year, plaintiff began experiencing anxiety, depression, and physical numbness on the right side of her body. Her doctor placed her on “stress leave” for part of a week in January 2001. Throughout the summer of 2001, she experienced emotional difficulties, “dreading a return to her untenable work environment,” and her doctor warned her that she would be placed on disability leave if her health continued to be jeopardized because of job stressors.

When plaintiff arrived at work on August 27, 2001, she found that the locks had been cut from the cabinets in her kindergarten classroom and that her supplies had been “thrown” into the hallway. Plaintiff sat with the eighth grade teachers in an unfamiliar meeting, but “broke down” at the end of the day because of the mess in her classroom, Alexander’s abuse, “the hopelessness of her teaching situation,” and the lack of assistance from DPS. The following day she was placed under the care of her doctors who placed her on medical “stress leave.”

Plaintiff filed suit on August 29, 2003, against DPS for the acts of Alexander as its agent. She alleged that Alexander engaged in employment discrimination and subjected plaintiff to a hostile working environment because of her race and sex, in violation of the Elliot-Larsen Civil Rights Act (“CRA”), MCL 37.2101 *et sep.* As a result, plaintiff claims she suffered from emotional and physical problems, loss of reputation, loss of earnings and benefits, and impairment to her earning capacity. She further alleged that both defendants were liable for intentional infliction of emotional distress (IIED) as a result of Alexander’s behavior. Finally, Plaintiff claimed tortious interference with a business relationship against Alexander, alleging that he intentionally interfered with plaintiff’s employment contract with DPS.

Defendants DPS and Alexander moved for summary disposition on plaintiff’s claims. The trial court granted defendants’ motion in part. The court dismissed the CRA claims of the hostile work environment and retaliation because plaintiff could not demonstrate she suffered an adverse employment action.¹ The court also dismissed the intentional interference claim against Alexander but allowed the plaintiff to proceed with her IIED claim against him. However, the court dismissed the IIED claim as it applied to DPS.

¹ Plaintiff was still employed by DPS and had been offered positions at other schools.

II. STANDARD OF REVIEW

We review the trial court's disposition of defendants' motion for summary disposition de novo. *Graves v American Acceptance Mortg Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004). Plaintiff's CRA claims were dismissed pursuant to MCR 2.116(C)(10). A summary disposition motion pursuant to subrule (C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). The moving party has the initial burden to support its claim for summary disposition by submitting affidavits, depositions, admissions, or other documentary evidence which negates an essential element of the nonmoving party's claim or which demonstrates that the nonmoving party's evidence is insufficient to establish an essential element of his claim. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that there is a genuinely disputed issue of material fact; when the burden of proof at trial would rest on the nonmoving party, he may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto, supra* at 362; *Bergen, supra* at 381. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. MCR 2.116(G)(5); *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Bergen, supra* at 381.

III. ELLIOTT-LARSEN CIVIL RIGHTS ACT

A. Disparate Treatment

The CRA prohibits employers from discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a); *Wilcoxon v Minnesota Min and Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). Plaintiff's claim of discriminatory treatment is commonly referred to as a "disparate treatment" claim. *Wilcoxon, supra* at 360. She correctly notes that different standards of proof are applied to determine whether a plaintiff has presented a prima facie disparate treatment claim based on the type of evidence of discrimination she provides. Here, plaintiff provides the testimony of Lula Denson, a former Head Secretary at Spain, regarding comments Alexander made to Denson about his plans to rid the school of several white teachers including plaintiff. We agree that Denson's testimony constitutes "ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action." *Id.* Accordingly, plaintiff has provided direct evidence of a discriminatory motive, rather than merely alleging "circumstances giving rise to an inference of discrimination." *Id.* at 359. Therefore, her prima facie case is not evaluated using the burden-shifting analysis enunciated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which explicitly requires a plaintiff to prove that the defendant's proffered legitimate motivations are merely pretextual. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001); *Wilcoxon, supra* at 359-360. Nor is she required to prove that she was treated differently from similarly situated employees, as is argued by DPS; rather, proof of such treatment is generally used to create an inference of discrimination in pretextual cases. *Wilcoxon, supra* at 361.

Instead, plaintiff's claim is a "mixed motive" or "intentional discrimination" disparate treatment claim. *Wilcoxon, supra* at 360. The elements of a mixed motive claim are:

(1) the plaintiff's membership in a protected class, (2) an adverse employment action, (3) the defendant was predisposed to discriminating against members of the plaintiff's protected class, and (4) the defendant actually acted on that predisposition in visiting the adverse employment action on the plaintiff. [*Id.* at 360-361.]

Then,

once the plaintiff has met the initial burden of proving that the illegal conduct . . . was more likely than not a "substantial" or "motivating" factor in the defendant's decision, the defendant has the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of the protected characteristic. [*Harrison v Olde Financial Corp*, 225 Mich App 601, 611; 572 Mich 679 (1997).]

Most significantly, when a plaintiff has provided direct evidence of discrimination, it is generally the job of the factfinder to weigh the parties' evidence concerning the defendant's motivation, the meaning of apparently discriminatory remarks, or the credibility of evidence. *DeBrow, supra* at 539-540; *Harrison, supra* at 613.

Plaintiff presented direct evidence that Alexander was motivated by a desire to rid the school of white teachers, specifically including plaintiff. He told Denson that "[if] I had my way it [sic] wouldn't be any [white teachers] in here" but that he would "keep some" because he "ha[d] to." Moreover, his stated plan to remove the teachers included reassigning them to the seventh or eighth grade where the "kids will eat them alive." A former preschool teacher, whom Alexander identified as one of the white teachers he intended to remove, confirmed that such a reassignment caused her to leave the school. Accordingly, plaintiff established direct evidence both that Alexander was predisposed to discriminate and that his predisposition was a motivating factor in his treatment of plaintiff. Because this evidence must be viewed in a light most favorable to plaintiff, the fact that defendants have also offered legitimate reasons for the employment actions taken by Alexander is not dispositive. Rather, in the face of plaintiff's direct evidence of his discriminatory intent, it is the jury's role to determine whether Alexander was actually motivated by permissible factors.

A secondary question remains regarding whether plaintiff has sufficiently supported her claim that she was discriminated against based on both her sex and her race. Either characteristic is sufficient to show that plaintiff was a member of a protected class. Plaintiff argues that Alexander's sex-based motivations are similarly implicated by his use of gendered phrases such as "white c---" and "white b----." However, Alexander's comments regarding his preferences and intentions to remove teachers explicitly target white teachers, regardless of their sex. Accordingly, we conclude that the gendered comments do not present the kind of direct evidence of discriminatory motive that is revealed by his race-based comments. Rather, the gendered comments, particularly when combined with Alexander's specific targeting of three women and no men, may be evidence of circumstances which create an inference that he was also motivated by sex-based animus. However, we acknowledge that this sort of circumstantial evidence would

require a separate analysis of plaintiff's prima facie claim using the burden-shifting approach for cases alleging pretext. *Wilcoxon, supra* at 359. Plaintiff has not addressed whether she could prevail under this higher burden, rather, she merely claims that she has presented sufficient direct evidence to avoid the burden-shifting analysis. Accordingly, plaintiff has not presented for appeal the secondary question whether her sex-based claims may independently survive summary disposition under the burden-shifting approach required where the evidence of discrimination is circumstantial.

The parties primarily dispute whether plaintiff has suffered an adverse employment action.

[I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) there must be some objective basis for demonstrating that the change is adverse because "a plaintiff's 'subjective impressions as to the desirability of one position over another' [are] not controlling." [*Id.* at 364 (brackets in original; internal citations omitted); see also *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003).]

* * *

Although there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as "a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." In determining the existence of an adverse employment action, courts must keep in mind the fact that "[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action." [*Peña, supra* at 312 (brackets in original; internal citations omitted).]

With regard to plaintiff's claim that she was constructively discharged, "a constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). "[O]nce individuals establish their constructive discharge, they are treated as if their employer had actually fired them." *Id.* at 710. Accordingly, we reject DPS's initial assertion that plaintiff's claim must be dismissed "because constructive discharge is a *defense* not a cause of action." Rather, in claims that allege discharge as an element, such discharge may be constructive rather than actual. *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 321 n 9; 577 NW2d 881 (1998).

Nonetheless, plaintiff has not alleged that her employment was terminated as a result of her compelled decision to stop teaching at Spain. A constructive discharge:

cannot become evident until the employee has, in fact, left the employment. It seems, therefore, that to say that a discharge occurred whenever an employer's action that resulted in the discharge occurred would be set a date of occurrence in retrospect. Until the employee resigns, the employer's action has yet to prove to be one of discharge. A discharge, be it constructive or otherwise, must have in place all the events necessary to determine its existence. [*Jacobson, supra* at 327.]

Here, defendants appear to correctly note that, as of the time of the summary disposition hearing, there was no proof that plaintiff resigned or was terminated. She claims to have been placed on medical leave and makes no mention of whether she continued to receive wages or benefits. Plaintiff claims on appeal, without supporting documentation, that she was terminated on August 5, 2005. Plaintiff also claims that there is no evidence of firm offers from DPS for other comparable positions. Most significantly, however, she primarily claims that her constructive discharge was a result of her inability to work in any position with DPS as a result of medical and emotional conditions that were allegedly caused by Alexander's harassment. Accordingly, her eventual termination does not appear directly related to her compelled decision to resign. Rather, she alleges constructive discharge as a result of her ongoing emotional and medical conditions. Plaintiff provides no authority for how these intervening problems are a cognizable proximate cause of constructive discharge, regardless of whether they originated from the harassment or whether Alexander may be responsible for them in tort.

Nonetheless, plaintiff has created a genuine issue of material fact regarding whether the events surrounding her resignation constitute an adverse employment action for other reasons. Plaintiff eventually left Spain after Alexander reassigned her to teach eighth grade science. On one hand, there is no evidence that she was demoted, that her wages decreased or that she received a less distinguished title, a material loss of benefits, or significantly diminished material responsibilities. *Peña, supra* at 312. Plaintiff also supplies little detail regarding the specific differences between the two positions as proof that the reassignment was not merely alternation of job responsibilities. *Wilcoxon, supra* at 364. On the other hand, plaintiff alleged that she was unfamiliar with middle school paperwork and scheduling, and she attested that Alexander was aware that her degree was in Early Childhood Education.² Accordingly, there is some evidence that the reassignment involved "significantly different responsibilities." *White v Burlington Northern and Santa Fe R Co*, 364 F 3d 789, 798 (CA 6, 2004), cert gtd in part ___ US ___; 126 S Ct 797; 163 L Ed 2d 626 (2005), quoting *Burlington Industries, Inc, v Ellerth*, 524 US 742, 761; 118 S Ct 2257; 141 L Ed 2d 643 (1998).³ Mostly significantly, there was direct evidence

² There is also some disagreement between the parties regarding whether plaintiff was certified to teach the position to which she was reassigned: plaintiff attests that she is not certified to teach eighth grade science; Alexander asserted that her certification "states [that she is] eligible [for a] K-8 self-contained classroom."

³ When the language of the Michigan CRA and Title VII of the federal Civil Rights Act is substantially similar, federal case law may be considered persuasive, although not binding, authority in cases brought under the Michigan CRA. *Peña, supra* at 311 n 3.

that Alexander reassigned plaintiff because the middle school students would “eat [her] alive” and, therefore, that she would eventually leave Spain. This is a strong indication that the reassignment was materially adverse, rather than a mere shift in responsibilities. It is also an indication of an adverse action that is “unique to a particular situation.” *Peña, supra* at 312. Moreover, the evidence that a former preschool teacher resigned as a result of a similar reassignment, and after being targeted by Alexander for removal from Spain, bolsters the conclusion that the action was adverse in both intent and effect and that the position was not merely subjectively undesirable to plaintiff.

We briefly note plaintiff’s alternative argument that her potential forced transfer to another position within DPS, as a result of Alexander’s harassment, was an adverse action. Because this alternative argument is not dispositive, and because plaintiff presents no authority or argument for her mere conclusion that a potential transfer, in and of itself, was adverse because it required a longer commute, this issue does not warrant further consideration. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Badiee v Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005). However, the fact that Alexander consistently recommended a transfer that was not desirable to plaintiff may bolster the overall conclusion that her reassignment to eighth grade was an adverse action that was intended and necessary to induce plaintiff to leave Spain.

Overall, we conclude that the trial court erred when it dismissed plaintiff’s disparate treatment claim. She has created genuine issues of material fact regarding whether Alexander’s racial animus motivated his reassignment of plaintiff to the eighth grade and whether the reassignment was an adverse employment action.

B. Hostile Work Environment

Plaintiff also presents a related claim that DPS may be liable for discrimination because Alexander created a hostile environment based on plaintiff’s race and sex. Harassment based on any of the enumerated classifications in MCL 37.2202(1)(a) is an actionable offense. *Downey v Charlevoix Rd Comm’rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998); see also *Haynie v Dep’t of State Police*, 468 Mich 302, 302; 664 NW2d 129 (2003); *Malan v Gen Dynamic Land Sys, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995).

[T]o establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee’s employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Downey, supra* at 629.]

Here, with regard to plaintiff’s claim of a gender-based hostile environment, the trial court appears merely to have incorrectly concluded that such a claim is not authorized by the CRA. Regardless, the court correctly concluded that there was no showing of respondeat superior to support plaintiff’s race- or gender-based hostile environment claims.

To succeed in showing respondeat superior for purposes of a hostile environment claim, a plaintiff must first show that the employer was “reasonably put on notice of the harassment.” *Chambers v Tretco*, 463 Mich 297, 313; 614 NW2d 910 (2000); and see *id.* at 312-316. “[N]otice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.” *Id.* at 319. If the employer received such notice, it may still then avoid liability if it can show that it took prompt and adequate remedial action. *Id.* at 313. “[T]he relevant inquiry concerning the adequacy of the employer’s remedial action is whether the action reasonably served to prevent future harassment of the plaintiff.” *Id.* at 319.

Here, plaintiff sent a letter to the Deputy CEO of DPS that vaguely alluded to “extensive harassment and embarrassment.” One month later, plaintiff filed an Employment Discrimination/Harassment Complaint Form with the DPS Human Rights Program that merely includes checkmarks in boxes for “harassment” based on “race.” The complaint indicates that documents supporting the claim were attached, but no attachments describe the harassment on which plaintiff now bases her claims. Rather, a follow-up letter from the DPS Human Rights Program to the Office of Civil Rights states that plaintiff had merely alleged that Alexander treated her differently from other teachers in disbursing supplies and approving field trips because of her race. Thus, the trial court correctly dismissed plaintiff’s separate hostile environment claim because she cannot show that DPS had notice of the harassment of which she now complains.

C. Retaliation

Next, we address plaintiff’s claim that DPS is liable for retaliation in violation of the CRA. The CRA provides:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a); *Garg v Macomb Mental Health*, 472 Mich 263, 272-273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005).]

To establish a prima facie claim of retaliation under the CRA, a plaintiff must show:

(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Id.* at 273, quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Here, the trial court improperly dismissed plaintiff’s retaliation claim because it wrongly concluded that she could not show that she suffered an adverse employment action. As previously discussed, plaintiff’s reassignment to the eighth grade may constitute such an action. Accordingly, plaintiff’s retaliation claim was improperly dismissed for this reason.

Plaintiff has also created a genuine issue of fact regarding her claim that this action was caused by Alexander's retaliation. This is particularly true given that DPS merely argues that there is insufficient proof of causation because Alexander had a legitimate reason to reassign plaintiff and because the "five-month period" between plaintiff's complaint and her reassignment was too remote to suggest causation. In order to establish causation, "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *Garg, supra* at 286, quoting *West, supra* at 186. Here, first, plaintiff has presented evidence that Alexander told Carol Upshaw, the Human Rights Program Supervisor, that he was "very angry" that plaintiff filed the complaint and he admitted that, as a result of the complaint, he characterized plaintiff as a "weak link in this building among – our family." Accordingly, in light of Alexander's preexisting animus and statements to Denson that he used such reassignments to force resignation, a jury could find that his reassignment of plaintiff to the eighth grade constituted a retaliatory action intended to remove plaintiff from the school. Moreover, plaintiff correctly notes that, despite the alleged ongoing harassment, Alexander did not actually reassign plaintiff until after she filed her complaint. Finally, Alexander appears to have been made aware of the complaint to DPS on May 4, 2001. His letter reassigning plaintiff is dated July 18, 2001, just over two months later. This evidence is sufficient to create a genuine issue of material fact regarding causation.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Next, plaintiff argues that the trial court improperly dismissed her intentional infliction of emotional distress ("IIED") claim against DPS. The trial court granted summary disposition of this issue in favor of DPS pursuant to MCR 2.116(C)(7), which allows for summary disposition where the claim is barred because of immunity granted by law. A governmental agency is generally immune from tort liability if it is "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). *Payton v City of Detroit*, 211 Mich App 375, 391-392; 536 NW2d 233 (1995). Plaintiff argues that DPS may be held liable because Alexander's intentional tortious act, by definition, cannot constitute the discharge of a governmental function. Plaintiff cites *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). However, the *Brewer* Court merely considered an intentional tort claim against agency employees, as individuals, not against the agency itself. *Id.* at 523. Plaintiff provides no authority for the proposition that DPS, itself, is not immune.

Rather, whether an agency is engaged in the exercise of an official function for purposes of the immunity doctrine is broadly defined by the "general nature of the activity of its employees, rather than the specific conduct of its employees." *Payton, supra* at 392. The *Payton* Court's reasoning directly contradicts plaintiff's claim that an intentional tort automatically precludes agency liability. This Court opined that "to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature. . . . [I]t would be difficult to envision a tortious act that is a governmental function." *Id.*, quoting *Smith v Dep't of Public Health*, 428 Mich 540, 609; 410 NW2d 749 (1987), *aff'd* sub nom *Will v MI Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Here, plaintiff merely claims that DPS may not be immune because Alexander's acts constituted an intentional tort. She does present an argument that Alexander was not discharging his duties as a principal when he carried out the acts. Moreover, we note that by all appearances,

Alexander was exercising his supervisory authority as a principal to require plaintiff to come to his office, to criticize her based on her work, and to reassign her.

Finally, we acknowledge that the *Smith* Court left open the possibility that a government body could “intentionally embark on a tortious course of conduct which would abrogate the immunity of its activity, not because it is tortious, but because it is presumably unauthorized by law and, accordingly, not a governmental function.” *Smith, supra* at 610. Regardless, the Court stressed: “we deal only with the theory of direct liability. [¶] As for the question what constitutes the ‘intent’ of a governmental body, the issue has long befuddled the courts. We do not attempt to define here the elusive concept of organizational intent.” *Id.* at 610 n 21. Here, plaintiff makes no argument that DPS may be imputed with tortious intent. For these reasons, the trial court properly dismissed plaintiff’s IIED claim against DPS.

V. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP

Plaintiff also argues that the trial court improperly dismissed her claim against Alexander for tortious interference with a business relationship. Plaintiff does not acknowledge that this Court recognizes two distinct torts for intentional interference with a business relationship or intentional interference with a contract. *Badiee, supra* at 365-367; *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d 358 (1989). She entitled her claim “Intentional Interference with [a] Business Relationship,” but she specifically alleged that Alexander interfered with her existing employment contract with DPS, “under which” she alleges she taught kindergarten at Spain Elementary.

Interference with a contract requires: “(1) a contract, (2) a breach, and (3) unjustified instigation of the breach by the defendant.” *Badiee, supra* at 366 (quoted citation omitted). Here, there is no evidence of a contract. Most significantly, even if Alexander does not contest that plaintiff essentially had a contract by virtue of her collective bargaining agreement, there is no evidence that this contract guaranteed her a position as a kindergarten teacher at Spain Elementary. Accordingly, plaintiff has not shown that Alexander caused a breach of any specific contractual right that is reflected in the record.

However, because we must view the pleadings in the light most favorable to plaintiff, we conclude that she stated a claim for interference with a business relationship. MCR 2.116(G)(5); *Bergen, supra* at 381.

The basic elements which establish a prima facie tortious interference with a business relationship are the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; knowledge of the relationship or expectancy on the part of the interferer; an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted. One is liable for commission of this tort who interferes with business relations of another, both existing and prospective, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another. [*Feaheny, supra* at 301, quoting *Northern Plumbing & Heating, Inc v Henderson*

Bros, Inc., 83 Mich App 84, 93; 268 NW2d 296 (1978), quoting 45 Am Jur 2d, Interference, § 50, p 322.]

Interference with an expectancy may or may not involve a contract. *Feaheny, supra* at 300-301. Accordingly, even an at-will employee may have an actionable expectation in “a subsisting relationship that is of value to the employee and will presumably continue in effect absent wrongful interference by a third party.” *Id.* at 303; see also *Health Call of Detroit v Atrium Home and Health Care*, 268 Mich App 83, 92; 706 NW2d 843 (2005). Here, although there is no evidence to support a claim that plaintiff had an extra-contractual expectancy to continue teaching at Spain Elementary, plaintiff has arguably made a claim that Alexander interfered with her general expectancy to continue teaching in some capacity with DPS.

Moreover, Alexander, as an intermediate supervisor, may, in fact, be a third party to a business relationship with the organization for which he acts as agent. *Feaheny, supra* at 305. A plaintiff merely must show that, rather than “acting for and on behalf of” the organization, the agent “act[ed] to further strictly personal motives.” *Id.* Here, plaintiff has presented a genuine issue of fact regarding whether Alexander was motivated by personal animus.

Nonetheless, first, Alexander does not appear to have intended to prevent plaintiff from working for DPS overall. Rather, he repeatedly suggested that she transfer and, in fact, offered to help her to do so. Second, plaintiff cites no authority for the proposition that liability may result from plaintiff’s own preference to stay at Spain, her decision not to pursue other possible positions with DPS, her ensuing mental and physical conditions, and her resulting inability to return to work at DPS. That is, her essential claim is that she is unable to continue working for DPS in any capacity because of her conditions. She has not offered any authority, however, for her proposition that Alexander may be liable for tortious interference as a result of these intervening conditions, even if he may be liable for the IIED that caused the conditions.

Technically, Alexander’s alleged causation of plaintiff’s conditions might broadly fit the category of interference that “prevent[s] a third person from continuing a business relationship with another”; DPS cannot utilize plaintiff as a teacher because she cannot work. *Feaheny, supra* at 301. However, plaintiff provides no support for the conclusion that the tort should be stretched to such lengths. Rather, the only case plaintiff cites in her brief is *Feaheny*, which presents a typical situation in which interfering supervisors caused a third-party board of directors to reduce the plaintiff’s responsibilities and benefits. *Id.* at 306-307. Accordingly, based largely on plaintiff’s lack of argument and authority for her claim that Alexander may be liable for tortious interference based on plaintiff’s inability to work, we conclude that she has not successfully challenged on appeal the trial court’s dismissal of her claim for tortious interference.

VI. CROSS-APPEAL

Finally, we address Alexander’s argument that the trial court should have dismissed plaintiff’s IIED claim against him. To establish the tort of IIED or reckless infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003).

Liability attaches only when a plaintiff can demonstrate that the defendant's conduct is 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. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

The test to determine whether a person's conduct was extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" [*Lewis, supra* at 196 (internal citations and punctuation omitted).]

Generally, the trial court makes an initial determination whether the conduct may be reasonably regarded as sufficiently extreme and outrageous to permit recovery. *Id.* The question should be presented to the jury if reasonable minds may differ regarding whether the conduct was, indeed, extreme and outrageous. *Id.*

Here, the parties primarily contest whether Alexander's acts were sufficiently extreme to present a question for the jury. Alexander also briefly argues that his actions did not cause plaintiff to suffer severe emotional distress. However, in support of this claim, he merely notes that plaintiff did not seek psychological counseling until 2003, when a worker's compensation attorney advised her to start working with a therapist. He provides no authority for why this fact should be dispositive in light of plaintiff's and Denson's testimony regarding plaintiff's emotional reactions and ongoing anxiety and health problems. With regard to Alexander's intent to distress, Alexander contests the truth of Denson's testimony. However, he does not appear to directly contest that Denson's testimony, if believed by the jury and when combined with Alexander's overall conduct, may establish that he intended to distress plaintiff. For instance, Denson heard Alexander voice his intentions to make plaintiff's working conditions intolerable so that she would leave, if necessary by reassigning her to a position where the students would "eat [her] alive." He also winked at Denson and said, "watch this," and "I'm going to show you how to make a white c--- act," when he called plaintiff to his office to "berate" her. Then, after berating plaintiff, he professed that he "feels good" when plaintiff cries.

We also agree with the trial court that Alexander's overall conduct was sufficient to present a question for a jury. Plaintiff presented evidence that Alexander regularly called her from her class over the school loudspeaker; she was to come to his office, where he would "berate" her, sometimes to the point that she cried or vomited. When plaintiff presented him with concerns, he told her that he was tired of white teachers complaining. She also presented evidence that he "cussed her out" in front of her students and repeatedly asked her to transfer, in part, because he knew of others who desired her job and he claimed that she was not a team player. We also find it significant that he appeared to threaten her with an emotionally stressful reassignment to a class that would "eat [her] alive" in order to induce plaintiff to leave the school. Accordingly, when the record is viewed in plaintiff's favor, the treatment appears to have consisted of more than mere indignities, insults and annoyances; Alexander directly interfered with plaintiff's ability to conduct her work and intentionally threatened her with the loss of her position and an emotionally stressful reassignment.

We acknowledge that Alexander's most outrageous acts were not done in plaintiff's immediate presence. For instance, only Denson attested to his use of profanity and to other behaviors such as spraying the seats of his office after plaintiff had left and saying: "you smell that c--- Denson[?]" Nonetheless, we agree with plaintiff that the context of Alexander's acts is a decisive factor in this case. In *Ledsinger v Burmeister*, 114 Mich App 12, 19; 318 NW2d 558 (1982), this Court concluded that it is "essential" to address the context of the conduct. "For example, the extreme and outrageous character of the conduct may arise from the position of the actor, his relation to the distressed party, or from his knowledge of peculiar susceptibilities of the distressed party." *Id.* Similarly, in *Margita v Diamond Mortgage Co*, 159 Mich App 181, 189; 406 NW2d 268 (1987), this Court opined that extreme conduct may result when a defendant abuses a relationship "which puts the defendant in a position of actual or apparent authority over a plaintiff or gives a defendant power to affect a plaintiff's interests."

Here, the record, when viewed in a light most favorable to plaintiff, suggests that Alexander abused his position of authority to intentionally inflict distress. As plaintiff's supervisor, he had the authority to evaluate her performance, to gain her captive audience for regular sessions in his office which Denson testified were aimed at upsetting plaintiff, and to threaten to transfer her to a position that he anticipated would be stressful enough to cause her to resign. Alexander argues that this treatment was justified because of plaintiff's poor performance as a teacher. In comparison, we acknowledge that the *Margita* Court, for instance, stressed that, there, the harassment by mortgage lenders in attempting to collect a debt was actionable because the debt was not, in fact, overdue. *Margita, supra* at 189. Accordingly, this Court explicitly characterized the defendants' actionable conduct as "[c]ontinuous *unnecessary* harassment." *Id.* (Emphasis added.) This Court opined that the case might be different "if defendants were proceeding on a debt they had a right to collect." *Id.* Accordingly, we agree that, if it was undisputed that plaintiff's work performance justified Alexander's acts, his conduct as her supervisor likely would not be actionable.

However, whether plaintiff's performance warranted Alexander's response is a genuinely disputed question. Plaintiff claims that she had not been told by Alexander or by the Early Childhood Supervisor that her work was deficient; she adds that she understood that complaints regarding the kindergarten students' lack of preparation for the first grade were aimed at both kindergarten classrooms. She also claims that the regular calls to Alexander's office usually resulted in his berating her for insignificant issues such as to which bathroom she took her children or her request that he inform her of which door she should use to dismiss the children, rather than for his claims of poor teaching. Alexander also provides little evidence of her poor performance beyond his own testimony and letters, along with Assistant Principal Clara Smith's assertions that plaintiff often failed to turn in her lesson plans and that plaintiff whined and created dissension. Neither Alexander nor Smith could document reports of complaints from unnamed parents and para professionals regarding plaintiff's teaching deficiencies. Most significantly, there is no record of Alexander's and Smith's allegations of poor performance until after plaintiff lodged her discrimination complaint with DPS. Accordingly, and particularly in light of plaintiff's evidence that Alexander was motivated by his desire to rid the school of white teachers, there is a genuine issue of material fact regarding whether Alexander's conduct was actually related to poor performance on plaintiff's part. Therefore, because he may be found to have abused his position to engage in continuous unnecessary harassment, the trial court properly denied summary disposition of the IIED claim against him.

Affirmed in part, reversed in part, remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello