

STATE OF MICHIGAN
COURT OF APPEALS

RENEA PENDER,

Plaintiff-Appellant,

v

OLIVET COLLEGE BOARD OF TRUSTEES,
DON TUSKI, and JULIE FOSTER,

Defendants-Appellees.

UNPUBLISHED

January 22, 2008

No. 273723

Eaton Circuit Court

LC No. 05-000997-CD

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In this case involving claims for unlawful retaliation under the Michigan Civil Rights Act¹ and intentional infliction of emotional distress, plaintiff Renea Pender appeals as of right from the trial court's order granting summary disposition in favor of defendants Olivet College Board of Trustees (the college), college president Donald Tuski, and college vice-president Julie Foster, pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

A. Background

This case arises from Pender's 2003 termination from her college administrator position, allegedly for refusing to impose a racially disparate punishment on a student. At all relevant times, Foster was the college's vice-president of community life. In July 2002, Foster hired Pender as director of residence life and new student programs, and was Pender's direct supervisor. However, if Foster was unavailable, Pender was to report to Tuski, the college president, who was Foster's superior.

Among Pender's responsibilities were the disciplining of students, the hiring, training and supervision of the directors of each of the three residence halls, and the training of resident advisors. Pender was also in charge of the student judicial system, including supervising the judicial board. The hall directors handled minor disciplinary issues, while serious or repetitive

¹ MCL 37.2101 *et seq.*

issues were referred to the judicial board. The judicial board imposed discipline based on the seriousness of the offense, and the student's past history of violations. Pender also supervised the campus safety department.

In August or September 2003, Eli Leatherbury and his roommate, Quran Yeman, who are both black, allegedly yelled racial slurs at a white student from their dormitory window and threatened him with a BB gun. There was conflicting evidence whether Leatherbury shot the white student (allegedly in the neck) with the BB gun. In any event, the gun was confiscated, and Leatherbury and Yeman were expelled from the residence hall for a semester, but were allowed to remain in school. Leatherbury apparently had a history of alcohol and drug violations, and had previously destroyed a dormitory room.

Less than a month after the Leatherbury incident, Michael Storer's roommate was caught with a BB gun, in the same residence hall. Storer is white. Storer admitted that the shotgun-type BB gun was his. However, Storer did not threaten anyone with the BB gun. In an affidavit, Storer admitted that he was in possession of a BB gun and ammunition, even though he knew that it was a violation of the rules, and that he had a prior history of alcohol-related violations. Storer was a senior, and was an active, high-profile student.

Soon after Storer's incident, Ernest Holloway, a black student, was found in possession of a pistol-type BB gun. Another student heard him mention that he had the gun, and it was reported to campus safety. Foster and the head of the campus safety department confronted Holloway. Holloway admitted that he had a BB gun that was packed in a trunk (foot locker) in his room and stated that he had not had an opportunity to take it home after learning that it was illegal. Holloway had no ammunition. The gun was confiscated.

Pender alleges that Foster gave her specific instructions concerning how she was to punish Holloway and Storer. According to Pender, Foster instructed her "to go light on [Holloway] and find [Storer] responsible, and make the sanction visible." Pender believed that the reason for the disparity in the students' punishments was their race. Pender claimed that Foster told her that Holloway was "one of the good black kids on campus, and that we needed to keep him." Pender believed that the backdrop to Foster's instructions was a history of racial tension at the college.

In October 2003, despite Foster's instructions, Pender chose to punish Storer and Holloway identically, finding each responsible, placing warning letters in their files, and confiscating their BB guns. Pender believed that she made a fair decision but, according to her, when she reported her decision to Foster, Foster lost her temper, said some angry things, and left to tell Tuski. According to Pender, Foster told her that she could not believe that she "had done this." Pender claimed that Foster said that "[t]his was going to mess up everything, and she didn't know how she was going to tell [Tuski] about it."

According to Pender, Foster did not speak to her for two days. When Foster finally approached Pender, she said that Tuski had wanted to reassign responsibility for judicial affairs to a different department and that Foster had to fight very hard to prevent that from happening. Foster then handed Pender an "action plan for employee performance, which had been copied to Tuski. Pender believed that the document was, in part, a "new job description." Foster agreed that "you can classify this as a probationary letter."

The action plan assigned several new duties to Pender, “to replace Community Standards.” Community standards is the section of Pender’s original job description that describes her judicial board duties, including supervising hall directors in their role as hearing officers, selecting and training the judicial board, maintaining judicial board files, and reviewing and updating judicial processes and policies, and student handbook policies. Instead of these judicial board duties, Pender was given duties involving reaching out to parents, organizing a resident advisor conference, and writing grant proposals.

The action plan states that many of Pender’s problems in the fall of 2003 stemmed from breakdowns in communication and supervision. To correct those problems, Pender was instructed to issue written agendas in advance of weekly staff meetings, have minutes taken at the meetings, have the minutes reviewed by the hall directors, turn in weekly reports to Foster, and continue meeting with Foster on a regular basis.

Just after the action plan was issued, there were instances of unspecified miscommunication between Pender and her hall directors. Foster asked Pender about this on Thursday, October 23, 2003, but what Pender told Foster was apparently completely different from what the hall directors had reported. Accordingly to Foster, she told Pender that she, Pender and the hall directors needed to meet to hash things out. However, Foster was leaving town the next morning, so she specifically instructed Pender not to discuss these issues with her staff, and not to meet with them, together or individually, even if they asked, until Monday, October 27, 2003, when Foster would be back in the office.

However, when Foster returned, there was an email from Pender, saying that she had met with several hall directors for two or three hours on Friday and recounting their conversation, during which they had discussed all the items that Foster specifically instructed Pender *not* to discuss in her absence. According to Foster, “[t]hat was the straw that broke the camel’s back for me.” Accordingly, on October 28, 2003, Foster terminated Pender’s employment. Tuski agreed with Foster that Pender was terminated for a culmination of issues, the most recent of which was disobeying a direct order, and the resulting lack of trust. In early August 2005, Pender filed this action, asserting separate claims of retaliation and intentional infliction of emotional distress against each of the three defendants, for a total of six counts.

B. Motion To Compel Deposition

In early May 2006, defendants moved to compel the taking of Pender’s deposition. Defendants alleged that, after having previously cancelled Pender’s deposition (because her mother was ill), Pender’s counsel repeatedly failed to respond to requests for an alternate date and, instead, unilaterally scheduled Foster’s deposition. Defendants informed Pender’s counsel that Foster was unavailable on the date selected, *and* that defendants wished to depose Pender *before* making Foster available for deposition.

At a hearing in mid-May 2006, the parties continued to disagree concerning whose deposition to take first. Accordingly, the trial court decided that, given the parties’ posturing, “I’ll make this call I guess.” The trial court decided that, because it was Pender’s lawsuit, defendants would be allowed to depose her first. The trial court ordered Pender to make herself available for a deposition no later than June 8, 2006, and Foster was to make herself available no

later than June 22, 2006. The trial court rejected Pender's repeated arguments that because she had the burden of proof, she should be allowed to depose Foster first.

C. Motion To Disqualify

In late May 2006, Pender moved to disqualify the trial judge, arguing that his personal interest in another case, *Pantera v Demitroff*, prevented him from being impartial in this case. Pender's counsel did not file a brief, but he supported the motion with his affidavit averring that on May 22, 2004, properties belonging to the judge and his neighbor (Pantera) had flooded during a heavy rain, allegedly because the neighbor on the other side of the road (Demitroff) had filled in some areas of her property with dirt. During the event, the judge was seen personally blocking the culvert in front of his and Pantera's properties (apparently to stem the flow of water). The trial judge had later raised the fill issue with various government officials.

Pantera sued Demitroff, but the trial judge was not a party to that action. Pender's counsel was hired to represent Demitroff. According to Pender's counsel, the trial judge discussed the *Pantera* case with counsel on at least three occasions, expressing the opinion that the flooding was Demitroff's fault. Pender's counsel alleged that the trial judge's feelings about the *Pantera* case resulted in hostility toward Pender's counsel and interfered with the trial judge's ability to be impartial in the present case.

At a hearing on June 1, 2006, the trial judge conceded that "yes, I may" have a *pecuniary* interest in the outcome of the *Pantera* case because "my position is [that] the actions of your client have adversely affected my property." The trial judge reiterated his belief that the flood was caused by the accumulation of fill on Demitroff's property, but rejected that as a basis for disqualification because he had no pecuniary interest in the *present* case. Pender's counsel stated that he had not personally criticized the trial judge in connection with either case and that the trial judge had no prior involvement in the present case, so those grounds for disqualification did not apply. Pender's counsel asserted, however, that the judge was enmeshed in other matters involving Pender. The trial judge rejected that argument because Pender was not involved in the *Pantera* case—her *attorney* was.

Upon being asked to identify specific instances of alleged partiality, Pender's counsel stated that the trial judge had not been fair in its decision of defendants' motion to compel depositions, or in a previous motion to compel answers to interrogatories. The trial judge conceded being short with counsel on occasion. However, he denied being biased against Pender because of his personal interest in the *Pantera* case. The trial judge then asked Pender's counsel if he wished to have the motion referred to the chief judge, and counsel declined. An order denying Pender's motion was entered in mid-June 2006.

D. Motion For Summary Disposition

In mid-August 2006, defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). At a hearing in mid-September 2006, the trial court stated that it had reviewed the entire file, read the depositions, and had reviewed relevant case law. The trial court found that Pender's documentary evidence fell short of establishing the outrageous conduct necessary to maintain a claim for intentional infliction of emotional distress. Concerning Pender's retaliation claim, the trial court found that Pender was not engaged in protected activity when she refused to

discipline Storer more harshly than Holloway because all the participants were white. The trial court added that “a lot of her own deposition testimony hurts her in this regard I believe, whether or not she was engaged in protected activity.” Concerning the element of knowledge, the trial court found that there was no evidence that “any of the defendants here had any knowledge that she was, that she apprised any of them of any alleged violation.” The trial court found no factual support for Pender’s claim that Foster and Tuski instructed her to discriminate against Storer, and knew of her protected activity (in refusing to comply). Additionally, according to the trial court, Pender “never communicated to anyone at the college that she sought [sic], thought a decision was being made based on race and she wouldn’t do it, follow their instructions.”

Concerning whether defendants took an adverse employment decision against Pender, the trial court found that Pender could not show that defendants had retaliated against her. Rather, according to the trial court, defendants “terminated her for legitimate, non-discriminatory reasons.” The last straw was Pender’s “direct defiance of an order” that she not meet with her staff until Foster’s return. The trial court concluded, “It is clear to me that the handling of the disciplinary action with the two students, the last two students, was but a small factor in a whole lot of issues.” Additionally, the trial court found that Pender could not establish causation, that is, that her participation in allegedly protected activity was a significant factor in her termination. Therefore, the trial court found that no questions of material fact existed concerning Pender’s retaliation claim and granted summary disposition to defendants. The trial court entered an order to that effect on September 26, 2006, and this appeal followed.

II. Scheduling Of The Depositions

A. Standard Of Review

Pender argues that the trial court erred in granting defendants’ motion to compel her deposition before Foster was deposed. We review for an abuse of discretion a trial court’s decision concerning a discovery dispute.²

B. Pender’s Claim

Pender does not claim that she was deprived of a fair opportunity to conduct discovery, or that the trial court’s ruling somehow had an effect on the outcome of this case. Rather, Pender disagrees with the trial’s court’s decision to order that her deposition be conducted before Foster was deposed. Pender asks this Court to “reverse the trial court’s order of deposition taking and its reasons therefore.” It is undisputed, however, that Foster and Pender were both deposed before defendants moved for summary disposition. This Court cannot reverse the order of depositions that have already been taken. Because this Court can no longer fashion a remedy for the alleged transgression that Pender identifies, the issue is moot, and we decline to consider it further.³

² *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

³ *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003).

III. Disqualification

A. Standard Of Review

Pender argues that the trial judge should have disqualified himself from hearing this case because her counsel represented a party in an unrelated lawsuit between two of the trial judge's neighbors. When reviewing a trial court's decision on a motion to disqualify the trial judge, we review for an abuse of discretion the trial court's findings of fact, while we review de novo the application of the law to those facts.⁴

B. Timeliness

"Generally, to preserve this issue for appellate review, a motion to disqualify must be filed within 14 days after the moving party discovers the basis for disqualification[.]"⁵ In this case, the basis for Pender's motion for disqualification was that the trial judge was a neighbor to a party that her counsel represented in a separate lawsuit. It is apparent that Pender's counsel was aware of this allegedly disqualifying ground well more than 14 days before filing the motion for disqualification. Thus, the motion was not timely filed.

C. Referral

More significantly, MCR 2.003(C)(3) provides that when a challenged judge denies a motion for disqualification, the judge shall refer the motion to the chief judge upon request by a party. In this case, after the trial judge denied Pender's motion, the trial judge asked Pender's counsel if he wished to have the motion referred to the chief judge, and counsel expressly declined. When a party fails to seek de novo review by the chief judge of a trial judge's decision not to disqualify himself, the issue is waived.⁶ Therefore, because Pender expressly declined the trial judge's offer to refer the motion to the chief judge, we conclude that this issue is waived. An error that has been waived is extinguished and, therefore, is not susceptible to review on appeal.⁷

IV. Summary Disposition

A. Standard Of Review

Pender argues that the trial court erred in granting defendants' motion for summary disposition of her claims for unlawful retaliation and intentional infliction of emotional distress. We review de novo, on the entire record, a trial court's grant of summary disposition to

⁴ *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003).

⁵ *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006); see MCR 2.003(C)(1).

⁶ MCR 2.003(C)(3)(a); *People v Williams (After Remand)*, 198 Mich App 537, 544; 499 NW2d 404 (1993).

⁷ *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

determine whether the prevailing party was entitled to judgment as a matter of law.⁸ When reviewing a motion under MCR 2.116(C)(10), this Court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists.⁹ The party opposing the motion may not rest on the mere allegations or denials contained in the pleadings, but must come forward with evidence of specific facts to establish the existence of a material factual dispute.¹⁰

B. Retaliation

Section 701 of the Civil Rights Act¹¹ prohibits an employer from retaliating against an employee for opposing or complaining about a violation of the act. “To establish a prima facie case of retaliation . . . a plaintiff must show (1) that the plaintiff engaged in 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.”¹²

As Pender argues, Michigan law does not distinguish between majority and minority races when analyzing claims of race discrimination. Rather, being a member of a protected group is relevant if a plaintiff chooses to establish a prima facie case of discrimination using indirect evidence, through the burden-shifting approach articulated in *McDonnell Douglas Corp v Green*,¹³ which gives rise to a rebuttable presumption of discrimination, including causation. Here, however, Pender is not a member of a protected class. Therefore, it does not appear that the *McDonnell Douglas Corp* burden-shifting approach is available to her, or that she intended to use it to prove either retaliation, or the underlying act of alleged discrimination against a student.¹⁴ Although the trial court observed that all parties involved in this case are white, Pender does not allege that she was the target of discrimination, but rather that she was retaliated against for opposing defendants’ efforts to discriminate against a student on the basis of the student’s race. Under § 402 of the CRA,¹⁵ an educational institution may not discriminate against students on the basis of their race. Pender testified that Foster directed her to impose differential punishment against two students on the basis of their race, but she refused to do so. Although Foster denied instructing Pender to take race into account when disciplining the

⁸ *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994); see also *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁹ *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

¹⁰ *Id.* at 362.

¹¹ MCL 37.2701(a).

¹² *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

¹³ *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See also *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132-135; 666 NW2d 186 (2003).

¹⁴ See *Lind v Battle Creek*, 470 Mich 230, 232-233; 681 NW2d 334 (2004).

¹⁵ MCL 37.2402(a) and (b).

students, a court may not decide issues of credibility when deciding a motion for summary disposition.¹⁶ Pender's testimony, accepted as true, was sufficient to establish a genuine issue of material fact with regard to whether she was engaged in protected activity within the meaning of § 701.

With regard to knowledge, the evidence established that Foster was a high-ranking employee of the college, capable of hiring and firing employees, including Pender. Therefore, her knowledge can fairly be imputed to defendant Tuski and the college.¹⁷ Plaintiff testified that defendant Foster was the person who instructed her to discriminate against a student on the basis of race, that Foster became upset when plaintiff informed Foster that she did not do so, and that Foster was the person who subsequently fired her. This evidence was sufficient to show that defendants had knowledge of Pender's opposition to an alleged violation of the CRA.

Regarding whether there was an employment action adverse to Pender, Foster admitted that the action plan was essentially a probation letter. While Pender's wages and title were unchanged, the action plan eliminated Pender's judicial board responsibilities, which gave her the power to make disciplinary decisions. Adverse employment actions include significantly diminished material responsibilities.¹⁸ Further, Foster terminated Pender approximately a week later, which unquestionably involves an adverse employment action.¹⁹ Thus, there was sufficient evidence of an adverse employment action to preclude summary disposition on this ground.²⁰

We agree with the trial court, however, that Pender was unable to satisfy the causation element of an unlawful retaliation claim. Defendants produced substantial evidence that both the action plan and Pender's subsequent termination were motivated by her poor job performance, in particular recurrent problems communicating with and supervising her staff, creating conflict, repeatedly breaking confidentiality, failing to timely complete tasks, and other issues. According to defendants, the "last straw" was Pender's disregard of a direct order not to meet with her staff to discuss ongoing problems until Foster returned to campus. Therefore, this case involves mixed motives.

"In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or

¹⁶ *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

¹⁷ *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621-623; 637 NW2d 536 (2001).

¹⁸ *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003).

¹⁹ *Id.*

²⁰ *Id.*; *Meyer, supra* at 569.

‘motivating’ factor in the decision.”²¹ “In addition, a plaintiff must . . . present *direct proof* that the discriminatory animus was causally related to the adverse decision.”²²

In response to the affidavits, depositions, and other documentary evidence that defendants submitted, Pender submitted evidence that she received a good performance review and a raise in June 2003. She asserts that the hall directors’ affidavits are pro forma and lack credibility. In her affidavit and deposition, Pender denied turning off the hall directors’ long distance service, implementing policies without Foster’s approval, and noted that she completed a manual for her staff. However, Pender admitted that she had substantial problems with one of her hall directors. Most significantly, Pender failed to address the weekend meeting that she held in direct violation of Foster’s specific instructions, which immediately preceded her termination.

We conclude that, even drawing all reasonable inferences in Pender’s favor, she failed to show that defendants’ alleged discriminatory animus was more likely than not a substantial or motivating factor in the decision to issue the action plan, or the decision to terminate her employment. For this reason, we conclude that the trial court did not err in granting defendants’ motion for summary disposition of Pender’s unlawful retaliation claim.

C. Intentional Infliction Of Emotional Distress

Because Pender was an at-will employee and failed to establish factual support for her unlawful retaliation claim, she cannot maintain a claim for intentional infliction of emotional distress.²³ Additionally, Pender failed to establish a genuine issue of material fact concerning whether defendants’ alleged conduct may be considered so extreme and outrageous to support a claim of intentional infliction of emotional distress.²⁴

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette

²¹ *Sniecinski, supra* at 133; see also *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002) (stating that “the impermissible factor must be a determining factor.”).

²² *Sniecinski, supra* at 133 (emphasis added).

²³ See *Cebulski v City of Belleville*, 156 Mich App 190, 196; 401 NW2d 616 (1986).

²⁴ See *Meek v Michigan Bell Tel Co*, 193 Mich App 340, 346-347; 483 NW2d 407 (1991).