

STATE OF MICHIGAN
COURT OF APPEALS

TAMARA FILAS,

Plaintiff-Appellant,

v

DEARBORN HEIGHTS SCHOOL DISTRICT 7,
JEFFREY BARTOLD, CHARLENE COULSON,
DEARBORN HEIGHTS BOARD OF
EDUCATION, CINDY DESMIT, MANDY
DIROFF, LORI FUJITA, CHRISTINE
KOWALSKI, DAVID MACK, ANGELA
RUDOLPH, PHILLIP SHANNON, VIRGINIA
MORGAN, and DENISE RAFFERTY,

Defendants-Appellees.

UNPUBLISHED
April 16, 2013

No. 308395
Wayne Circuit Court
LC No. 11-002576-CZ

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right a trial court order granting defendants' motion for summary disposition. For the reasons set forth in this opinion, we affirm.

I. FACTS & PROCEDURAL HISTORY

Plaintiff is a tenured teacher in the Dearborn Heights School District No. 7 (the School District) where she teaches geometry. Plaintiff is presently on leave. Sometime after plaintiff was hired, she was involved in a car accident. Plaintiff alleged that this accident caused her to develop sensitivity to fluorescent lights and to loud noises. At or about the start of the 2010 academic year, plaintiff began wearing "lightly-tinted" prescription glasses, custom hearing protection in loud areas such as hallways, and she brought a bench to her classroom so that she could lay down on it and rest when students were not present. According to plaintiff, her students engaged in conduct designed to create loud noises. Plaintiff responded to the conduct by giving an "informational" audiology presentation to her class. Plaintiff also provided a handout that contained information on the anatomy of a human ear. The handout included language that stated that any action deemed as deliberate to cause plaintiff pain or injury could "be subject to punishment," and "may constitute a wrongful act." The handout stated that

“[k]nowingly and deliberately causing pain and/or bodily harm to any individual can be the basis of a legal action in a court of law against the person or persons responsible.”

In addition to the handout, plaintiff gave her students a “disciplinary contract” to take home, review with their parents, sign and return. The contract included language that required the student to acknowledge that “I understand that if I deliberately create sounds that cause pain or irreversible harm to another person’s hearing, I may be held accountable.” The parents needed to agree that their child understood, “there will be serious consequences for behavior that causes pain or damage to anyone’s hearing.” Plaintiff did not obtain permission from the School District to give the presentation or to provide the handouts. In an affidavit, Charlene Coulson, assistant superintendent, averred that numerous students and parents complained to the District and perceived the contract as a threat to sue noisy students.

After receiving the complaints, Superintendent Jeffrey Bartold, Coulson and a union representative met with plaintiff. The administration asked plaintiff “to provide medical information to substantiate your need for a daybed in your classroom and for any additional accommodations you may need based on your serious headaches, vision issues and hearing issues.” Plaintiff was placed on paid administrative leave pending “investigation of the contract and other actions surrounding the behaviors in the classroom.”

On November 29 2010, plaintiff forwarded medical documentation to the School District; however, the School District concluded that the documentation did not show that plaintiff needed “reasonable accommodation” to perform her job. Plaintiff was informed that, pursuant to the School District’s Collective Bargaining Agreement (CBA), the superintendent would recommend to the Board of Education (the Board) that plaintiff undergo a physical and/or mental examination. Plaintiff was informed that she could ask that the Board consider the recommendation in a closed session in accord with the Open Meetings Act (OMA), MCL 15.261, *et seq.*; however, plaintiff did not request a closed session.

The Board considered the superintendent’s recommendation at a December 6, 2010, meeting. Item XIII on the Meeting Agenda was entitled “Executive Session,” and item XV was entitled “Board Action on Complaint Against Staff Member.” The meeting minutes stated that after about an hour, a Board member moved to have the Board go into executive session, “and pursuant to Section 8h of the [OMA] to consider material exempt from disclosure under statute.” Approximately two hours later, the Board reconvened in an open session and unanimously passed Resolution #10-154 authorizing the superintendent to require a “staff member” (i.e. plaintiff) to take a “physical and/or mental examination” at the School District’s expense. The Board indicated, “[t]he staff member’s name and infraction(s) are designated in executive session meeting minutes. . . .”

Following the meeting, the School District gave plaintiff the opportunity to provide revised medical documentation to verify that she needed accommodations to perform her job. Ultimately, plaintiff submitted additional documentation, but she did not comply with the School District’s directives to attend a meeting with the administration to discuss her return to work. Instead, plaintiff requested to be placed on voluntary medical leave. The School District complied. Thereafter, the School District attempted on several occasions to arrange a meeting with plaintiff to discuss her return to the classroom for the 2011 academic year, to no avail. The

School District informed plaintiff that she was on “unauthorized, unpaid leave of absence,” and had exhausted her allowance of sick days and leave under the FMLA. Plaintiff has remained on leave ever since.

Meanwhile, on March 3, 2011, plaintiff commenced this action. In her complaint, plaintiff made references to the Teacher Tenure Act (TTA), MCL 38.71 *et seq.*, and alleged three decipherable counts. In Count 1, plaintiff alleged a violation of the Freedom of Information Act (FOIA)¹, MCL 15.231 *et seq.*, and in Counts II-IV, plaintiff alleged violations of the OMA. Specifically, plaintiff alleged that defendants violated MCL 15.268(a) of the OMA, which provides that a public body may meet in closed session to consider complaints against a public employee “if the named person requests a closed hearing.”

Defendants moved for summary disposition, arguing that the Board properly went into closed session under the OMA pursuant to MCL 15.268(h), which allows a public body to meet in closed session “[t]o consider material exempt from discussion or disclosure by state or federal statute.” Defendants argued that the Board discussed plaintiff’s medical condition, which was exempt from disclosure under state and federal law under the Americans With Disabilities Act (ADA), 42 USC 12101 *et seq.*, FOIA, and the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq.* In addition, defendants argued that student complaints considered by the Board were educational records that could not be disclosed under the Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g.

The trial court granted defendants’ motion for summary disposition with respect to the TTA claims pursuant to MCR 2.116(C)(8) and (C)(10), and it granted defendants’ motion with respect to the OMA claims pursuant to MCR 2.116(C)(10). The court held that, “[t]here can be no violation of the [TTA] when no action has been taken under it,” and it found that the Board properly went into closed session to discuss plaintiff’s medical condition. This appeal ensued.

II. ANALYSIS

Plaintiff contends that the trial court erred in granting defendants’ motion for summary disposition. “This Court reviews the grant or denial of summary disposition *de novo* to determine if the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(10), we consider “the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A moving party is entitled to summary disposition under MCR 2.116(C)(10) when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law.” *Id.* at 552. A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim based upon the pleadings alone. *Maiden*, 461 Mich at 119. The motion should be granted when a plaintiff’s claims are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* (quotation omitted).

¹ Plaintiff’s FOIA claims are not at issue in this appeal.

Plaintiff's argument with respect to the TTA is grounded on MCL 38.112, which, at the time plaintiff filed her complaint,² provided that a controlling board could place a tenured teacher on unrequested leave of absence "because of physical or mental disability," provided that the teacher "shall have the right to a hearing" under MCL 38.104(1). MCL 38.104(1), in turn, provides that a teacher "may contest the controlling board's decision to proceed upon the charges" by filing an appeal with the State Tenure Commission. Plaintiff argues that she was denied her right to a hearing with the Tenure Commission because the superintendent, as opposed to the Board, placed her on unrequested leave. She claims that because a "controlling board" did not place her on leave or consider formal "charges" against her, she could not obtain the right to a hearing under MCL 38.104(1).

In this case, plaintiff incorrectly contends that she could not obtain a right to a hearing under MCL 38.104(1). Here, while the superintendent initially placed plaintiff on paid administrative leave, the Board essentially affirmed that act at the Board meeting when it approved the superintendent's recommendation that plaintiff submit to a medical evaluation. Once the Board acted, plaintiff could have appealed that decision to the Tenure Commission and obtained her hearing pursuant to MCL 38.104(1). While no formal charges were filed against plaintiff, she could have nevertheless appealed the Board's actions and obtained a hearing under MCL 38.104(1) where she could have contested the ordered medical examination and the unrequested leave. This Court has previously noted that the Tenure Commission has broad authority to implement and enforce the TTA. See *Kramer v Van Dyke Public Schools*, 134 Mich App 479, 488; 351 NW2d 572 (1984) ("[t]he State Tenure Commission has jurisdiction over questions arising under the teachers' tenure act"); see also MCL 38.137 (providing that the Tenure Commission is "vested with such powers as are necessary to carry out and enforce the provisions of [the TTA]"); MCL 38.121 (providing that a tenured teacher "may appeal to the tenure commission *any decision of a controlling board under this act*, other than a decision governed by article IV. . . .") (Emphasis added). Indeed, plaintiff's failure to appeal to the Tenure Commission and exhaust her administrative remedies is fatal to any claims she may have raised under the TTA. See MCL 38.104(7) (once a tenured teacher is aggrieved by a final decision of the Tenure Commission, the teacher may seek judicial review of the decision).

Moreover, even if we were to assume that plaintiff for some reason could not file a claim with the Tenure Commission, plaintiff is not entitled to any relief under the TTA. Here, plaintiff is not presently on "unrequested" leave. Instead, plaintiff asked to be placed on voluntary medical leave less than a month after the Board approved the superintendent's recommendation. By making this request, plaintiff converted the "unrequested" leave of absence to a requested leave of absence. Therefore, all of her arguments relating to being placed on unrequested leave are moot and she is not entitled to any relief.

² The statute was subsequently amended by 2011 PA 100, effective July 19, 2011.

For these reasons, the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's TTA claims.³ See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) (this Court will affirm a trial court when it reaches the right result albeit for different reasons).

Plaintiff next contends that the trial court erred when it concluded that defendants did not violate the OMA.

MCL 15.268 provides two exceptions to the general rule that all meetings of a public body must be conducted in an open session⁴ in relevant part as follows:

A public body may meet in a closed session only for the following purposes:

(a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against . . . a public . . . employee . . . *if the named person requests a closed hearing*. . . . [Emphasis added.]

* * *

(h) To consider material exempt from discussion or disclosure by state or federal statute.

Plaintiff contends that the Board considered complaints against her at the December 6, 2010, meeting, that she did not request a closed session, and that the Board therefore violated subsection (8)(a) when it went into closed session. Defendants counter that the Board properly went into closed session under 8(h) because it considered material exempt from disclosure—i.e. plaintiff's medical condition and student complaints.

In this case, before the Board meeting, the School District made medical inquiries of plaintiff that were considered by the Board and were exempt from disclosure under 29 CFR 1630.14(c)(1), a regulation governing implementation of the ADA. That regulation provides in relevant part as follows:

(c) Examination of employees. A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(1) Information obtained under paragraph (c) of this section regarding the medical condition or history of any employee *shall be* collected and maintained

³ Given our resolution of plaintiff's arguments with respect to the TTA, we need not address her argument that the CBA was inconsistent with the TTA.

⁴ See MCL 15.263(1).

on separate forms and in separate medical files and be *treated as a confidential medical record*. . . . [29 CFR 1630.14 (emphasis added).]

Here, the School District is a “covered entity” for purposes of the ADA. See 29 CFR 1630.2(b) (defining “covered entity” to include an “employer”). Additionally, the School District made medical “inquiries” of plaintiff and plaintiff responded to those inquiries. Specifically, plaintiff forwarded information from health professionals to the School District regarding her medical conditions per the School District’s inquiry. Hence, the information was confidential and exempt from disclosure under 29 CFR 1630.14(c)(1). Furthermore, the responses to the inquiries were necessarily related to the Board’s discussions at the meeting. Coulson informed plaintiff that the inadequacy of the responses precipitated the superintendent’s decision to recommend that plaintiff undergo a mental and/or physical examination. Thus, the Board necessarily had to consider the responses to the inquiries in deciding whether to approve the superintendent’s recommendation. Therefore, given that such information was exempt from disclosure, the Board had authority to go into closed session pursuant to MCL 15.268(h).

In addition, plaintiff’s medical information was exempt from disclosure under MCL 15.24(1)(l), which exempts from disclosure “[m]edical, counseling or psychological facts or evaluations concerning an individual” if consideration of the information would reveal the individual’s identity. Here, the Board considered medical or psychological facts or evaluations during the Board meeting. Plaintiff submitted letters from medical professionals detailing her medical ailments. Plaintiff had a lengthy medical history at the school after she was involved in a car accident. It was necessary for the Board to consider and discuss all of these facts and circumstances in evaluating the superintendent’s recommendation. The Board could not have conducted its inquiry in public without revealing plaintiff’s identity. As such, the material was exempt from disclosure under MCL 15.243(1)(l), and the Board was therefore authorized to go into closed session to discuss the material pursuant to MCL 15.268(h).⁵

Plaintiff contends that the Board was not authorized to go into closed session because the Board considered “complaints” against her. However, even if the Board considered “complaints” against plaintiff, the complaints were inextricably linked to plaintiff’s medical condition, information of which was not subject to disclosure. To the extent any complaints against plaintiff were considered, the Board needed to consider all of the facts and circumstances surrounding the superintendent’s recommendation that plaintiff undergo a medical examination. Moreover, the decision that came out of the Board meeting was that plaintiff had to submit to a

⁵ Defendants also contend that medical information was exempt from disclosure under HIPAA and student complaints were exempt under FERPA, 20 USC 1232g; however, because defendants fail to cite to specific relevant provisions of those statutes and otherwise fail provide any meaningful analysis in support of their arguments, they have abandoned them for review. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003) (“[a]n appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position”).

medical evaluation, which is indicative that the Board discussed any complaints or infractions solely in the context of plaintiff's medical condition. In other words, the complaints were only relevant to the Board's determination that plaintiff should take a medical examination. The Board did not consider the complaints for any other purpose as the ultimate outcome of the hearing did not precipitate the filing of disciplinary charges against plaintiff.

In sum, plaintiff's medical information was protected material that was exempt from disclosure under the ADA and FOIA, consideration of which was necessary to allow the Board to decide whether to approve the superintendent's recommendation that plaintiff undergo a physical and/or mental evaluation. Moreover, the protected material was inextricably linked to any complaints against plaintiff that the Board considered. Accordingly, the Board was authorized to go into closed session under MCL 15.268(h) and the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's claims under the OMA. MCR 2.116(C)(10).

Affirmed. Neither party having fully prevailed, neither may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher