

STATE OF MICHIGAN
COURT OF APPEALS

SYRAH IMTIAZ,

Plaintiff-Appellant,

v

THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN, MERLE
JAARDA, KEN STOFFERS, WILLIAM E.
KOTOWICZ and JASON R. CAMPBELL,

Defendant-Appellees.

UNPUBLISHED

March 2, 2006

No. 253107

Washtenaw Circuit Court

LC No. 02-000565-CK

SYRAH IMTIAZ,

Plaintiff-Appellant,

v

THE BOARD OF REGENTS OF THE
UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

No. 253109

Washtenaw Circuit Court

LC No. 02-000097-MH

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the order granting summary disposition under MCR 2.116(C)(7) and (10) to defendants in this action involving student disciplinary proceedings against plaintiff. We affirm.

I

The pertinent facts are not in dispute. Plaintiff, a woman of Pakistani decent, enrolled in the University of Michigan School of Dentistry (defendant university or university). Upon enrollment, each student signs an acknowledgment to abide by the Honor Code. Violations of the Honor Code are reported to the Honor Council, a body comprised of eleven elected students from the School of Dentistry. The duties of the Honor Council are entirely judicial and advisory.

Plaintiff was accused of violating the Honor Code in a class taught by Defendant Jaarda and defendant Stoffers (“first incident.”) Upon notification of the charges, plaintiff waived her right to an Honor Council hearing and opted to have her case heard by a three-member ad hoc faculty committee. Following the hearing, the ad hoc committee members unanimously agreed that plaintiff committed the violations as alleged in the complaint. Plaintiff appealed the ad hoc committee’s recommendation for expulsion to the Executive Committee.

Within days of the Executive Committee hearing, plaintiff admitted that she committed the alleged violation. The Executive Committee notified plaintiff of its decision not to adopt the Honor Council’s recommendation for expulsion, and to suspend her until the fall semester of 2001, place her on probation for the duration of her studies at the university, record the offense on her transcript until five years after her graduation, rescind any scholarship support, and require that she attend counseling and an ethics course. To explain her absence from the university, plaintiff sent a class-wide email stating she was returning home to care for an ill parent.

During plaintiff’s absence, an anonymous letter disclosing the fact that plaintiff was suspended for cheating was placed in each dentistry student’s mailbox. The letter was also posted for at least two days on a centrally located bulletin board in the dental school. Generally, only faculty was permitted to post letters on the bulletin board. The individual defendants denied knowing the identity of the author of the letter and to date, no investigation has occurred although defendants concede the letter breached the confidentiality of the proceedings.

Following her return, plaintiff was accused of a second Honor Code violation (“second incident”). Following an exam, a classmate submitted a complaint against plaintiff to the Honor Council alleging “inappropriate test taking behavior.” The Honor Council conducted a hearing, and determined that plaintiff acted inappropriately or acted suspiciously, but did not find sufficient evidence to support a determination that plaintiff actually cheated. The Honor Council refrained from recommending “definitive severe sanctions,” and instead imposed minor penalties. Plaintiff appealed, and a hearing was scheduled before the Executive Committee.

In the interim, a third complaint against plaintiff was submitted to the Honor Council (“third incident”). Defendant Jaarda and defendant Stoffers alleged that plaintiff misappropriated another student’s property, a “PVS impression.”¹ Plaintiff was notified of the charges by a letter, and a hearing was held by the Honor Council on the allegations of the third incident. The Honor Council concluded that plaintiff was guilty of taking the PVS impression and presenting false information by denying guilt, and recommended her expulsion from the Dental School.

¹ Each dental student, at the beginning of semester, receives a plastic set of teeth and gums called a “typodont.” To complete assignments, students replicate the typodont by creating a stone model from a PVS impression. The PVS impression is first prepared by pouring a liquid over the typodont, which sets and dries. The PVS impression is filled with liquid stone and becomes an exact stone model of the typodont. Students then make adjustments in the stone model(s) as required by each assignment.

Plaintiff appealed this recommendation and she and her attorney subsequently appeared before the Executive Committee. The Executive Committee adopted the Honor Council's recommendation and formally expelled the plaintiff.

Plaintiff's motion for a preliminary injunction to enjoin her expulsion was denied by the trial court. This Court granted her motion for immediate consideration, but denied her application for leave to appeal.² Plaintiff filed a motion for immediate consideration and application for leave to appeal with the Michigan Supreme Court. Although immediate consideration was granted, the Supreme Court denied the motion for leave to appeal on July 22, 2002.³

Plaintiff filed her complaint in circuit court. Count I of plaintiff's amended complaint asserts a due process claim, alleging defendants' disciplinary proceedings and procedures violated her rights. In Count II, plaintiff alleged constitutional violations under 42 USC § 1983. Count III specifically alleged a due process claim against defendant university for failing to, among other things, monitor, control, and supervise its employees who it had reason to know were violating its policies and procedures. In Count IV, plaintiffs requested a writ of mandamus, compelling her reinstatement and redaction of her school records. Plaintiff also alleged a violation of the Elliot-Larsen Civil Rights violation based on national origin (Count V), defamation (Count VI), intentional infliction of emotional distress (Count VII), breach of contract (Count VIII), assault and battery against defendant Stoffers (Count IX), and ethnic intimidation (Count X).

At the close of discovery, defendants collectively filed a motion under MCR 2.116(C)(7) and (10). After a hearing was held, the trial court issued an opinion granting defendants' motion on all counts except plaintiff's battery claim (Count IX). The trial court denied plaintiff's motion for reconsideration. The parties stipulated to the dismissal of the remaining claim. Plaintiff now appeals the dismissal of her due process claims (Counts I, II, and III), her mandamus claim (Count IV), her defamation claim (Count VI), and her ethnic intimidation claim (Count X).

II

Generally, whether a party was afforded due process of law is a question of law that is review de novo. *Hanlon v Civil Serv Comm'n*, 253 Mich App 710, 717; 660 NW2d 74 (2002). Similarly, this Court reviews a trial court's decision on a motion for summary disposition de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Whether a cause of action is barred by the statute of limitations under MCR 2.116(C)(7) is a question of law that this Court also reviews de novo. *McKiney v Clayman*, 237 Mich App

² *Imtiaz v Bd of Regents of the Univ of Michigan*, unpublished order of the Court of Appeals, entered May 30, 2002 (Docket No. 241528).

³ *Imtiaz v Bd of Regents of the Univ of Michigan*, 466 Mich 896; 649 NW2d 75 (2002).

198, 200-201; 602 NW2d 612 (1999). To ascertain whether the claim is time-barred as a matter of law, this Court considers all documentary evidence submitted by the parties and accepts as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004); *McKiney, supra* at 201.

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

III

Plaintiff first argues individual members of the Honor Council were possibly biased against her, denying her the right to an impartial trier of fact, because they either (1) sat in judgment of her in prior disciplinary proceedings, (2) were exposed to the anonymous letter posted in the dental school, or (3) were subject to the interference and influence of defendant Jaarda when he attended and participated in the proceedings. Plaintiff also challenges the trial court's determination that she failed to establish "actual bias," arguing that only "possible bias" need be established. We conclude that plaintiff has failed to show bias, and that reversal is not required.

The constitutional guarantee of procedural due process limits governmental action and requires the government to institute safeguards in proceedings which affect the rights protected by due process, including life, liberty and property. US Const, Am XIV; Const 1963, art 1, § 17. Michigan's guarantees of due process are construed no more broadly than its federal counterpart. *Gazette v City of Pontiac*, 212 Mich App 162, 173; 536 NW2d 854 (1995).

Generally, due process requires that an individual be given notice and a meaningful opportunity to be heard. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). "A student faced with expulsion has the right to a pre-expulsion hearing before an impartial trier of fact." *Newsome v Batavia Local Sch Dist*, 842 F2d 920, 927 (CA 6, 1988). Rudimentary procedural due process requires (1) notice, (2) an opportunity to defend, (3) a hearing, and (4) a written, although relatively informal, statement of findings. *Verbison v Auto Club Ins Ass'n*, 201 Mich App 635, 641; 506 NW2d 920 (1993).

In *Ferrario v Escanaba Bd of Ed*, 426 Mich 353; 395 NW2d 195 (1986), the Supreme Court identified four situations that present constitutionally unacceptable risks of bias: where a judge or decision maker (1) has a pecuniary interest in the outcome, (2) has been the target of personal abuse or criticism from the party before him; (3) is "enmeshed in [other] matters involving petitioner . . .", or (4) might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decision maker. *Id.* at 374 (citation omitted). The

Court held that a plaintiff must show that the risk of unfairness was intolerably high or that the probability of unfairness is too high to be constitutionally tolerable. *Id.* at 380.

The record as a whole before us does not reflect that the risk of unfairness to plaintiff was intolerably high or that the probability of unfairness was too high to be constitutionally tolerable. The individual members of the Honor Council and ad hoc committees were not the sole decision-makers. Instead, the Honor Council and committees only submitted recommendations to the Executive Committee, which, on three occasions, the Executive Committee did not adopt.

Plaintiff has also failed to establish bias on the part of two Honor Council members who sat in judgment of her on two occasions. In any event, “[m]ere familiarity with the facts of a case . . . does not, however, disqualify a decision maker.” *Ferrario, supra* at 376 (citations omitted).⁴

We also reject the contention that defendant Jaarda orchestrated or influenced the proceedings by submitting a question during plaintiff’s testimony. At a hearing, the Honor Code expressly authorizes “faculty member(s) who may be involved . . . to ask questions and make comments relevant to the issue.” Accordingly, defendant Jaarda was authorized, as the professor who received the report of the theft, to be present in the investigative portion of the hearing and ask questions. Because the record shows that Jaarda did not participate in the deliberation portion of the proceedings, he did not improperly influence the outcome. The trial court properly dismissed plaintiff’s claim that she was denied a right of review by an impartial factfinder.

Plaintiff’s next claim requires us to address whether due process requires a university to adopt and articulate an evidentiary standard for the burden of proof required to support a finding of fact in disciplinary proceedings. Plaintiff contends that the absence of an enunciated standard,⁵ in this case allowed the Honor Council to make findings based on suspect evidence and arbitrarily expel plaintiff in violation of her right to due process.

The right to an education has been recognized a legitimate property or liberty interest protected from arbitrary short term suspensions. *See Goss v Lopez*, 419 US 565, 573-575; 95 S Ct 729, 42 L Ed 2d 725 (1975); *Regents of Univ of Michigan v Ewing*, 474 US 214, 225; 106 S Ct 507; 88 L Ed 2d 523 (1985).

In *Goss*, the United States Supreme Court held that a student suspended for ten days from a public high school for disciplinary misconduct was entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story” either before or within a reasonable period of

⁴ We note that if plaintiff had concerns about her classmates’ inability to remain impartial, she had the option, which she did not exercise, of (1) having each hearing heard by an ad hoc faculty committee or (2) proceeding directly to a hearing before the Executive Committee.

⁵ The University of Michigan is the sole state public university to not formally adopt and implement an evidentiary standard for disciplinary proceedings.

time after the suspension. *Goss, supra* at 581. The Supreme Court noted for cases of longer suspension or expulsion due process may require more protection. *Id.* at 579.

However, the majority of federal courts addressing this issue have not imposed further protections for graduate school disciplinary proceedings. See *Flaim v Medical College of Ohio*, 418 F3d 629, 633-643 (2005) (determining that medical school student's dismissal following felony conviction did not violate procedural due process where student received notice and had opportunity to be heard); *Foo v Trustees of Indiana Univ*, 88 F Supp 2d 937, 952 (SD Ind, 1999) (an undergraduate student accused of various acts of misconduct and subject to progressive disciplinary actions including dismissal was not entitled to detailed notice, more time between notice and hearing, or advance notification of a right to appeal to a review board); *Nash v Auburn Univ*, 812 F 2d 655 (CA 11, 1987) (graduate students one year suspensions for academic dishonesty were not entitled to a list of witnesses, summary of their testimony, full cross-examination of testifying witnesses, adherence to formal rules, or de novo review of denial decision) and.

Michigan federal courts have held that “[a]cademic institutions have a significant interest in the promulgation of procedures for the resolution of student disciplinary problems.” *Hart v Ferris State College*, 557 F Supp 1379, 1388 (D Mich, 1983) (citation omitted). In *Jaksa v Regents of Univ of Michigan*, 597 F Supp 1245, 1250 (D Mich, 1984), the court, while determining that the procedures in a suspension proceeding for a student accused of cheating did not violate due process, noted that the primary purpose of a university is to educate students:

A school is an academic institution, not a courtroom or administrative hearing room. Similarly, a school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants. Formalizing hearing requirements would divert both resources and attention from the educational process Maintaining a relationship between schools, parents and students “in an adversary atmosphere and according [to] the procedural rules to which we are accustomed on a court of law would hardly best serve the interests of any of those involved.” . . . While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms. [Citations omitted.]

This Court has similarly recognized educational institutions’ rule making authority. “[C]ourts must give great deference to a school administration’s construction of its own rules and regulations.” *Birdsey v Grand Blanc Comm Schools*, 130 Mich App 718, 724; 344 NW2d 342 (1983), quoting *Wood v Strickland* 420 US 308, 324-325; 95 S Ct 992; 43 L Ed 2d 214 (1975). In *Birdsey* this Court further held “the Michigan Constitution provides that in reviewing the factual findings of an administrative agency, courts are bound by those findings if there is competent, material and substantial evidence to support them.” *Id.* at 723, citing Const 1963, art 6, § 28. “Substantial evidence” requires more than a mere scintilla and means such evidence relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *McBride v Pontiac Sch Dist*, 218 Mich App 113, 123; 553 NW2d 646 (1995). Under this test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn. *Id.*

In addition, “the Michigan Constitution confers a unique constitutional status on our public universities and their governing boards.” *Federated Publs, Inc v Michigan State Univ Bd of Trustees*, 460 Mich 75, 84, 87-88; 594 NW2d 491 (1999). While not without limits, the governing boards’ authority has been described as “the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the legislature.” *Id.* at n 8, quoting *Bd of Regents of the Univ of Michigan v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). In educational matters, the independence of Michigan’s public universities is well established. See *Branum v Bd of Regents of Univ of Michigan*, 5 Mich App 134, 138; 145 NW2d 860 (1966).

We therefore reject plaintiff’s assertion that due process requires that a Michigan university adopt and enunciate an evidentiary standard for student disciplinary proceedings. Here, the committees’ respective findings of theft and cheating were supported by competent, material and substantial evidence on the record. Review of the record shows an inference of cheating could be drawn from evidence showing the match between the staple holes, responses and corresponding erasures on plaintiff’s and the other student’s grading sheets. A legitimate inference of theft of the PVS impression could be drawn from the evidence showing the unexplainable similarity of the distinct air bubbles between the stone model plaintiff observed in plaintiff’s possession and a second stone model made from the missing impression. Given this evidence, we find the absence of an enunciated evidentiary standard did not deprive plaintiff of procedural due process.⁶

We also conclude plaintiff had a reasonable opportunity to be heard and reject plaintiff’s contention she was unreasonably denied the opportunity to present evidence. Plaintiff contends the exclusion of Kirsten Schwartz as a witness was prejudicial as Schwartz would have testified that stone models get intermingled in class, possibly explaining why plaintiff might have had possession of a stone model that matched a second stone model made from the missing PVS impression. We disagree.

Plaintiff was afforded the procedural protections guaranteed under the Honor Code as it does not provide for the submission of all evidence and instead allows an accused student to have an opportunity to present his or her point of view and bring any material pertinent to the matter being discussed. The record reveals Schwartz’ testimony was cumulative as the Honor Council heard testimony from another student that stone models get intermingled or lost. Further, Schwartz was interviewed in the course of the investigation but had no specific information to offer surrounding the circumstances of the missing PVS impression. Given this evidence and plaintiff’s ability to present her defense theory through cross-examination and the presentation of

⁶ We expressly reject plaintiff’s reliance on dicta in *Smyth v Lubbers*, 398 F Supp 777, 795-799 (WD Mich, 1975) where the court opined that “some articulated and coherent standard of proof [should] be formally adopted and applied . . . which determines the student’s guilt or innocence of the charge [in student disciplinary proceedings.]” In any event, the *Smyth* Court declined to articulate precisely what standard of proof would be constitutionally adequate. *Id.* More importantly, because the constitutional concerns of double jeopardy present in *Smyth* are not implicated in the instant case, *Smyth* is factually distinguishable. *Id.* at 787-793.

other evidence, the Honor Council's decision to exclude Schwartz' testimony was not violative of due process. Accordingly, we find plaintiff had a meaningful opportunity to be heard before the Honor Council, irrespective of the exclusion of Schwartz as a witness. See *Birdsey*, *supra* at 345; *Schaer v Brandis Univ*, 432 Mass 474, 481; 735 NE2d 373, 380 (2000) (a disciplinary committee "may choose to admit all statements by every witness or it may choose to exclude some evidence").

Plaintiff also argues she was denied the opportunity to be heard before the Executive Committee. We conclude that plaintiff has abandoned this issue for failing to identify the witnesses she wished to present or provide the details of their proposed testimony.⁷ Nevertheless, we find plaintiff's argument meritless.

Plaintiff notably does not cite to any provision allowing for the presentation of fact-giving witnesses to the Executive Committee. Nor does plaintiff cite to any binding precedent recognizing a right to appeal a student disciplinary proceeding. Instead, our review of the authorities on this subject reveal that the federal courts that have addressed this issue have not recognized a substantive right of appeal in student disciplinary proceedings. "[W]here the original hearing comports with due process, no appeal is required by the constitution." See *Flaim*, *supra* at 636, quoting *Foo*, *supra* at 952. Michigan courts have not recognized a right of appeal as a requisite of due process. See *Moore v Spangler*, 401 Mich 360, 368; 258 NW2d 34 (1977) (appellate review is not required by due process nor is the right of appeal an inherent or inalienable right); *In Re Myers*, 131 Mich App 160, 165; 345 NW2d 663 (1984). Accordingly, without a right of appellate review, plaintiff cannot claim a violation of due process protections before the Executive Committee.

In regard to the granting of summary disposition on plaintiff's substantive due process claim, we also find no error. To prove a substantive due process violation, a plaintiff must show that the defendant's actions were arbitrary and capricious and without a rational basis for the action. See *Dynamic Mfrs, Inc v Michigan Employment Sec Comm'n*, 369 Mich 556, 560; 120 NW2d 173 (1963).

The record shows a distinct increase in the severity of the offenses perpetrated by plaintiff, and that plaintiff was unable to conduct herself in accordance with the University's rules and regulations. Thus, plaintiff has not established a dispute of material of fact to refute defendants' articulated rational basis for expelling plaintiff. We find no abuse of discretion or arbitrary action on the part of defendants.

Plaintiff next argues the trial court improperly granted defendants' motion on her defamation claim under MCR 2.116(C)(7). Plaintiff contends defendants waived the statute of limitations as a defense because it was not raised in defendants' first responsive pleading. Even

⁷ An appellant may not simply announce a position and leave it to this Court to discover and rationalize that position, nor may she give cursory treatment with little or no citation of supporting authority. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

assuming that summary disposition was not proper under MCR 2.116(C)(7), plaintiff nonetheless failed to establish a defamation claim as a matter of law.

Plaintiff cites as defamatory, the portion of the anonymous letter which reads, “[w]ho knows how many times [plaintiff] cheated her way through school and others? Is it any wonder that she ranked high in the class?” Plaintiff contends the statements destroyed her reputation. Defendants assert substantial truth as a defense.

To establish a defamation claim, a plaintiff must show: (1) a false and defamatory statement about the plaintiff, (2) an unprivileged communication to a third party, (3) fault by the publisher, which amounts to at least negligence, and (4) either actionability of the statement regardless of special harm or the existence of special harm because of the publication. *Kevoorkian v American Medical Ass’n*, 237 Mich App 1, 8-9; 602 NW2d 233 (1999). “A communication is defamatory if it tends to lower an individual’s reputation in the community or deters third persons from associating or dealing with that individual.” *Mino v Clio School Dist*, 255 Mich App 60, 72; 661 NW2d 586 (2003); *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998). However, “substantial truth” is a defense to a defamation claim. *Hawkins v Mercy Health Svcs, Inc*, 230 Mich App 315, 333; 583 NW2d 725 (1998). The defense requires looking “to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial.” *Rouch v Enquirer & News of Battle Creek Michigan (After Remand)*, 440 Mich 238, 259; 487 NW2d 205 (1992).

In this case, even viewing the evidence in a light most favorable to plaintiff, plaintiff’s claim fails because the statements in the anonymous letter are substantially true. The record evidence shows that plaintiff admitted to and accepted responsibility for switching grade sheets to receive a higher grade that she did not earn. Thus, albeit in a breach of confidentiality, the letter correctly characterized her as an admitted cheater, and the fact that a reader of the letter may ponder about her past conduct does not make the statements actionable. “Absent evidence that the defamation defendant intended the defamatory implication,” he “is not responsible for every defamatory implication a reader might draw from his report of true facts.” *Royal Palace Homes, Inc v Channel 7 of Detroit, Inc*, 197 Mich App 48, 56; 495 NW2d 392 (1992).

Moreover, the statements to which plaintiff takes offense are not actionable as defamation because they cannot be proved as false and can be properly characterized as rhetorical hyperbole. *Ireland, supra* at 614-619, citing *Milkovich v Lorain Journal Co*, 497 US 1, 17-20; 110 S Ct 2695; 111 L Ed 2d 1 (1990).

Plaintiff next contends the trial court improperly dismissed her ethnic intimidation claim. She asserts defendant Stoffers’ placement of his hand on her shoulder while making the statement, “every time I think of September 11, I think of you,” demonstrates a specific intent to harass plaintiff because of her ethnicity. We disagree.

The ethnic intimidation statute, MCL 750.147b,⁸ reads:

(1) A person is guilty of ethnic intimidation if that person *maliciously, and with specific intent to intimidate or harass* another person because of that person's race, color, religion, gender, or national origin, does any of the following:

(a) Causes physical contact with another person.

(b) Damages, destroys, or defaces any real or personal property of another person.

(c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur. [Emphasis added.]

Here, plaintiff has not established a prima facie case of ethnic intimidation. The parties do not dispute that defendant Stoffers touched plaintiff's shoulder and only contest the context to be given to defendant Stoffers' comment. However, absent a direct reference to her ethnicity or circumstantial evidence to show a racist motive, a rational finder of fact could not infer that the reference to "September 11," alone, demonstrates the physical contact was committed maliciously with a specific intent to intimidate or harass because of national origin. See *People v Schutter*, 265 Mich App 423, 430; 695 NW2d 360 (2005) (MCL 750.147b only requires some act of physical contact committed maliciously and accompanied by a specific intent to intimidate or harass because of race, color, religion, gender, or national origin). In this regard, the trial court properly characterized the comment as ambiguous. Without more, plaintiff has not created a dispute of material fact demonstrating a specific intent to harass or intimidate because of a racist motive.

Plaintiff acknowledges that the statement lacks an express reference to her ethnicity. However, she contends she established defendant Stoffers' specific intent with circumstantial evidence sufficient to survive a motion for summary disposition. Plaintiff contends defendant Stoffers "on several occasions" exhibited continued hostility toward her when he stated, "[y]ou're still here, we'll see how long," and "if I were you, I would transfer." While these comments may indicate hostility; however, they do not, (1) either contextually or directly, reflect a hostility based on her national origin or (2) show defendant Stoffers possessed a hostility based on her national origin that motivated or explained the "September 11" remark. *People v Stevens*, 230 Mich App 502, 505-506; 584 NW2d 369 (1998). Accordingly, the trial court properly granted summary disposition on plaintiff's ethnic intimidation claim.

⁸ MCL 750.147b is a criminal statute, but provides for a civil action for a person who is a victim of the crime of ethnic intimidation" *Badiee v Brighton Area Sch*, 265 Mich App 343, 359 n 19; 695 NW2d 521 (2005), quoting MCL 750.147b(3).

Having previously concluded that the trial court properly determined plaintiff received sufficient due process protections to prevent an erroneous deprivation, we need not address plaintiff's claim for a writ of mandamus to reinstate her as a student in good standing and expunge her record of expulsion.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ David H. Sawyer

/s/ Kurtis T. Wilder