

STATE OF MICHIGAN
COURT OF APPEALS

KEITH HARRIS,

Plaintiff-Appellee,

v

MOTT COMMUNITY COLLEGE, MOTT
COMMUNITY NURSING PROGRAM,
MARJORIE STAFFORD, JANET WESTOFF,
and PATRICIA MARKOWICZ,

Defendants-Appellants.

UNPUBLISHED

April 1, 2014

No. 313403

Genesee Circuit Court

LC No. 11-095878-CK

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In this action filed by plaintiff, Keith Harris, following his dismissal from defendant Mott Community College, defendants Mott Community College, Mott Community Nursing Program, instructor Marjorie Stafford, nursing program faculty coordinator Janet Westoff, and Dean of Health Sciences Patricia Markowicz appeal as of right the November 8, 2012, order denying in part their motion for summary disposition. Because we find that defendants were entitled to summary disposition on all matters at issue, we reverse.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff, a nursing student, began his first nursing clinical courses at defendant Mott in January of 2010. As part of his enrollment in the nursing program, plaintiff received a handbook that discussed, among other matters, the evaluation of his clinical performance. The handbook stated that a student who received an unsatisfactory final evaluation in the clinical course because of a safety violation could be dismissed from the program, and that the student would be ineligible to be readmitted to the program. Plaintiff's actions during a hospital clinical course, which included safety violations, caused his dismissal from the nursing program in April of 2010.

The first of plaintiff's safety violations, and the only one he disputes, allegedly occurred on April 13, 2010. In a safety violation incident report prepared by Stafford, plaintiff's clinical instructor, clinical assistant Dee Cummings alleged that plaintiff used the phrase, "lazy SOB," in reference to a patient. Plaintiff denied the incident in his deposition testimony. He testified that a patient refused his help in bathing because he was a male, so a nurse's aide had to help bathe

the patient. According to plaintiff, the nurse's aide thought that plaintiff did not want to bathe the patient because he was lazy, so the nurse's aide told another student that nursing students were lazy. The other student subsequently relayed the comment to plaintiff. Thereafter, plaintiff told Cummings that a nurse's aide believed he was lazy, and that he wanted to speak with the nurse's aide about the situation. Plaintiff admitted though, that Cummings addressed the allegation of plaintiff calling the patient a "lazy SOB" with him, but he believed that Cummings misunderstood what had occurred.

The conduct that led to plaintiff's second safety violation occurred on April 14, 2010. It is undisputed that on that date, plaintiff administered an oral narcotic to a patient without an instructor present. Plaintiff, who admitted that school policy required a nursing instructor to be present in order for a student to administer medication, admitted during his deposition that he administered the medication without an instructor present. A nurse who worked for the hospital was present, however. Plaintiff admitted that the nurse did not order him to administer the medication, and that it was not an emergency situation. Plaintiff testified in his deposition that shortly after he administered the medication, Cummings entered the room, and he told her what he had done. Cummings then consulted Stafford, who took plaintiff aside and discussed the incident with him. During the discussion, Stafford reviewed the mistake with plaintiff. Stafford subsequently filed a safety violation report for this incident. Plaintiff testified in his deposition that he did not receive the report until after he was dismissed from school.

Approximately one week later on April 21, 2010, plaintiff assisted another nursing student in repositioning a patient. While doing so, plaintiff increased the patient's oxygen level by two liters because he believed her oxygen level was too low. Shortly thereafter, the patient's doctor entered the room and plaintiff told the doctor what he had done. The doctor verified the change in the patient's oxygen level, observed the patient briefly, and thanked plaintiff for adjusting the patient's oxygen level. Plaintiff did not note the increase in oxygen in the patient's chart, but believed that the doctor had done so. Plaintiff admitted in his deposition that adjusting a patient's oxygen level without an instructor present was outside of the realm of his responsibilities as a nursing student, and testified that he should have waited to have an instructor present before he changed the patient's oxygen level. He also admitted that he did not know the oxygen level that had been ordered for the patient. Plaintiff testified that Stafford did not discuss this incident with him until the day he was dismissed from the program. He also admitted that this incident occurred the day before his dismissal.

In addition to those violations, Cummings reported that plaintiff changed a patient's dressing and that he attempted to change another patient's dressing without first changing his gloves. Plaintiff recalled that Cummings spoke to him about this incident and informed him that he made a mistake. Further, plaintiff admitted that he wore scrubs in violation of defendant Mott's policy regarding nursing student attire. Plaintiff, who worked as a nursing assistant at the hospital at which the clinic was held, testified that he could wear any color scrubs he chose as a nursing assistant, but that defendant Mott had a stricter dress code policy for its students. Plaintiff testified that Stafford spoke with him about his attire on the day of the incident, but declined to send him home for his improper attire. Plaintiff also admitted that Cummings and Stafford alleged that he shook two bottles of antibiotics while walking to a patient's room prior to administering the medication. Plaintiff initially admitted that he shook the bottles, but later

denied shaking them, and instead alleged that he merely inverted them, which he alleged was standard procedure for administering that type of antibiotic.

Lastly, in a note attached to a document labeled “Documentation of Clinical Performance Counseling,” Stafford noted that the other nursing students were disturbed by plaintiff’s “cavalier attitude,” that plaintiff made it apparent he worked as a nursing assistant at the hospital at which the clinical evaluation took place, and that he did not listen to feedback from his instructors. This document was signed by Stafford, but not by plaintiff.

On April 22, 2010, plaintiff met with Cummings and defendants Stafford and Westoff. Prior to the meeting, plaintiff believed that Stafford wanted to speak with him about his unsupervised administration of narcotics. At the meeting, plaintiff was informed that he was being dismissed from the nursing program for his safety violations, and that Stafford would recommend that he not be readmitted to the program. Plaintiff testified that he was not given incident reports for his safety violations before the meeting or at the meeting. He denied that he became upset at the meeting or that he raised his voice. Plaintiff testified that although he knew about the meeting in advance, he did not know that the purpose of the meeting was to inform him that he was being dismissed from the program.

Following the safety violations and the April 22, 2010 meeting with plaintiff, Stafford rated plaintiff’s clinical performance as unsatisfactory in the areas of providing safe nursing care and in “[c]alculat[ing] dosages correctly and administer[ing] medication utilizing related principles.” Stafford also rated plaintiff’s performance unsatisfactory in: (1) rapport with his instructors; (2) demonstrating accountability for his actions; (3) assessing his own weaknesses; (4) conforming to dress and behavior; and (5) recognizing legal and ethical standards by engaging in behavior “out of his realm as a student nurse.”

Following his dismissal, plaintiff met with defendant Markowicz to discuss the dismissal and to challenge the decision. He testified that he requested the safety violation incident reports before the meeting, but was not given them. He also testified that defendant Markowicz was satisfied with the manner in which his dismissal had been handled. In an e-mail, defendant Markowicz reported that plaintiff chose not to respond in writing on the safety violations issue, did not want to pursue the complaint procedure, and did not take the requisite forms for pursuing a complaint despite being offered the forms. Markowicz reported further that plaintiff did not seem to recognize the seriousness of the concerns and his documented behavior showed “a pattern of unsafe, insubordinate, somewhat reckless behavior that’s outside the scope of practice for a first-semester student nurse.”

Thereafter, defendant initiated a complaint with the Vice Chancellor of Academic Affairs. Plaintiff testified in his deposition that the Vice Chancellor listened to his complaint, but did not overturn the dismissal.

On May 4, 2010, plaintiff’s attorney sent a letter to defendants and requested immediate reinstatement for plaintiff. The letter alleged that Stafford: (1) failed to conduct an informal conference using the safety violation incident forms at or near the time of the incidents; (2) failed to present a written plan and meet with plaintiff to assess his compliance; (3) failed to obtain plaintiff’s signature on the reports; and (4) backdated the reports before presenting them to

plaintiff. According to the letter, plaintiff maintained a 3.8 grade point average before he was dismissed from the program.

Shortly thereafter, defendant Markowicz responded to the letter from plaintiff's counsel, stating that she believed plaintiff was afforded due process and that he could not return to the nursing program because of his failure of the clinic course for safety violations. The letter alleged that plaintiff was not given copies of the safety violations at the April 22, 2010 meeting because he was perceived to be agitated and angry with defendants Stafford and Westoff.

Plaintiff filed suit on April 21, 2011, alleging that he was denied his right to procedural and substantive due process because he was never given notice or the opportunity to participate in the procedures outlined in the student handbook. Further, plaintiff alleged that defendants breached the contract outlined in the handbook, and that they breached the duties of fair dealing and honesty. Lastly, plaintiff alleged negligent and/or intentional infliction of emotional distress. As to his procedural due process violation and breach of contract claim, plaintiff argued that defendant Mott was required to comply with the procedures set forth in the student handbook.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), arguing that defendant Mott's student catalog disclaimed any contractual relationship in this case, and that the breach of fair dealing and honesty claims were unsupported by the evidence. Regarding plaintiff's due process claims, defendants argued that plaintiff received notice and an opportunity to be heard on April 22, 2010 and April 30, 2010. Further, defendants argued there was no genuine issue of material fact concerning plaintiff's emotional distress claims because defendants acted within the policies and procedures applicable to nursing students. Lastly, the individual defendants argued that they were entitled to governmental immunity.

On November 8, 2012, the trial court granted summary disposition on plaintiff's negligent and intentional infliction of emotional distress claims. Further, the trial court ruled that plaintiff's due process claims encompassed his breach of contract and fair dealing claims. Lastly, the trial court denied defendants' motion for summary disposition as to plaintiff's due process claims, finding that genuine issues of material fact existed regarding defendants' intent and motive.

As presented by defendants, the issues before this Court are whether plaintiff's claims were barred by governmental immunity and whether plaintiff asserted substantive and procedural due process claims that could withstand defendants' motion for summary disposition.

II. GOVERNMENTAL IMMUNITY

Defendants argue that the trial court erred in denying their motion for summary disposition because they contend that they are entitled to governmental immunity on plaintiff's

claim that they violated his due process rights.¹ This Court reviews de novo whether a defendant is entitled to governmental immunity. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). “As a general rule, governmental immunity is not available in a state court action where it is alleged that the state violated a right conferred by the state constitution.” *County Rd Ass’n of MI v Governor*, 287 Mich App 95, 121; 782 NW2d 784 (2010). “However, our Supreme Court has clearly held that no inferred damages remedy for a violation of a state constitutional right exists against individual government employees.” *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001), citing *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000). Here, plaintiff’s constitutional claims sought monetary damages against the individual employees as well as against the Mott defendants. Plaintiff’s constitutional claims against the Mott defendants are not barred by governmental immunity, *County Rd Ass’n*, 287 Mich App at 121, but he cannot state a claim for monetary relief against the individual employees, *Lavey*, 248 Mich App at 250 (explaining that a claim for monetary damages against individual government employees for an alleged violation of a state constitutional right fails to state a claim on which relief can be granted). As such, we find that the trial court erred by not dismissing plaintiff’s constitutional claims against the individual employees. *Jones*, 462 Mich at 335; *Lavey*, 248 Mich App at 250. Accordingly, we focus the remainder of our analysis on whether the Mott defendants were entitled to summary disposition on plaintiff’s constitutional claims.

III. PROCEDURAL DUE PROCESS

Next, we consider the Mott defendants’ argument that they were entitled to summary disposition on plaintiff’s procedural due process claim. This Court reviews de novo a ruling on a motion for summary disposition. *AFSCME Council 25 v Wayne Co*, 292 Mich App 68, 79; 811 NW2d 4 (2011). Likewise, we review constitutional issues de novo. *Id.*

“Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property.” *In re VanDalen*, 293 Mich App 120, 132; 809 NW2d 412 (2011) (quotations omitted). “A threshold requirement to a substantive or procedural due process claim is the plaintiff’s showing of a liberty or property interest protected by the Constitution.” *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 209; 761 NW2d 293 (2008) (quotation omitted). Generally, a property right arises from contract or statute. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 587; 588 NW2d 467 (1998).

Initially, we find that plaintiff cannot claim a property right based on the student handbook. This Court has declined to find that a student handbook creates a contract, express or implied, between universities and students. *Cuddihy v Wayne State Univ Bd of Governors*, 163 Mich App 153, 156-158; 413 NW2d 692 (1987). See also *Kieta v Thomas M. Cooley Law School*, 290 Mich App 144, 148 n 3; 799 NW2d 579 (2010). Accordingly, we do not find that the handbook in the case at bar created a contractual right, either express or implied, between

¹ The parties do not challenge the trial court’s finding that plaintiff’s breach of contract and breach of fair dealing and honesty claims were subsumed into his due process claims. As such, we do not address those claims separately.

plaintiff and the defendant Mott. *Cuddihy*, 163 Mich App at 156-158. As such, any alleged due process violation cannot be based on the student handbook.

Concerning whether plaintiff has a procedural due process claim based on an alleged right to pursue an education or based on any other alleged right, plaintiff's trial court pleadings and brief on appeal do not develop this issue. Nevertheless, for purposes of resolving this appeal, we follow the lead of the United States Supreme Court in assuming, without deciding, that a student has a property interest in his or her education that can be protected by due process. *Board of Curators of Univ of Mo v Horowitz*, 435 US 78, 84-85; 98 S Ct 948; 55 L Ed 2d 124 (1978). See also *Bell v Ohio State University*, 351 F 3d 240, 249 (CA 6, 2003). Due process is a flexible concept, and the United States Supreme Court has held that in an academic setting, all that is required was an "informal give and take" between the student and the university. *Horowitz*, 435 US at 85-86. The United States Supreme Court has also noted that in assessing procedural due process claims, there exists a "significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." *Id.* at 86. Further, when a student is dismissed for academic, rather than disciplinary concerns, the student is not entitled to a hearing. *Id.* at 89. This is because the decision to dismiss a student for academic concerns is based upon the academic judgment of school officials and because such a decision is subjective and evaluative by nature, and therefore, "is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90. "As such, in the procedural due process context, informal review and evaluation sessions between student and faculty meet constitutional requirements." *Borrell v Bloomsburg Univ*, 955 F Supp 2d 390, 403 (MD PA, 2013) (quotation omitted). In *Horowitz*, 435 US at 85, the United States Supreme Court held that where medical school faculty members had informal discussions with the student regarding her shortcomings in clinical programs, and where the decision to dismiss the student was "careful and deliberate," the student was afforded sufficient procedures under the Fourteenth Amendment.

In the case at bar, plaintiff was dismissed for academic reasons – most notably, his failure to adhere to safety procedures in a clinical setting. Therefore, he was not entitled to a full hearing before dismissal; instead, he was only entitled to an informal review with faculty members. See *id.* at 85-86, 89-90; *Borrell*, 955 F Supp 2d at 403. On this record, we find that the procedures afforded to plaintiff were sufficient to afford him whatever level of process he was due because plaintiff was given informal sessions with faculty members before his dismissal. For instance, Stafford pulled plaintiff aside immediately after the incident where he delivered medication without an instructor present and counseled him regarding the incident. Further, faculty members had discussions with plaintiff concerning his failure to change gloves and his failure to adhere to the school's uniform policy. Moreover, plaintiff was given the opportunity to meet with Cummings and defendants Stafford and Westoff following the incident where he increased a patient's oxygen level without prior authorization. On each of these occasions, faculty members provided plaintiff with the requisite informal review. See *Borrell*, 955 F Supp 2d at 403. Furthermore, plaintiff was afforded the opportunity to appeal his dismissal on two occasions. Although the decision to dismiss plaintiff in this case was reached relatively quickly, we find that plaintiff was afforded sufficient procedures so as to comport with due process, and that the institution's decision, which was based on plaintiff's failure to adhere to safety requirements in a clinical setting, was careful and deliberate. See *Horowitz*, 435 US at

85-86; *Bell*, 351 F 3d at 249. As such, there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law on this claim.

IV. SUBSTANTIVE DUE PROCESS

Defendants next argue that they are entitled to summary disposition because there was no genuine issue of material fact concerning plaintiff's substantive due process claim. As we explained in *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300 Mich App 361, 379-380; 835 NW2d 593 (2013) (quotation omitted):

[A]lthough the text of the Due Process Clauses provides only procedural protections, due process also has a substantive component that protects individual liberty and property interests from arbitrary government actions regardless of the fairness of any implementing procedures The right to substantive due process is violated when legislation is unreasonable and clearly arbitrary, having no substantial relationship to the health, safety, morals, and general welfare of the public.

In deciding this issue, we again follow the lead of the United States Supreme Court in assuming, without deciding, that a substantive due process right exists in a student's right in continued enrollment.² *Regents of Univ of Mich v Ewing*, 474 US 214, 222-223; 106 S Ct 507; 88 L Ed 2d 523 (1985). In deciding whether this alleged right was violated, our Supreme Court considered whether the school's decision to dismiss the student was arbitrary or capricious. *Id.* at 223, 225. See also *Bell*, 351 F 3d at 251.

As noted above, the decision to dismiss plaintiff in the case at bar was for his academic shortcomings in a clinical setting. "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Ewing*, 474 US at 225. In *Ewing*, the United States Supreme Court cautioned that a reviewing court may not overturn a university's academic decision "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Id.* at 225 n 11. See also *Ku v State of Tennessee*, 322 F 3d 431, 438 (CA 6, 2003).

In light of the "narrow avenue for judicial review" in this area, *Ewing*, 474 US at 227, we find that defendants were entitled to judgment as a matter of law because there was no genuine issue of material fact regarding whether defendants' decision to dismiss plaintiff from the nursing program was a substantial departure from accepted academic norms such that defendants did not exercise professional judgment. Indeed, plaintiff committed several safety violations despite being warned and counseled about his conduct, and he subsequently admitted in his

² Again, plaintiff's trial court pleadings and his brief on appeal contain almost no discussion concerning whether such a right even exists.

deposition to several of the violations and to knowing that his actions constituted violations of defendant Mott's policies. One of these violations involved increasing a patient's oxygen level without supervision and without prior knowledge of the oxygen level that had been ordered for the patient. Overall, plaintiff's deficient clinical performance resulted in several failing marks on his clinical evaluation. Consequently, in light of this record, and in light of the "narrow avenue for judicial review" in this area, we decline to find that the decision to dismiss plaintiff from the nursing program was a substantial departure from accepted academic norms as to demonstrate that defendants failed to exercise professional judgment. *Id.*

Because we conclude that there was no genuine issue of material fact with regard to plaintiff's due process claims, we find that defendants were entitled to summary disposition on all of plaintiff's claims. Accordingly, we reverse the trial court's order denying summary disposition in part to defendants and remand for entry of summary disposition in favor of defendants on all of plaintiff's claims.³

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

³ In reaching this conclusion, we reject plaintiff's challenge to the trial court's grant of summary disposition on his negligent infliction of emotional distress and intentional infliction of emotional distress claims because plaintiff did not file a cross appeal. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999) ("Generally, failure to file a cross appeal precludes an appellee from raising an issue not appealed by the appellant."). Moreover, we find that the trial court did not err in concluding that there was no genuine issue of material fact as to whether defendants engaged in the requisite extreme or outrageous conduct.