STATE OF MICHIGAN

COURT OF APPEALS

BARBARA HAMAN,

Plaintiff-Appellant,

v

MICHAEL J. RINKEL and SIEMION, HUCKABAY, BODARY, PADILLA, MORGANTI & BOWERMAN, P.C.,

Defendants-Appellees.

UNPUBLISHED
July 31, 1998

No. 196175
Wayne Circuit Court
LC No. 94-404727 NZ

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right orders of Wayne Circuit Judge Sean F. Cox granting defendants' motion for summary disposition of plaintiff's legal malpractice claim under MCR 2.116(C)(10), and assessing plaintiff's counsel $2,500 in costs for bringing a frivolous motion for recusal. We affirm the grant of summary disposition, but reverse the assessment of costs.

Defendants represented plaintiff in a wrongful discharge action against plaintiff's former employer, Heritage Hospital. Plaintiff worked as an admitting nurse coordinator for more than thirty years when, on March 26, 1990, her employment was terminated for "cost containment reasons." The next day, plaintiff met with defendants to consider a legal response, providing them with a copy of her employment contract. The contract stated that any lawsuit arising from her termination must be filed within six months of the termination. Shortly thereafter, defendants advised plaintiff that she had legitimate claims for breach of contract and age discrimination, and agreed to file a complaint on her behalf. However, defendants did not file the complaint until November 10, 1990, almost eight months after plaintiff's termination. Heritage Hospital filed a motion for summary disposition, arguing that the complaint was barred by the contractual limitations provision, that plaintiff had failed to exhaust her administrative remedies, and that plaintiff could not produce any evidence of age discrimination. The trial court granted the hospital's motion.

Plaintiff then commenced the instant case, alleging legal malpractice, breach of contract, violation of the Michigan Consumer Protection Act, misrepresentation, and fraudulent concealment. Wayne Circuit Judge Richard C. Kaufman dismissed all claims on a motion for summary disposition, except for the legal malpractice claim, finding that genuine issues of material fact existed concerning whether plaintiff would have succeeded in the underlying suit but for defendants' alleged negligence. However, at a subsequent status conference, Judge Kaufman explained that he had not realized that plaintiff had conceded that her position was terminated pursuant to a legitimate reduction in the work force, and suggested that defendants file another motion for summary disposition emphasizing that reduction. Defendants took this advice and filed a new motion for summary disposition, which was entertained by Judge Cox, Judge Kaufman's successor upon the latter's retirement. Judge Cox granted the motion on the ground that there was no genuine issue of material fact concerning the possibility that plaintiff could have prevailed on her claims against the hospital. Plaintiff then brought a motion for rehearing or recusal. Following arguments on the motion, Judge Cox denied the motion and ordered plaintiff's counsel to pay $2,500 in costs to defendant for filing a frivolous motion to recuse. Immediately afterward, upon plaintiff's request that he refer the recusal question to the chief judge, Judge Cox recused himself, but let the $2,500 in sanctions stand.

On appeal, plaintiff argues that Judge Cox lacked authority to reverse Judge Kaufman's earlier ruling, that he failed to rule on plaintiff's claim that defendants committed malpractice by failing to advise plaintiff to accept a mediation award, that he erred in denying plaintiff's request for costs attendant to responding to the motion for summary disposition, that he should have recused himself before making the ruling, and that he erred in ordering plaintiff's counsel to pay costs to defendants over a frivolous motion for recusal.

We observe at the outset that plaintiff has not challenged the specific reasoning under which Judge Cox granted defendants' motion for summary disposition. However, that judgment warrants our review, because the propriety of it bears at least indirectly on other questions at issue on appeal. We hold that the motion for summary disposition was properly granted on its merits. Summary disposition is appropriate where the claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984). We review a trial court's decision on a motion for summary disposition de novo. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). In the instant case, plaintiff conceded in open court that the hospital was acting pursuant to a genuine need to reduce its work force. In light of that, because plaintiff was not selectively terminated and replaced, but rather her position was eliminated with attendant duties being spread to remaining employees, and because plaintiff put forward no evidence affirmatively suggesting that her employer targeted her for dismissal for improper motives, plaintiff could not have prevailed in the underlying cause of action. See *Lytle v Malady*, ___ Mich ___; ___ NW2d ___ (1998) (No. 102515, issued 7/1/98) (where an employee alleging discrimination was dismissed during the course of the employer's legitimate reduction in work force, the employee may survive a motion for summary disposition only by presenting sufficient admissible evidence to create a reasonable factual dispute that the employer's proffered reason for the dismissal was mere pretext); *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 114-115; 469 NW2d 284 (1991) (termination was for just cause where the employer had valid economic reasons for

reducing the work force and the former employee failed to offer evidence of any other reason for the discharge); *Barnes v Gencorp, Inc*, 896 F2d 1457, 1465-1466 (CA 6, 1990) (where the employer has reduced the work force, if a discharged employee's duties are absorbed by the existing work force, with no workers hired or transferred for that purpose, there has been no replacement of the terminated worker for purposes of establishing the prima facie case of discrimination). Because plaintiff failed to demonstrate that she would have prevailed in her underlying cause of action, she failed to establish a prima facie case of legal malpractice. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

Plaintiff's argument that Judge Cox lacked authority to entertain the motion for summary disposition is without merit. Judge Cox had all of the power and authority held by his predecessor, Judge Kaufman. *People v Herbert*, 444 Mich 466, 471-472; 511 NW2d 654 (1993). Despite plaintiff's characterization of the later motion for summary disposition as an improper renewal of the earlier one, for the later motion defendants in fact presented argument and authority not considered in the earlier one. Because Judge Kaufman would have had authority to consider in the later issues not specifically decided in the first, Judge Cox also had the authority to consider the later motion.[1]

Our conclusion that Judge Cox properly considered and decided defendants' motion for summary disposition of the legal malpractice claim obviously compels the conclusion that plaintiff was not entitled to costs attendant to defending that motion. Further, the interests of justice militate against finding an abuse of discretion where a court declines to concern itself with whether counsel should have advised acceptance of a mediation settlement where the client's case giving rise to the offer in the first place has itself been shown to be meritless.

Finally, plaintiff argues forcefully that Judge Cox should have recused himself on the ground that Robert Siemion, a member of defendant law firm, was on Judge Cox's election campaign committee. The question whether a trial judge should have recused himself sua sponte, because of bias or the appearance of impropriety, warrants review on appeal for an abuse of discretion. See *People v Cole*, 349 Mich 175, 200; 84 NW2d 711 (1957) (concerning a judge's general conduct of a trial); *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997) (concerning the chief judge's review of a motion for judicial disqualification); *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992) (concerning a judge's decision on a motion for recusal).

A judge is disqualified who cannot impartially hear a case because of personal bias or prejudice for or against a party or attorney. MCR 2.003(B)(1). A party alleging a violation under this rule must prove actual bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). However, even where actual bias or prejudice cannot be shown, the constitutional right to due process requires disqualification where *"experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable*." *Id.* at 498, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), adding emphasis and quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975).

We further accept persuasive guidance from the State Bar Standing Committee on Professional and Judicial Ethics, which has stated that where a member of a judge's election campaign committee is

acting as an advocate in a matter before that judge, the judge's disqualification is not automatic, but that the judge must disclose the relationship, and should liberally consider a party's request for recusal. Opinion JI-79 (February 7, 1994). In such a situation, a showing of actual bias is not required because Canon 2 of the Code of Judicial Conduct requires that members of the judiciary avoid the appearance of impropriety in all activities. *Id*. It is only a modest extension of this reasoning to suggest that these principles come to bear where the committee member is not an advocate before the judge, but is conspicuously affiliated with a law firm appearing as a party before the judge. Thus it would have been preferable for Judge Cox to have alerted the parties to the possible appearance of a conflict of interest. However, in any event, Judge Cox was not automatically required to recuse himself. Judge Cox explained that he had had no contact with Robert Siemion in the five years before he decided the motion for summary disposition, and that he had not contacted Siemion to solicit support for his campaign. These facts, which plaintiff does not dispute, suggest that the relationship between Judge Cox and Siemion was not so close that the Judge was required to recuse himself sua sponte before deciding defendants' motion for summary disposition. For these reasons, and because Judge Cox's ruling on the motion was the legally correct one, his failure to alert the parties to his relationship with Mr. Siemion was harmless error.

However, plaintiff's argument that Judge Cox erred in awarding defendant $2,500 in sanctions against plaintiff's counsel for filing a frivolous motion for recusal has merit. The rules of court forbid the filing of a frivolous pleading, MCR 2.114(D), and the pleading of a frivolous claim, MCR 2.625(A)(2). The question whether a violation of one of these rules has occurred is one of fact, which we review for clear error. *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). Here, in light of the plain fact of Judge Cox's election contributor being affiliated with the defending law firm, and of the authorities discussed above inveighing against judges conducting proceedings in the face of actual or apparent conflicts of interest, it is clear that plaintiff's motion for recusal was well grounded in fact and law. Further, there is no allegation that plaintiff sought recusal for any improper purpose. We accordingly hold that Judge Cox clearly erred in sanctioning plaintiff's attorney for the filing of a frivolous motion.

We affirm the order granting summary disposition, but remand to the trial court with instructions to vacate the order requiring plaintiff to pay costs because of a frivolous motion for recusal. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert P. Young, Jr.

[1] This holds regardless of the propriety of Judge Kaufman's earlier ruling. Plaintiff asks us to review and affirm Judge Kaufman's denial of the earlier motion for summary disposition regarding plaintiff's legal malpractice claim, but because we affirm Judge Cox's granting of the later motion the propriety of the earlier ruling has no bearing on this case. Further, because plaintiff was not aggrieved by Judge

Kaufman's order, plaintiff is not entitled to appeal it as of right. *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).