STATE OF MICHIGAN

COURT OF APPEALS

GODELIEVE TAPP,

Plaintiff-Appellant,

v

WESTERN MICHIGAN UNIVERSITY and DOUGLAS DAVIDSON,

Defendants-Appellees.

UNPUBLISHED
December 28, 1999

No. 211725
Kalamazoo Circuit Court
LC No. 96-001627 CZ

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

This action arises out of a relationship between plaintiff, a former student at Western Michigan University, and Douglas Davidson, an associate professor of sociology at WMU. After the relationship ended, plaintiff commenced this action alleging claims for sexual harassment and hostile environment under the Civil Rights Act, MCL 37.2103(i); MSA 3.548(103)(i), sexual battery, tortious interference with a contractual relationship, intentional infliction of emotional distress, and gross negligence. The trial court granted defendants' motion for summary disposition, dismissing all counts of plaintiff's complaint. Plaintiff appeals as of right. We affirm.

The trial court did not abuse its discretion in denying plaintiff's motion to compel discovery. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994). Plaintiff failed to demonstrate that the requested materials were relevant to her claims, or reasonably calculated to lead to the discovery of admissible evidence. MCR 2.302(B)(1); *In re Hammond*, 215 Mich App 379, 386; 547 NW2d 36 (1996); *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994). We also find that the trial court did not abuse its discretion in granting defendants' motion to amend an admission. Defendants demonstrated good cause for the amendment and the trial court allowed plaintiff to conduct further discovery on the subject matter. MCR 2.312(D)(1); *Medbury v Walsh*, 190 Mich App 554, 556-557; 476 NW2d 470 (1991); see also 2 Dean & Longhofer, Michigan Court Rules Practice, Authors' Comments, p 392. We find no support for plaintiff's contention that amendment is permitted only upon a showing of "manifest injustice."

The trial court's decision granting summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5). Summary disposition under MCR 2.116(C)(10) is proper when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. *Weymers v Khera*, 454 Mich 639, 646; 563 NW2d 647 (1997).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. MCR 2.116(G)(5); *Michigan Ins Repair Co, Inc v Manufacturers Nat'l Bank of Detroit*, 194 Mich App 668, 673; 487 NW2d 517 (1992). All factual allegations in support of the claims are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id*. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993).

When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(7), this Court accepts all of the plaintiff's well-pleaded allegations as true and construes them most favorably to the plaintiff. We must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties. The motion should be granted only if no factual development could provide a basis for recovery. MCR 2.116(G)(5); *Skotak v Vic Tanny Internat'l, Inc*, 203 Mich App 616, 617; 513 NW2d 428 (1994).

We agree with the trial court that the numerous evidentiary materials submitted by the parties demonstrate that there is no genuine issue of material fact with regard to the fact that plaintiff was involved in a consensual relationship with defendant Davidson. On the basis of the evidence presented, it is clear that plaintiff cannot establish that Davidson's conduct was unwelcome and, therefore, cannot prevail on her claim of sexual harassment. *Champion v Nation Wide Security*, 450 Mich 702, 708-709; 545 NW2d 596 (1996). Further, the trial court did not err in determining that plaintiff could not establish a claim of quid pro quo sexual harassment, because the evidence demonstrated that plaintiff's relationship with Davidson did not affect her educational opportunities. MCL 37.2103(i); MSA 3.548(103)(i). Accordingly, the trial court did not err in granting defendant Davidson summary disposition of count one of plaintiff's complaint pursuant to MCR 2.116(C)(10). *Weymers*, *supra*.

Regarding plaintiff's hostile environment claim, in order to prevail, plaintiff was required to demonstrate that she was subject to unwelcome sexual conduct or communication as determined under an objective reasonableness standard. *Radtke v Everett*, 442 Mich 368, 382, 386; 501 NW2d 155 (1993). It is clear from the evidence presented that plaintiff cannot demonstrate unwelcome conduct or communication. Further, the record clearly demonstrates that WMU promptly investigated and took action upon receiving notice of the relationship. Thus, summary disposition of plaintiff's hostile environment claim was properly granted in favor of WMU pursuant to MCR 2.116(C)(10). MCL 691.1407(2); MSA 3.996(107)(2); *Radtke, supra* at 396, citing *Downer v Detroit Receiving*

Hospital, 191 Mich App 232, 234; 477 NW2d 146 (1991); *Poe v Haydon*, 853 F 2d 418, 425-426 (CA 6, 1988).

Next, summary disposition of plaintiff's sexual battery claim was proper as to defendant Davidson under MCR 2.116(C)(10) because the evidence demonstrated that the sexual conduct was consensual and, therefore, plaintiff could not establish a claim of battery. *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). Summary disposition under MCR 2.116(C)(7) was also proper as to defendant WMU, because the evidence demonstrated that Davidson was acting for his own personal purposes and, therefore, WMU cannot be vicariously liable. MCL 691.1407(1); MSA 3.996(107)(1); *Malcolm v East Detroit*, 437 Mich 132, 140; 468 NW2d 479 (1991); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 591-592; 363 NW2d 641 (1984); *Skotak*, *supra* at 617; *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989).

Next, plaintiff's claim for tortious interference with a contractual relationship was properly dismissed against defendant Davidson pursuant to MCR 2.116(C)(10) because plaintiff failed to demonstrate the existence of a contract sufficient to support a cause of action for this tort. Further, plaintiff failed to allege malice or any wrongful act by Davidson that interfered with plaintiff's educational rights and opportunities with WMU. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992); *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). Plaintiff also failed to proffer any evidence demonstrating that Davidson "engaged in his conduct for the purpose of wrongfully interfering with plaintiff's [alleged] contract" with WMU. *Wood v Herndon v Herndon*, 186 Mich App 495, 500, 502; 465 NW2d 5 (1990). Plaintiff's reliance on *Tash v Houston*, 74 Mich App 566; 254 NW2d 579 (1977), is misplaced, because that case involved an at-will contract in an employment situation. Courts have rejected a rigid application of contract law in the area of student-university relationships. *Regents of the University of Michigan v Ewing*, 474 US 214; 106 S Ct 507; 88 L Ed 2d 523 (1985); *Doherty v Southern College of Optometry*, 862 F 2d 570, 577 (CA 6, 1988); *Cuddihy v Wayne State University Bd of Governors*, 163 Mich App 153, 157-158; 413 NW2d 692 (1987).

We find no error in the trial court's dismissal of count four, intentional infliction of emotional distress, as to WMU pursuant to MCR 2.116(C)(7). Considering the evidence presented, there is no basis to conclude that WMU was grossly negligent in investigating plaintiff's allegations, or that either the ombudsman, the affirmative action officer, or any other employee of WMU investigated plaintiff's claims with "a substantial lack of concern for whether an injury results." MCL 691.1407(2); MSA 3.996(107)(2). Plaintiff's reliance on *Marrocco v Randlett*, 431 Mich 700, 710-711; 433 NW2d 68 (1988), and *Gracey v Wayne Co Clerk*, 213 Mich App 412, 416-418; 540 NW2d 710 (1995), is misplaced. See *American Transmissions, Inc v Attorney General*, 454 Mich 135, 142-143; 560 NW2d 50 (1997).

Further, while we agree that plaintiff's complaint alleged a claim of intentional infliction of emotional distress with regard to defendant Davidson sufficient to withstand a motion for summary disposition under MCR 2.116(C)(7), *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Haverbush v Powelson*, 217 Mich App 228; 551 NW2d 206 (1996); *Doe v Mills*, 212 Mich App 73, 91-92; 536 NW2d 824 (1995); *Meek v Michigan Bell Telephone Co*, 193

Mich App 340, 346; 483 NW2d 407 (1992), defendant Davidson also requested summary disposition of this claim under MCR 2.116(C)(10) and we conclude that dismissal under this subrule was proper. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 456, 460; 487 NW2d 799 (1992). Because the evidence demonstrates that plaintiff's relationship with Davidson was consensual, and thus not unwelcome, we conclude that plaintiff is unable to establish a genuine issue for trial as to whether Davidson's actions arose to a level that could be considered extreme and outrageous. *Roberts, supra*; *Doe, supra*. This Court will not reverse a trial court's decision if the right result is reached for the wrong reason. *In re Powers*, 208 Mich App 582, 591; 528 NW2d 799 (1995).

Finally, the trial court did not err in granting summary disposition to WMU pursuant to MCR 2.116(C)(7) on plaintiff's claim for gross negligence. The trial court correctly found that the gross negligence exception set forth in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) does not apply to governmental agencies under MCL 691.1407(1); MSA 3.99(107)(1). WMU was engaged in a governmental function when it investigated plaintiff's charges against Davidson. In any event, it is clear from the evidence presented that WMU's agents were not grossly negligent in their investigation.

We agree that the trial court erred in relying on *Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993), when dismissing plaintiff's gross negligence claim as to defendant Davidson pursuant to MCR 2.116(C)(8). See *Jennings v Southwood*, 446 Mich 125, 129-133; 521 NW2d 230 (1994). The correct standard for determining gross negligence is that set forth in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). *Southwood, supra* at 136-137; *Haberl v Rose*, 225 Mich App 254, 265; 570 NW2d 664 (1997); *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 693-694; 558 NW2d 225 (1996). Nevertheless, Davidson requested summary disposition of this claim on the basis of both MCR 2.116(C)(8) and (10), and we agree that summary disposition was warranted under MCR 2.116(C)(10). Considering the evidence of the consensual nature of the relationship between plaintiff and Davidson, it is clear that plaintiff is unable to set forth sufficient facts upon which reasonable minds could differ as to whether Davidson's conduct could be considered "so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Harris, supra* at 694.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey