STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA CLULEY and DAVID CLULEY,

Plaintiffs-Appellants,

v

LANSING BOARD OF WATER AND LIGHT and JOHN ELASHKAR,

Defendants-Appellees.

UNPUBLISHED
March 7, 2006

No. 264208
Ingham Circuit Court
LC No. 03-002186-CK

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

In this employment dispute, plaintiffs Virginia Cluley and David Cluley (the Cluleys) appeal as of right from the trial court's order granting summary disposition in favor of defendants Lansing Board of Water and Light and John Elashkar with respect to Virginia Cluley's claims for defamation, intentional infliction of emotional distress, interference with a contract, breach of contract, and sex discrimination claim under the Elliott-Larsen civil rights act (CRA),[1] and David Cluley's derivative claim for loss of consortium. The Cluleys also challenge an earlier trial court order granting summary disposition in favor of defendants with respect to Virginia Cluley's claim alleging a violation of her constitutional rights. We affirm.

I. Basic Facts And Procedural History

Defendant Lansing Board of Water and Light (the BWL) is a public body, whose principal governing body is a board of commissioners appointed by the City of Lansing. Defendant John Elashkar retired from his position as assistant general manager for the BWL in 2000. The BWL subsequently rehired Elashkar as the BWL's interim general manager in November 2002, pursuant to a written contract that gave him the customary authority and duties of an officer and general manager of the BWL.

Virginia Cluley, a long-time employee of the BWL, held the position of manager of customer accounts and collection services in June 2003, when she received a "notice of possible

[1] MCL 37.2101 *et seq*.

disciplinary action" memorandum from Elashkar and Kellie Willson, an internal auditor, in connection with three business trips that Virginia Cluley took between October 2002 and April 2003. Following a hearing regarding the notice, Elashkar wrote a "disciplinary action" memorandum to Virginia Cluley in which he determined that she should be disciplined for violating various policies and directives. Elashkar instructed Virginia Cluley to reimburse the BWL a minimum of $3,048, and suspended her employment for 30 days without pay, with instructions that she report to the human resources department on her return on July 21, 2003, for appointment to a nonmanagerial position.

Virginia Cluley did not return to work in July 2003, but rather went on medical leave. Elashkar retired from the BWL in September 2003, and was replaced by Sanford Novick as the BWL's general manager.

Virginia Cluley was still on leave status with the BWL in December 2003, when she filed this action against the BWL and Elashkar, claiming that she had been constructively discharged. Virginia Cluley alleged claims against both defendants for defamation, sex discrimination under the CRA, breach of contract, violation of the Michigan Constitution, and violation of public policy. Virginia Cluley also alleged claims against Elashkar individually for intentional infliction of emotional distress and tortious interference with a business (contract) relationship, and against the BWL alone for negligent infliction of emotional distress. Virginia Cluley's husband, David Cluley, alleged a claim for loss of consortium against both defendants.

Defendants moved for summary disposition of each of the claims under various different grounds. Following a hearing, the trial court entered an order partially granting defendants' motion under MCR 2.116(C)(8). The trial court dismissed Virginia Cluley's CRA claim with respect to Elashkar. The trial court also dismissed Virginia Cluley's claims alleging violation of her constitutional rights, violation of public policy, and negligent infliction of emotional distress.

Virginia Cluley subsequently agreed to an early retirement from the BWL. Defendants thereafter filed a second motion for summary disposition, which was heard by a different judge. The trial court granted the motion and dismissed the Cluleys' remaining claims, relying on MCR 2.116(C)(7) (governmental immunity), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10) (no genuine issue of material fact). The trial court denied the Cluleys' motion for reconsideration.

II. Standard Of Review

A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone.[2] The trial court should grant the motion only if a claim is "'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'"[3]

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[2] MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[3] *Maiden*, *supra* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim.[4] The trial court considers the affidavits, pleadings, depositions, admissions, and other evidence, to the extent that the content or substance would be admissible as evidence, in a light most favorable to the nonmoving party.[5] Where the proffered, admissible evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[6]

A trial court may grant summary disposition under MCR 2.116(C)(7) if a claim is barred because of immunity granted by law. Because governmental immunity is a characteristic of government, to survive a (C)(7) motion raised on these grounds, the plaintiff must have alleged facts warranting the application of an exception to governmental immunity.[7] Neither party is required to file supportive material; any documentation that is provided to the trial court, however, must be admissible evidence.[8] The plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[9] If the facts are undisputed and reasonable minds could not differ regarding the legal effect of those facts, the trial court may decide whether a claim is barred by immunity as a matter of law.[10]

We review de novo a trial court's decision on a motion for summary disposition.[11] The applicability of governmental immunity is a question of law that we also review de novo.[12]

III. Tort Claims

A. The Claims

The Cluleys argue that the trial court erred by dismissing Virginia Cluley's tort claims based on governmental immunity. The Cluleys also argue that the trial court erred in concluding that, even assuming no immunity, Virginia Cluley's tort claims were factually deficient. However, the Cluleys' statement of the questions presented on appeal fails to challenge the trial court's decision regarding the merits of the tort claims. We may decline to address an issue that is not set forth in the statement of the questions presented.[13] Nonetheless, we are empowered to

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[4] *Id*. at 119.

[5] MCR 2.116(G)(6); *Maiden*, *supra* at 119-120.

[6] *Maiden*, *supra* at 120.

[7] *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002); *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

[8] *Maiden*, *supra* at 119.

[9] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Smith*, *supra* at 616.

[10] *Grahovac v Munising Twp*, 263 Mich App 589, 591; 689 NW2d 498 (2004).

[11] *Maiden*, *supra* at 118.

[12] *Baker v Waste Mgt of Mich, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

[13] MCR 7.212(C)(5); *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000).

address any issue that we believe justice requires be considered and resolved, that is, for example, where a significant issue is raised and all the facts and law are presented.[14]

Under the circumstances of this case, we have elected to consider the Cluleys' arguments regarding both governmental immunity and the merits of Virginia Cluley's tort claims to the extent that consideration is appropriate to properly resolve the tort claims. We have also considered Elashkar's position that he was individually immune under MCL 691.1407(5), even though Elashkar has not fully addressed the trial court's rejection of his motion for summary disposition on this ground. An appellee may argue alternative grounds for affirmance without filing a cross appeal.[15]

B. Defamation

The Cluleys' complaint alleged defamation against both the BWL and Elashkar arising from Elashkar's accusations in the disciplinary action. We first address the Cluleys' claims against the BWL. In general, a governmental agency's liability for an ultra vires act may be direct or may arise under a theory a vicarious liability where the tortious act was committed by an employee acting during the course of employment and within the scope of his or her authority.[16]

The governmental immunity act provides "broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]"[17] "A plaintiff pleads in avoidance of governmental immunity by . . . pleading facts that demonstrate that the alleged tort occurred during the exercise or discharge of a nongovernmental . . . function."[18] "Governmental function" is statutorily defined, in pertinent part, as "'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.'"[19] But, we stress, it is the general activity, not the specific allegedly tortious conduct, that determines if an agency was engaged in a

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[14] *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004); see *Health Care Ass'n Workers Compensation Fund v Director of Bureau of Worker's Compensation*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

[15] *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

[16] See *Smith v Dep't of Public Health*, 428 Mich 540, 605-610; 410 NW2d 749 (1987) (Brickley, J., concurring), and *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 623-625; 363 NW2d 641 (1984).

[17] *Ross*, *supra* at 595; see MCL 691.1407(1).

[18] *Mack*, *supra* at 204.

[19] *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003), quoting MCL 691.1401(f).

governmental function.[20] The focus is on whether the government agency had authority to perform the activity in any manner.[21]

We reject the Cluleys' claim that Elashkar's alleged improper motive for disciplining Virginia Cluley is relevant in determining if the activity was a governmental function. Although Justice Brickley indicated in his plurality opinion in *Smith v Dep't of Public Health*,[22] in the context of addressing a theory of direct liability against an agency, that "the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function," the Michigan Supreme Court later rejected an improper-purpose or malevolent-heart exception to governmental immunity. For purposes of the immunity granted to high-level executives acting within the scope of their authority under MCL 691.1405(5), the Court found that the executive's motive was not a relevant factor.[23]

We therefore focus solely on the evidence regarding the general activity in which Elashkar was engaged to determine if the BWL could be held liable for Elashkar's alleged defamatory conduct. Lansing's city charter, § 5.108.1, gives the BWL "administrative, executive and policy making authority over the operation of those City utility services assigned to it in accordance with the provisions of this Charter." Under § 5-203.11, the BWL, "except as otherwise provided in this Chapter, shall be responsible for and have authority over the compensation, benefits, bonding, conditions of employment, and labor management activities for all employees of the Board of Water and Light." Under § 5-202, the BWL was required to appoint a director, who was responsible for carrying out the duties assigned by the BWL, and an internal auditor, who was to report directly to the BWL. Other evidence presented to the trial court, viewed in a light most favorable to the Cluleys, established that the director was also known as the general manager. The BWL could lawfully investigate and take disciplinary measures against an employee through its general manager and internal auditor. Therefore, we uphold the trial court's decision that the BWL was absolutely immune from liability for Virginia Cluley's defamation claim because it was engaged in a governmental function.

With regard to Elashkar's individual immunity, we note that under MCL 691.1407(5), "the elective or highest appointive executive official of all levels of government [is] immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her . . . executive authority." Under MCL 691.1407(2), an officer or employee of a governmental agency is immune where (a) the officer or employee was acting or reasonably believed he was acting within the scope of his authority, (b) the governmental agency was

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[20] *Tate v Grand Rapids*, 256 Mich App 656, 661; 671 NW2d 84 (2003); *Pardon v Finkel*, 213 Mich App 643, 649; 540 NW2d 774 (1995); *Giddings v Detroit*, 178 Mich App 749, 759; 444 NW2d 242 (1989).

[21] *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989).

[22] *Smith*, *supra* at 608-609.

[23] *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997); see also *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 593-595; 640 NW2d 321 (2001).

engaged in a governmental function, and (c) the officer's or employee's conduct did not amount to gross negligence that is the proximate cause of the injury or damage.

But MCL 691.1407(2) does not apply unless there is no other applicable statutory provision.[24] Hence, we first consider defendants' position on appeal that Elashkar was entitled to immunity under MCL 691.1407(5). Unlike MCL 691.1407(2), subsection (5) simply requires that the employee act within the scope of his authority.

The trial court erroneously relied on *Grahovac v Munising Twp*, in concluding that Elashkar did not appear to be the "highest appointed official" of a "level of government." Unlike *Grahovac*, in which the township fire department was at the complete disposal of the township board,[25] the instant case involves a board that is granted authority under a city charter with respect to administrative, executive, and policy-making matters. The BWL is a "level of government," and, hence, Elashkar, as its highest appointed executive, is immune from tort liability under MCL 691.1407(5).[26]

Because the Cluleys neither alleged in their complaint nor offered evidence from which it could be reasonably inferred that Elashkar, as the highest-ranking executive appointed by the BWL, lacked authority to take disciplinary action against a lower-level employee under the broad authority granted to him by the BWL in his employment contract, we conclude that Elashkar was entitled to immunity under MCL 691.1407(5). Because MCL 691.1407(5) applies, it is unnecessary to determine whether the trial court properly found that Elashkar was also entitled to immunity under MCL 691.1407(2). Accordingly, we also need not address whether Virginia Cluley had a cognizable claim for defamation against Elashkar grounded on gross negligence because Elashkar was entitled to immunity under MCL 691.1407(5).

Alternatively, however, we would affirm because the Cluleys have not established that the trial court erred in finding no factual support for the publication element of a defamation claim. The elements of a defamation claim are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication."[27]

We deem any challenge to the trial court's determination that Elashkar had a qualified privilege to publish the "notice of possible disciplinary action" and "disciplinary action" memorandum to fellow employees abandoned because the Cluleys have not addressed this

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[24] *Grahovac*, *supra* at 597.

[25] *Id*. at 594.

[26] See *Davis v Detroit*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 254368, released for publication January 10, 2006); *Meadows v Detroit*, 164 Mich App 418, 427; 418 NW2d 100 (1987).

[27] *Mitan v Campbell,* 474 Mich 21, 24; 706 NW2d 420 (2005).

issue.[28] Regardless, we find no support for the Cluleys' claim that the BWL's status as a public body satisfies the publication requirement. The Cluleys' reliance on *Detroit Free Press, Inc v Dep't of Consumer & Industry Services*,[29] is misplaced because this case is not an action under the Freedom of Information Act.[30] Having failed to establish factual or legal support for the publication element of a defamation claim, we would uphold the trial court's grant of summary disposition under MCR 2.116(C)(10) in favor of both defendants with respect to this issue.

C. Intentional Infliction Of Emotional Distress

The Cluleys' complaint alleged that Elashkar "intentionally made false allegations against plaintiff Virginia Cluley for the express purpose of costing said plaintiff her job." We agree with the Cluleys' claim that the trial court erroneously treated this tort as also applying to the BWL when granting summary disposition in favor of defendants but find the error harmless.[31] We uphold the trial court's decision to grant summary disposition in favor of Elashkar under MCR 2.116(C)(7) because, as with the defamation claim, while we do not entirely agree with the trial court's reasoning, we conclude that the trial court reached the right result.[32] The trial court's determination that Elashkar was immune from liability under MCL 691.1407(2) was premature because it did not apply the gross negligence element in MCL 691.1407(2)(c). Indeed, the trial court failed to recognize that MCL 691.1407(3) provides that MCL 691.1407(2) "does not alter the law of intentional torts as it existed before July 7, 1986."[33] "[T]his Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence."[34] Further, we need not address whether MCL 691.1407(3) applies to a claim for intentional infliction of emotional distress because neither party has raised this issue. And for the same reasons set forth with regard to the Cluleys' defamation claim, we hold that Elashkar was entitled to summary disposition under MCR 2.116(C)(7) based on the immunity provision in MCL 691.1407(5).

Even if Elashkar was not entitled to immunity, we would not reverse because the Cluleys have failed to establish any basis for disturbing the trial court's grant of summary disposition with respect to the merits of this claim under MCR 2.116(C)(8) and (10). This Court recognizes the tort of intentional infliction of emotional distress where a plaintiff proves (1) extreme and

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[28] *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

[29] *Detroit Free Press, Inc v Dep't of Consumer & Industry Services*, 246 Mich App 311; 631 NW2d 769 (2001).

[30] MCL 15.231 *et seq*.

[31] MCR 2.613(A).

[32] *Hall v McRea Corp*, 238 Mich App 361, 369; 605 NW2d 354 (1999) (stating that this Court will not reverse if the trial court reached the right result albeit for a wrong reason).

[33] See also *Sudul v Hamtramck*, 221 Mich App 455, 458 (Corrigan, J.) and 480-481 (Murphy, P.J., concurring); 562 NW2d 478 (1997) (assault and battery tort not shielded by governmental immunity).

[34] *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004).

outrageous conduct, (2) intent or recklessness, (3) causation, and (4) extreme emotional distress.[35]

We agree with the Cluleys that the trial court erred to the extent that it indicated that Elashkar's motivation was irrelevant because intent is an element of this tort.[36] But to the extent that the trial court examined Elashkar's conduct separate from his state of mind, the trial court took a proper approach to determine if the complaint stated a legally sufficient claim of extreme and outrageous conduct, or was factually supported.

The threshold requirement for extreme and outrageous conduct is high.[37] The conduct itself must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"[38] In a contractual setting, the tort must rest on a breach of duty distinct from the contract.[39]

The Cluleys' allegation that Virginia Cluley was wrongfully accused and disciplined based on false allegations arises out of her employment with the BWL. Even if we were to find that the evidence presented to the trial court, viewed in a light most favorable to the Cluleys, was sufficient to substantiate this allegation, Elashkar's conduct does not satisfy the threshold of extreme and outrageous conduct. Therefore, we uphold the trial court's decision to grant summary disposition in favor of Elashkar.

D. Tortious Interference

The Cluleys' complaint labeled Virginia Cluley's claim against Elashkar as a tortious inference with a business relationship, but the allegations arose out of Virginia Cluley's contract with the BWL. The Cluleys alleged that Elashkar constructively discharged Virginia Cluley because he could not stand the thought that she "could possibly eclipse the jobs/positions" that he held at the BWL, and that Elashkar "wrongfully, intentionally, against the advice of other management personnel, with malice, constructively terminated plaintiff Virginia Cluley . . . ."

Again, we uphold the trial court's grant of summary disposition in favor of Elashkar under MCR 2.116(C)(7) because, while we do not entirely agree with the trial court's reasoning, we agree that the trial court reached the right result. Elashkar was immune from liability for the

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[35] *Id*. at 481; see also *Doe v Roman Catholic Archbishop*, 264 Mich App 632, 643; 692 NW2d 398 (2004).

[36] *VanVorous*, *supra* at 481-482.

[37] *Id*. at 481.

[38] *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602-603; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, comment d, pp 46-47.

[39] *Id*. at 603-604.

tortious interference claim under MCL 691.1407(5). The trial court's error in treating this claim as applying to the BWL was harmless.[40]

Further, even if Elashkar were not immune from liability, we would not reverse because the Cluleys have not established any basis for disturbing the trial court's grant of summary disposition with respect to the merits of this claim. Michigan recognizes the tort of interference with a contract and a distinct tort of tortious interference with a business relationship or expectancy.[41] For either tort, the plaintiff must establish that the defendant was a "third party" to the contract rather than an agent of one party acting within the scope of his authority.[42] The agent must act solely for his own benefit and with no benefit to the principal.[43]

The evidence, viewed in a light most favorable to the Cluleys, failed to establish a genuine issue of material fact regarding whether Elashkar was acting strictly for his personal benefit when he issued the "notice of possible disciplinary action" jointly with the internal auditor, conducted a hearing regarding the notice, and ultimately took disciplinary action that included Virginia Cluley reimbursing the BWL for at least $3,048 and serving a 30-day suspension, with instructions that the she report to the human resources department for a nonmanagerial position on her return. We therefore conclude that, even assuming no immunity, Elashkar was entitled to summary disposition.

IV. Breach Of Contract

The Cluleys contend that the trial court erred in dismissing Virginia Cluley's breach of contract claim. Although the trial court referred to both MCR 2.116(C)(8) and (10) when considering this claim, because it is apparent that the trial court's decision was based on evidence outside the pleadings, we treat the motion as having been granted pursuant to MCR 2.116(C)(10).[44]

The Cluleys alleged that Elashkar, as the BWL's agent, constructively discharged Virginia Cluley from her employment following the disciplinary proceeding. In light of the evidence that Elashkar required that Virginia Cluley accept a lesser, nonmanagerial position, we do not agree with defendants that Virginia Cluley could not proceed on a constructive discharge theory. A constructive discharge is not in itself a cause of action, but rather a defense against an

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[40] MCR 2.613(A).

[41] See *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 382; 689 NW2d 145 (2004); *Health Call of Detroit v Atrium Home & Health Care Services, Inc,* 268 Mich App 83, 91; 706 NW2d 843 (2005).

[42] *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004); *Reed v Michigan Metro Girl Scout Counsel*, 201 Mich App 10, 13; 506 NW2d 231 (1993).

[43] *Reed*, *supra* at 13; see also *Feaheny v Caldwell*, 175 Mich App 291, 305-306; 437 NW2d 358 (1989).

[44] *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998); *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

argument that a plaintiff left the job voluntarily.[45] A reduction in job responsibilities can constitute a constructive discharge.[46]

The dispositive question, therefore, is whether there was factual support for Virginia Cluley's claim of a just-cause employment relationship. Under the legitimate expectations theory, on which Virginia Cluley relies, an employer's policies and procedures may become legally enforceable if they instill legitimate expectations of job security in employees.[47] Such a claim rests on the employer's promises to the work force generally, rather than to a particular employee.[48]

> The first step in analyzing a legitimate expectations claim under *Toussaint*, is to determine, *what*, if anything, the employer has promised. Promises, like contracts, may be either express or implied.
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> * * *
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> Once it is determined that a promise has been made, the second step is to determine whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employer's employees. In this regard, we note that only policies and procedures reasonably related to employee termination are capable of instilling such expectations.[49]

Here, defendants' evidence that the BWL's employee handbook applied to Virginia Cluley and contained the following notice was unrebutted by the Cluleys:

> This manual neither implies nor establishes a contract between Lansing Board of Water and Light ("BWL") and the employee. The contents of this Employee Policies and Benefits Reference Handbook summarize current BWL policies, procedures and programs and are intended as guidelines only. Actual policies, procedures and programs can be obtained from Human Resources or viewed on the BWL Intranet Website in the Human Resources section.
>
> The BWL retains the right to change, modify, suspend, interpret or cancel in whole or in part any of the published or unpublished personnel policies or practices of the BWL, without advance notice, in its sole discretion, without

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[45] *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994).

[46] *Jenkins v Southeastern Mich Chapter, American Red Cross*, 141 Mich App 785, 797-798; 369 NW2d 223 (1995).

[47] *Rood v Gen Dynamics Corp*, 444 Mich 107, 117-118; 507 NW2d 591 (1993), citing *Toussaint v Blue Cross & Blue Shield of Mich*, 408 Mich 579, 615; 292 NW2d 880 (1980).

[48] *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 682-683; 599 NW2d 546 (1999); *Nieves v Bell Industries, Inc*, 204 Mich App 459, 463; 517 NW2d 235 (1994).

[49] *Rood*, *supra* at 138-139 (emphasis in original).

> having to give cause or justification to any employee. Recognition of these rights and prerogatives is a term and condition of employment and continued employment. As such, the contents of this handbook do not constitute the terms of an employment contract and the BWL is not required to employ you for any set period of time. Any written or oral statement to the contrary by a Supervisor, Manager, Director or other agent of the BWL is unauthorized and should not be relied upon by any prospective or existing employee.

Although the notice does not contain the phrase "at will," such a relationship is presumed, absent proof of a contract for either a definite term or prohibiting discharge absent just cause.[50] The statement that the BWL is not required to employ any employee for a "set period of time" describes an employment relationship for an indefinite period. While the indefinite term does not preclude enforcement of a just-cause term,[51] the notice goes further by giving notice that the BWL can change its published and unpublished policies, without notice, during the indefinite term. A policy to act or refrain from acting in a specified way, if the employer chooses, does not rise to the level of a promise.[52] Thus, we conclude that, examined as a whole, the notice describes an at-will relationship, which cannot be changed by any practice or statement of the BWL's agents.

Further, we are not persuaded that the Cluleys established factual support for their position that Virginia Cluley had a just-cause employment contract. It was incumbent on the Cluleys to set forth the facts that establish a genuine issue of material fact in the trial court when opposing defendants' motion for summary disposition.[53] Even viewed in a light most favorable to the Cluleys, the evidence regarding the various just-cause statements made by BWL agents and actual practices, examined in the context of the notice in the handbook, were not reasonably capable of being interpreted as promises of just-cause employment.

We note that the Cluleys rely on evidence regarding an anti-discrimination policy that was presented to the trial court in their motion for reconsideration, but we conclude that the policy is not reasonably capable of being interpreted as a promise of just-cause employment. Accordingly, we conclude that there is no merit to this issue.

V. Sex Discrimination Under The CRA

The Cluleys argue that the trial court erred in dismissing Virginia Cluley's sex discrimination claim under the CRA. Specifically, the Cluleys challenge the trial court's grant of defendants' second motion for summary disposition under MCR 2.116(C)(10). Because the Cluleys have not challenged the trial court's earlier decision granting summary disposition in

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[50] *Id*. at 116.

[51] *Toussaint*, *supra* at 598.

[52] *Rood*, *supra* at 139.

[53] *Maiden*, *supra* at 121.

favor of Elashkar, individually, under MCR 2.116(C)(8), we deem that issue abandoned.[54] We note, however, that after the trial court's decision, the Michigan Supreme Court held that an employer's agent may be individually liable under the CRA.[55] But Elashkar's individual liability is not material to a proper resolution of this appeal because Elashkar's conduct forms the basis of Virginia Cluley's claim against the BWL.

With regard to the Cluleys' position that they presented direct evidence that Elashkar discriminated against Virginia Cluley because of her sex, we limit our review to the Cluleys' reliance on evidence that Elashkar referred to Virginia Cluley as a "whore" and remarked that she "slept her way to the top."[56]

Direct evidence of discrimination is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action.[57] The Cluleys' proffered evidence would have more significance if Virginia Cluley claimed that Elashkar sexually harassed her. The CRA prohibits sexual harassment in the nature of "communications of a sexual nature."[58] Taunting an employee with sexual remarks such as "whore" might constitute sexual harassment.[59] But the remarks in this case were isolated and were not made by Elashkar to Virginia Cluley. No remarks were established between the time of Elashkar's first retirement in 2000 and his disciplinary action against Virginia Cluley in June 2003. Also, Virginia Cluley does not claim sexual harassment, but rather that Elashkar made an adverse employment decision because she was a woman.

Although the evidence might support a reasonable inference that Elashkar disliked Virginia Cluley, viewed in a light most favorable to the Cluleys, the evidence does not support a reasonable inference that Elashkar took disciplinary action against Virginia Cluley in June 2003 because she was a woman. The CRA does not remedy an employer's personal dislike of an employee, but rather adverse employment actions based on the employee's membership in a certain class.[60]

With regard to the Cluleys' claim that Virginia Cluley established a prima facie case of sex discrimination under the burden-shifting approach in *McDonnell Douglas Corp v Green*,[61]

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[54] *Prince*, *supra* at 197.

[55] *Elezovic v Ford Motor Co*, 472 Mich 408, 411; 697 NW2d 851 (2005).

[56] Although plaintiffs also argued below that Elashkar's involvement in employment actions against other women was admissible to demonstrate his discriminatory animus, plaintiffs have not pursued this argument on appeal.

[57] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 133; 666 NW2d 186 (2003).

[58] See MCL 37.2103(i), and *Haynie v Dep't of State Police*, 468 Mich 302, 312; 664 NW2d 129 (2003).

[59] See *Vasquez v Los Angeles Co*, 349 F3d 634 (CA 9, 2003).

[60] *Hickman v W-S Equip Co*, 176 Mich App 17, 21; 438 NW2d 872 (1989).

[61] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

we note that the prima facie case must be tailored to the particular facts of a case.[62] But the general framework for establishing a prima face case based on disparate treatment and disparate replacement is distinct.[63]

Here, the record indicates that the Cluleys opposed defendants' motion for summary disposition based on their assertion that defendants could not establish any other employee who was disciplined in the same manner as Virginia Cluley. The Cluleys' proposed discriminatory replacement theory, i.e., the BWL's alleged undertaking to replace Virginia Cluley with a male employee, was raised in the Cluleys' motion for reconsideration of the trial court's summary disposition order. The Cluleys' assertion that the trial court should have considered differences between how Virginia Cluley and a particular male employee were disciplined was likewise specifically presented to the trial court in their motion for reconsideration. But any challenge by the Cluleys to the trial court's denial of their motion for reconsideration is deemed abandoned because the Cluleys do not address that decision in their brief, nor is it properly presented in the statement of questions presented.[64] In any event, based on our review of the record, we find no basis for disturbing the trial court's denial of the Cluleys' motion for reconsideration.[65]

VI. Constitutional Claim

The Cluleys argue that Virginia Cluley's constitutional claim should be reinstated if this Court concludes that Virginia Cluley has no remedy under the CRA. We disagree. The trial court correctly ruled that Const 1963, art 1, § 2, does not provide a private cause of action.[66]

VII. Loss Of Consortium

Because the Cluleys do not address the trial court's dismissal of David Cluley's loss of consortium claim, we deem this issue abandoned.[67] In any event, we agree with defendants that because David Cluley's loss of consortium claim is derivative of Virginia Cluley's claims, it was properly dismissed following the dismissal of Virginia Cluley's claims.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

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[62] *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001).

[63] See *Smith v Goodwill Industries of W Mich, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000).

[64] *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *McGoldrick, supra* at 298.

[65] *Kokx v Bylenga*, 241 Mich App 655, 658-659; 617 NW2d 368 (2000).

[66] *Lewis v Michigan*, 464 Mich 781; 629 NW2d 868 (2001).

[67] *Prince*, *supra* at 197.