STATE OF MICHIGAN

COURT OF APPEALS

JANICE L. HAY,

Plaintiff-Appellant,

v

MADISON DISTRICT PUBLIC SCHOOLS, MADISON DISTRICT BOARD OF EDUCATION, MADISON DISTRICT PUBLIC SCHOOLS SUPERINTENDENT, AFSCME LOCAL 25, and ALBERT GARRETT,

Defendants-Appellees,

and

BERNARD PRYZBYCKI,

Defendant.

UNPUBLISHED
April 23, 2009

No. 283783
Oakland Circuit Court
LC No. 2007-081197-CD

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants in this wrongful discharge claim. Because the trial court did not err when it granted summary disposition in favor of defendants without first conducting a hearing, the trial court did not err when it dismissed plaintiff's case against defendants AFSCME Local 25 and Bernard Pryzbycki, the trial court followed the proper procedure for disqualification and reassignment of judges, and, the trial court did not err when it dismissed plaintiff's claims for wrongful termination on the basis of sex and retaliatory termination, we affirm.

Plaintiff was employed by defendant Madison District Public Schools as a school bus driver and was a member of defendant American Federation of State, County, and Municipal Employees (AFSCME), Local 1468. On September 2, 2005, plaintiff attended a meeting regarding a scheduling disagreement and other issues she had with a coworker, Bernard Przybycki. Also present at the meeting were: Przybycki, another school bus driver; Donna Ball, head custodian at Wilkinson Middle School and President of Local 1468, Michigan AFSCME Council 25; and, Nancy Fellows, AFSCME Staff Representative. Prior to the meeting, plaintiff

and Przybycki had various disagreements about bus routes, union procedures, and other matters that required Union intervention to solve. The September 2, 2005 meeting was contentious and involved heated discussions. Testimony indicated that plaintiff spoke first at the meeting airing concerns about Przybycki. When Przybycki spoke next, plaintiff interrupted him and alleged that Przybycki had been "harassing her for the past two years[.]" At some point during the meeting Fellows attempted to calm plaintiff down, but plaintiff stated that she did not "have to be here for this." A short time later, plaintiff began to gather her things and stated that she was going to see the Superintendent. Fellows responded to plaintiff by stating something like, "you're not going alone are you?" Plaintiff replied something to the effect of, "no I'm bringing a gun" or "no, I'll take my take my gun." Plaintiff then left the meeting. The others, initially stunned by plaintiff's comment, remained in the meeting room discussing business not related to plaintiff.

Shortly thereafter, plaintiff's statement about a "gun" was reported to Superintendent William Harrison. The district's human resources director, Georgia Naidus, received a written statement about the events from Przybycki and also spoke with both Ball and Fellows about the meeting. The written and oral reports all indicated that plaintiff stated "no, I'll take my gun" in response to Fellows' question about going to the Superintendent's office. Harrison convened a meeting on September 9, 2005 with plaintiff, Ball, and Naidus. At the meeting, Harrison explained that he had received information that an employee had made a gun threat and he wanted to speak with plaintiff to get her version of the events as part of his own investigation. Plaintiff stated that she had been advised by her lawyer not to say anything. Apparently the matter was discussed privately in separate caucuses and then Harrison offered plaintiff another opportunity to speak, but she again declined to speak on the advice of counsel. Harrison explained that without any other information he would proceed by placing plaintiff on paid administrative leave until October 12, 2005 pending further investigation of the matter.

On October 12, 2005, plaintiff, Harrison, and Naidus met again. Harrison reported that the matter had been investigated and asked plaintiff if she would like to explain her side of the story. Plaintiff again refused to comment on the situation on the advice of counsel. Harrison then informed plaintiff that based on the result of the investigation and the fact that plaintiff did not deny making the gun threat her employment was terminated.

Plaintiff filed a grievance. Union representatives asked Harrison if he would reconsider the termination if plaintiff explained what happened at the September 2, 2005 meeting. Harrison explained that he would consider any information but would not make any decisions without first seeking the advice of counsel. On November 18, 2005, a formal grievance hearing was held. At the meeting, plaintiff denied making the statement about bringing the gun to the superintendent's office. While Harrison told plaintiff that he appreciated her explanation of the events, he found Ball's and Przybycki's contradictory statements more credible. Harrison did not change the termination decision and plaintiff's grievance proceeded to arbitration.

The arbitrator held hearings in June and August 2006. The arbitrator heard testimony from plaintiff, Przybycki, Ball, Naidus, Harrison, and two other union members. The arbitrator issued a lengthy written opinion summarizing the testimony heard as well as a detailed analysis. The arbitrator found that the evidence established that plaintiff actually said that she was "going to bring a gun" with her to the superintendent's office at the September 2, 2005 meeting and that plaintiff falsely denied the statement. The arbitrator also found that the penalty of discharge was

commensurate with the gravity of plaintiff's offense. For these reasons, the arbitrator ultimately concluded that the district had just cause to terminate plaintiff's employment and seniority under the collective bargaining agreement.

Some months later, in March 2007, plaintiff filed the instant lawsuit against the school district, the board of education, the current superintendent Paul Rogers, Przybycki, Ball, and her union. Plaintiff's complaint alleged wrongful termination, breach of her union contract, and discrimination on the basis of sex in violation of her civil rights. Throughout the litigation, various parties were dismissed from the cause of action and ultimately the only defendants that remained were the school district, the board of education, and Rogers. Defendants filed a motion for summary disposition of plaintiff's claim under MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court granted defendants' motion pursuant to MCR 2.116(C)(10) and dismissed the case. Plaintiff now appeals as of right.

We review de novo a trial court's decision on a motion for summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim; the motion should be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Medical Center v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds might differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must review the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

Plaintiff first argues that the trial court erred when it granted summary disposition in favor of defendants without first conducting a hearing. We review for an abuse of discretion the trial court's decision to limit or dispense with oral argument. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000). An abuse of discretion occurs when the trial court chooses a decision falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The trial court's written opinion and order specifies that it was exercising its discretion under MCR 2.119(E)(3) to decide the matter without a hearing. A trial court is specifically authorized, in its discretion, to dispense with or limit oral argument with respect to motions. MCR 2.119(E)(3); *American Transmission, supra* at 709. The trial court, being well aware of the facts and issues involved in this matter because they were fully briefed by both parties, did not abuse its discretion by dispensing with oral argument on the summary disposition motion in this case. *Id.*

Next, plaintiff argues that the trial court erred when it dismissed plaintiff's case against the union. Plaintiff claims that the union breached its duty of fair representation because in essence, the union did not represent her "at all," because in essence "the union was merely representing itself[.]" Plaintiff specifically asserts that the union breached its duty by acting arbitrarily, capriciously, and in bad faith in processing her grievance by not permitting her to be represented at union proceedings, filing no briefs or other documents on her behalf, and because

her union representative Ball, had a conflict of interest. Plaintiff further asserts that the union's decisions throughout the grievance process were based around events that never happened.

The duty of fair representation requires a labor union to serve the interests of all members without hostility or discrimination, exercise its discretion in complete good faith and honesty, and avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; 17 L Ed 2d 842 (1967); *Goolsby v Detroit*, 419 Mich 651, 661; 358 NW2d 856 (1984). The union must act "'without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance.'" *Goolsby, supra* at 663-664, quoting *Lowe v Hotel & Restaurant Employees Union*, 389 Mich 123, 146-147; 205 NW2d 167 (1973). Bad faith is demonstrated by intentional acts or omissions made for dishonest or fraudulent reasons. *Goolsby, supra* at 679.

However, bad-faith conduct is not always required to make out a breach of duty. *Goolsby, supra* at 681-682. "[T]he conduct prohibited by the duty of fair representation includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence." *Id*. at 682. "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness, as to be irrational." *Air Line Pilots Ass'n, Int'l v O'Neill*, 499 US 65, 67; 111 S Ct 1127; 113 L Ed 2d 51 (1991) (internal quotations and citations omitted.)

Plaintiff has failed to show sufficient legal and factual support for her arguments, and thus we find no error in the dismissal of the union as a defendant. Plaintiff initiated the grievance process pursuant to the union's collective bargaining agreement (CBA). The CBA provided for final and binding arbitration of grievances. The union processed plaintiff's grievance and it was fully heard throughout the arbitration process. The uncontroverted evidence established that the union did not refuse to represent plaintiff. The union submitted a written brief to the arbitrator on her behalf; Betty Gaston, a union staff specialist represented plaintiff at the evidentiary hearings where she examined witnesses; and, the union also submitted documentary evidence in support of plaintiff's position to the arbitrator including the results of a polygraph test where the analyst stated that when asked whether plaintiff stated that she would bring a gun to the school, she passed the polygraph test.

With regard to the alleged lack of representation, plaintiff's personal and professional interests were clearly represented by the union, and plaintiff's arguments that the union was only representing itself throughout the process are baseless. With regard to plaintiff's bald assertion that Ball had a conflict of interest, we can only assume that plaintiff had a problem with Ball because she was present at the September 2, 2005 meeting and was truthful when asked about her recollection of the events that took place. Plaintiff has not shown error with regard to Ball. In sum, plaintiff has presented no evidence that the union acted arbitrarily, capriciously, and in bad faith in processing her grievance. There is no evidence that the union abdicated its responsibility under the law. A union has considerable discretion in evaluating and deciding the proper course of action with respect to grievances. *Goolsby, supra* at 662-664. Although plaintiff is unsatisfied with the outcome of the arbitration, the evidence establishes no breach of

duty. *Goolsby, supra* at 681-682; *Pearl v Detroit*, 126 Mich App 228, 235, 237; 336 NW2d 899 (1983).

Plaintiff next argues that the change in the assigned judge from Judge Langford-Morris to Judge Goldsmith prejudiced the outcome of the case and caused unnecessary confusion. The record reveals that initially this case had been assigned to Judge Langford-Morris. Judge Langford-Morris signed her own Order of Disqualification/Reassignment on August 14, 2007 citing a "conflict of interest."[1] The next day, Chief Judge Potts reassigned the matter to Judge Goldsmith in accordance with MCR 8.111(C).

Plaintiff never raised this issue before the trial court and therefore this issue is unpreserved. Thus, this Court may decline to address it. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review"); *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007). Also, plaintiff failed to sufficiently brief this issue. Plaintiff provided no case law in support of her position and did not explain or articulate even one reason in regard to how the judicial reassignment affected the outcome of the case or caused unnecessary confusion. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). "Failure to brief a question on appeal is tantamount to abandoning it." *Mitcham, supra*. Accordingly, we decline to address this issue. *Wilson, supra*. In any event, we do note however that the circuit court followed the proper procedure for disqualification of judges found in MCR 2.003 and reassignment of judges found in MCR 8.11(C).

Next, plaintiff contends that Przybycki should have remained in the case and should not have been dismissed from this action because he was "served with papers" and "was aware that he was a party defendant from the outset." In support of her claim, plaintiff merely alleges that she and her counsel were "under [t]he impression that the same law firm that represented [defendant] school [d]istrict [w]as in fact representing this [d]efendant as well, and apparently, was mislead in [t]his regard." Plaintiff does not explain why she was under this impression.

A court usually obtains personal jurisdiction over a defendant "by service of process." *Isack v Isack*, 274 Mich App 259, 266; 733 NW2d 85 (2007). "[S]ervice of the summons is a necessary part of service of process," and if the plaintiff completely fails to ensure service of the summons, the court does not obtain personal jurisdiction over the defendant. *Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991).

The record reveals that counsel for defendant school district, defendant board of education, and defendant Rogers never filed an appearance on behalf of Przybycki. Moreover,

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[1] Counsel for defendant school district, defendant board of education, and defendant Rogers had recently represented Judge Langford-Morris in an unrelated legal matter.

plaintiff merely sent the copy of the complaint intended for Przybycki via first-class mail to defendant school district. In fact, the proof of service attached to plaintiff's first amended complaint represents that Przybycki was served "by Regular U.S. First Class Mail, addressed as follows: . . . BERNARD PRYZBYCKI, c/o Madison District Public Schools, 25421 Alger, Madion Heights, MI 48071." This was not proper service. MCR 2.105 governs service of process for the summons and complaint.

MCR 2.105(A)(2) provides as follows:

> (A) Individuals. Process may be served on a resident or nonresident individual by
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> ***
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> (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail.

Plaintiff clearly did not comply with the requirements of MCR 2.105(A)(2) when she purported to serve Przybycki by first class mail rather than registered or certified mail with return receipt as required by MCR 2.105.

It appears from the record, and plaintiff does not actually dispute that she never gave Przybycki any form of service of the summons and complaint. Consequently, pursuant to the plain language of MCR 2.102(E)(1), "[o]n the expiration of the summons . . . the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." See *Peterson v Auto-Owners Ins Co*, 274 Mich App 407, 413; 733 NW2d 413 (2007). Thus, because plaintiff did not properly serve Przybycki and submit the return of service form, Przybycki was properly deemed dismissed as a defendant in this case.

Finally, plaintiff argues in her supplemental brief on appeal that the trial court erred when it granted summary disposition regarding her claims that she was wrongfully terminated on the basis of sex and a claim for retaliatory termination. A claim of unlawful discrimination may be established either by direct evidence or by circumstantial evidence. *DeBrow* v *Century 21 Great Lakes, Inc*, 463 Mich 534, 537-538; 620 NW2d 836 (2001). "Direct evidence" is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 133; 666 NW2d 186 (2003). If the plaintiff has no direct evidence of discrimination, he is required to establish a prima facie case within the balancing framework of *McDonnell Douglas Corp* v *Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *DeBrow*, *supra* at 539-540. To establish a prima facie case of discrimination, a plaintiff must show by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered adverse employment action; (3) she was qualified for her position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Id*. at 538 n 8, citing *Lytle v Malady* (On Rehearing), 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Id*. If it does so, the burden returns to the plaintiff to show that the employer's stated reason for its action was actually a mere pretext. *Id.*

Here, the trial court was correct when it found that plaintiff has no evidence of anything other than an adverse employment action. Plaintiff presented no direct evidence of any discriminatory animus or retaliatory action. Nor did she present any circumstantial evidence. Our review of the record shows simply that plaintiff was terminated because she threatened to bring a gun to the superintendent's office. Under the circumstances, plaintiff has no evidence that this reason for termination was a mere pretext.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio