

STATE OF MICHIGAN
COURT OF APPEALS

ELDON R. TELLER,

Plaintiff-Appellant,

v

ANCHOR BAY SCHOOL DISTRICT,

Defendant-Appellee.

UNPUBLISHED

July 1, 1997

No. 193750

State Tenure Commission

LC No. 95-000018

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Plaintiff, who was a teacher at Anchor Bay High School, appeals as of right from a State Tenure Commission order that he be discharged for engaging in conduct that violated the policies and procedures of the Anchor Bay School District. We affirm.

In April 1995, a female Anchor Bay High School student alleged that between January and April of that year, plaintiff, who was her science teacher, had hugged and kissed her. The student also claimed that plaintiff had given her \$50 and a tee-shirt, had invited her to lunch and had lied about her age so that she could attend a school-sponsored bingo night with him. Once these allegations were made public, four former Anchor Bay High School students also alleged that plaintiff had engaged in similar behavior toward them. Only one of these four women was a student at the time that plaintiff's alleged conduct occurred. Plaintiff admitted that he had hugged and kissed these women, but denied that he had ever "French kissed" a student or that his conduct had been of a sexual nature.

Following an investigation, the Anchor Bay Board of Education filed tenure charges against plaintiff pursuant to Article IV, Section 2 of the Michigan teacher tenure act, MCL 38.71, *et seq.*; MSA 15.1971, *et seq.* The board then conducted a hearing on these charges and suspended plaintiff without pay. Plaintiff appealed this decision to the State Tenure Commission, which conducted a hearing. In a preliminary decision, the hearing referee found that the school district had established that plaintiff had committed the misconduct described in two of the four charges and suspended plaintiff without pay for two years; however, when the parties challenged this decision, the Tenure Commission ordered plaintiff's discharge from teaching at Anchor Bay Schools.

Plaintiff first contends that the commission exceeded its authority in basing its decision to discharge him on the finding that he had committed sexual misconduct when the charges did not allege sexual misconduct. Where the charges provide sufficient notice of the factual allegations against a teacher, they are sufficient. In *Sutherby v Gobles Bd of Ed (After Remand)*, 132 Mich App 579, 589; 348 NW2d 277 (1984), a teacher complained that he was discharged for “insubordination” even though he had not specifically been charged with insubordination. This Court affirmed the discharge, noting that “[a]lthough ‘insubordination’ was not specifically charged, appellant was notified of all the factual claims against him. He received adequate notice.” *Id.* In this case, plaintiff was specifically charged with inappropriately hugging and kissing students. The commission determined that because plaintiff’s conduct was inappropriate and of a sexual nature, he had committed sexual misconduct. Even though the words “sexual misconduct” were not used in the statement of charges, the factual allegations were sufficient to apprise plaintiff that he was being charged with conduct of a sexual nature. Thus, the commission did not exceed its authority by discharging plaintiff for “sexual misconduct.”

Plaintiff next contends that defendant did not lay a sufficient foundation for the admission of the original complainant’s written statement, which was prepared after she brought the allegations, under the recorded recollection exception to the hearsay rule. MRE 803(5) provides that a witness’ recorded recollection is not excluded by the hearsay rule, even if the witness is available to testify. A document is admissible under this rule if the following foundational requirements have been established: (1) the document pertains to matters of which the witness once had knowledge; (2) the witness now has insufficient recollection of these matters to testify; and (3) the document was created by the witness or, if not, the document has been examined by the witness and shown to have accurately reflected the witness’ knowledge of the matters when they were fresh in the witness’ memory. *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992). At the Tenure Commission hearing, over plaintiff’s objection and without explanation, the hearing referee admitted the complainant’s written statement into evidence. Before this statement was admitted, the complainant testified that the statement pertained to plaintiff’s acts of which she had complained, that she had insufficient recollection of these events to testify, and that she prepared the statement when these events were fresh in her memory. This was a sufficient foundation for the admission of this statement as a recorded recollection. *Id.*

Plaintiff also argues that it was an abuse of discretion for the hearing referee to admit testimony of plaintiff’s uncharged conduct toward non-students under MRE 404(b)(1). MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Under this rule, “other acts evidence is admissible *whenever* it is relevant on a noncharacter theory.” *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996). The hearing referee properly admitted this testimony for the purpose of showing a pattern to plaintiff’s behavior or the absence of a

mistake or misunderstanding. The referee emphasized that this evidence was not admitted to establish that plaintiff had engaged in the acts of which he was accused. Because this evidence was relevant to a noncharacter theory, it was not an abuse of discretion for the referee to admit it for that purpose. *Id.* at 259.

Plaintiff also argues that testimony regarding plaintiff's admissions to Chesterfield Police Detective Ed Colinas, who investigated these allegations, was inadmissible because Colinas acted outside the scope of his authority in obtaining plaintiff's statement outside his jurisdiction. In questioning plaintiff about these allegations, Colinas asked him whether he would want a teacher to treat his daughter this way. Colinas testified that plaintiff responded by putting his head on the table and stating that he knew that what he had done was wrong. Plaintiff asserts that MCL 764.2a; MSA 28.861(1) operated to exclude Colinas' testimony. This statute provides that an officer may exercise his authority outside his jurisdiction if he is operating in conjunction with the Michigan State Police or with an officer of the outside jurisdiction. *Id.* The purpose of this statute is to protect the rights and autonomy of local governments. *People v McCrady*, 213 Mich App 474, 480-481; 540 NW2d 718 (1995). Thus, "a violation of the statute would not justify application of the exclusionary rule." *Id.* at 481. Accordingly, Colinas' testimony need not have been excluded on this ground.

Plaintiff also argues that Colinas' testimony regarding plaintiff's admissions should have been excluded because the referee refused to admit plaintiff's evidence of Colinas' bias. On the first day of the three-day hearing, Colinas testified that he had been interviewed on a television station regarding the charges against plaintiff. Plaintiff did not attempt to introduce the videotape of the interview at this point. However, on the third day of the hearing, after Colinas had been dismissed, plaintiff attempted to introduce evidence of the interview through one of his witnesses for the purpose of establishing that the interview had occurred. Defendant objected to the admission of the tape for this purpose, but agreed to stipulate to the fact that the interview had occurred. The referee refused to admit the videotape on the ground that Colinas was no longer at the hearing to answer questions regarding the videotape. The referee indicated that plaintiff had the opportunity to cross-examine Colinas and should have introduced the videotape at that point if he wished to use it to attack Colinas' credibility. The commission affirmed this decision, holding that because matters concerning the order of the proofs are within the sound discretion of the hearing referee, it was not an abuse of discretion for the referee to refuse to allow belated admission of the videotape.

Plaintiff contends that MCL 600.2158; MSA 27A.2158 prevented the referee from excluding the videotape. This statute provides:

No person shall be excluded from giving evidence on any matter, civil or criminal, by reason of crime or for any interest of such person in the matter, suit, or proceeding in question, or in the event of such matter, suit or proceeding, in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime, may be shown for the purpose of drawing in question the credibility of such witness, except as is hereinafter provided. [MCL 600.2158; MSA 27A.2158.]

The purpose of this statute is to abrogate the common law's disqualification of certain witnesses for reasons of infancy, infamy and interest. *People v Bouchee*, 400 Mich 253, 264; 253 NW2d 626 (1977). This statute is inapplicable to this issue because it does not indicate that the referee was obligated to allow a belated admission of a videotape.

Next, plaintiff argues that the commission abused its discretion in relying on the arguments of plaintiff's attorney that defendant's witnesses were incredible when it determined that plaintiff had shown no willingness to change his behavior. The referee found that plaintiff had expressed contrition to Colinas and to plaintiff's psychologist, Dr. Ruth Coleman, and that Coleman believed that plaintiff's behavior was the result of the habit that he had developed from hugging and kissing his autistic and severely retarded daughter in order to teach her to respond to people. The referee also noted that Coleman believed that plaintiff had recognized his poor judgment and was willing to change. The commission found that plaintiff had attempted to minimize the severity of his misconduct by testifying that he had kissed the original complainant as an automatic reflex or due to excitability the day after he learned that his daughter did not suffer from a fatal, degenerative syndrome. The commission found that this complainant's credible testimony deviated significantly from plaintiff's account. Moreover, the commission noted that when asked why his testimony contradicted that of the five students or former students, plaintiff said, "Some people had a tendency to say lies. Some people have a tendency not to remember things that happen. . . . Maybe they were scared." The commission found that these attacks on the credibility of witnesses indicated that plaintiff had not acknowledged wrongdoing. The commission also noted that plaintiff's brief in support of his exceptions was replete with such unpersuasive suggestions. In addition, the commission determined that the many other instances in which plaintiff's testimony contradicted other witnesses' testimony and tended to minimize the severity of his conduct established that he did not recognize his poor judgment. Finally, the commission found that Coleman's opinion was formulated on the basis of limited knowledge of plaintiff's behavior and was, therefore, unpersuasive. Thus, the commission did not rely on the arguments of plaintiff's counsel in reaching the conclusion that plaintiff failed to recognize the wrongful nature of his conduct. The commission merely noted as an aside that plaintiff's attacks on the credibility of witnesses had continued in his brief in support of his exceptions. Accordingly, reversal is not required on this basis.

Plaintiff next argues that the commission erred in failing to affirmatively state that its members had read the record before signing the final order. MCL 24.281(2); MSA 3.560(181)(2) provides that a "proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who had read the record." Contrary to plaintiff's assertions, the commission did not violate this provision. The commission indicated in its decision that it had "reviewed the exceptions, cross-exceptions and statement in support of the preliminary decision in light of the record, including briefs filed by both parties." The fact that the commission reviewed this material "in light of the record" indicates that it read the record. Moreover, it is clear from a review of the decision and order, which is replete with findings of fact and citations to the record, that the commission read the record thoroughly. Thus, reversal is not required on this basis.

Finally, plaintiff contends that in making its findings of fact and in concluding that defendant had established reasonable and just cause for discharging him, the commission ignored certain testimony that

supported plaintiff's theory of the case, i.e., that his hugs and kisses were friendly and not of a sexual nature. A tenured teacher may be discharged or demoted only for reasonable and just cause. *Hagerty v State Tenure Comm*, 179 Mich App 109, 113; 445 NW2d 178 (1989). Reasonable and just cause may be established by significant evidence that the teacher is unfit to teach. *Id.* A teacher's sexual advances toward students and inappropriate comments to or touching of students constitutes reasonable and just cause to discharge a teacher. See generally *Szopo v Richmond Community Schools Bd of Ed*, State Tenure Commission Docket No. 93-60, pp 2-3 (1994); *Garwood v Bd of Ed of Chippewa Valley Schools*, State Tenure Commission Docket No. 89-26, p 15 (1992). As plaintiff asserts, some of the testimony supported his theory; however, viewed in context and in light of the whole record, the evidence that plaintiff highlights also supports the commission's conclusions. The overwhelming evidence indicates that plaintiff engaged in a pattern of kissing, hugging and pressing his body close to his female students. This supports the commission's conclusion that defendant had reasonable and just cause to discharge plaintiff. *Szopo, supra* at 2-3; *Garwood, supra* at 15.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Robert P. Young, Jr.