STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1516

Emy Albert,
Appellant,

vs.

Independent School District No. 709,
Respondent.

Filed April 15, 2013
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-CV-11-3115

Kenneth D. Butler, Kenneth D. Butler, Ltd., Duluth, Minnesota (for appellant)

Sandra J. Grove, Law Offices of Stilp & Grove, Golden Valley, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

In this tort action arising out of appellant-student's negative experiences with her high school hockey coach, appellant challenges the dismissal of her first amended

complaint under Minn. R. Civ. P. 12.02(e) and denial of her motion to further amend her complaint. We affirm.

FACTS

From September 2007 through October 2010, appellant Emy Albert attended Duluth East High School, part of respondent Independent School District No. 709. During her first two years of high school, Albert played on Duluth East's varsity girls' hockey team. Prior to the 2009-10 season, the school district's three high schools combined to form one girls' hockey team, and hired Shawna Davidson as head coach. This case involves Albert's negative interactions with Davidson during the 2009-10 season.

Albert alleges that Davidson engaged in inappropriate conduct while performing her coaching duties. Davidson regularly used profanity, yelled at players, and made crude jokes about a former coach. According to Albert, Davidson took the team shopping at the store where she worked on a practice night, sent the team out-of-town to watch a hockey game without informing parents, and gave team members, including minors, lottery tickets as Christmas gifts. When Albert expressed concern to Davidson about these actions, Davidson responded by singling Albert out for ridicule and punishment. Davidson's retaliatory action included making Albert practice with both the junior varsity and varsity teams, benching her during games, and verbally attacking and embarrassing her in front of her teammates. Eventually, Davidson stopped talking to Albert, told the other players not to talk to her, returned her equipment without explanation, and did not invite her to participate in off-season training sessions.

Davidson refused to meet with Albert's parents to discuss her complaints, and the school district did not address Albert's concerns about Davidson's conduct. As a result of Davidson's conduct, Albert transferred to a private high school for her senior year.

Albert initiated this action against the school district, alleging claims of negligent hiring, negligent supervision, bullying, and harassment. Albert's bullying claim asserts that Davidson's refusal to speak to her constitutes intentional infliction of emotional distress. The school district moved to dismiss the complaint under Minn. R. Civ. P. 12.02(e), arguing that the complaint "fails to state a claim as a matter of law."

Before the motion hearing, Albert interposed an amended complaint, adding causes of action for intentional and negligent infliction of emotional distress. Albert also filed a memorandum opposing the dismissal motion, arguing, in part, that her amended complaint made the motion moot. Albert's responsive memorandum also addressed the merits of the school district's motion, including her negligent and intentional-infliction-of-emotional distress claims. The district court held a hearing on December 12, 2011.

Four days after the motion hearing, the school district filed a notice of motion and motion to dismiss Albert's first amended complaint under rule 12.02(e). The school district did not file any of the other documents required by Minn. R. Gen. Pract. 115.03 or set a hearing date for the motion. The district court granted the school district's first rule 12 motion, dismissing Albert's original complaint with prejudice. Albert requested leave to bring a motion for reconsideration under Minn. R. Gen. Pract. 115.11. The same day, the school district sent a letter to the district court and Albert's counsel asking whether additional memoranda or argument were necessary in connection with its motion

to dismiss Albert's first amended complaint, given the substantive overlap between the two motions.

In February 2012, the district court denied Albert's request to seek reconsideration but authorized her first amended complaint, allowing her to assert the two emotional-distress claims. Albert then filed a motion for leave to serve and file a second amended complaint to add a cause of action under 42 U.S.C. § 1983 (2006), claiming that the school district condoned Davidson's retaliatory behavior thereby depriving Albert of her right to free speech. The school district opposed the motion as untimely and without merit, and again advised the district court that it did not see any fundamental difference between Albert's original complaint and first amended complaint that would warrant additional briefing or argument.

At the hearing on her motion to amend, Albert argued that the school district's second rule 12 motion was not before the district court because the school district had not complied with the procedural requirements of rule 115.03. The school district disagreed, pointing out that it properly noticed the motion to dismiss Albert's first amended complaint and again asking the court whether additional briefing or argument were necessary. The district court denied Albert's motion for leave to file a second amended complaint and granted the school district's second rule 12 motion, dismissing Albert's emotional-distress claims with prejudice. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion or err by dismissing Albert's first amended complaint under Minn. R. Civ. P. 12.02(e).

Albert argues that the district court abused its discretion by dismissing her first amended complaint without strictly enforcing the procedural requirements of Minn. R. Gen. Pract. 115.03. We review the district court's enforcement of a local rule for abuse of discretion. *See* Minn. Stat. § 484.33 (2012) ("[I]n furtherance of justice, [the General Rules of Practice] may be relaxed or modified in any case, or a party relieved from the effect thereof, on such terms as may be just."); *Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. App. 1991) ("Enforcement of local rules is left to the discretion of the district court."). In determining whether the district court's enforcement of a local rule constitutes an abuse of discretion, we consider whether the deviation was unfairly prejudicial. *See Nowicki v. Benson Props.*, 402 N.W.2d 205, 208 (Minn. App. 1987) (noting that the district court has discretion to relax its local rules, which are primarily for the convenience of the district courts, as long as it does not prejudice the parties).

Rule 115.03 requires a party to serve and file a notice of motion and motion, proposed order, any affidavits and exhibits, and a memorandum of law at least 28 days prior to the hearing on a dispositive motion. Albert contends that dismissal of her amended complaint without a second round of written arguments and a hearing was unfairly prejudicial. We disagree.

Albert had both prior notice of the school district's motion to dismiss her first amended complaint and an opportunity to respond to the merits of the school district's argument.[1] The school district filed a notice of motion and motion to dismiss Albert's first amended complaint four months before Albert appeared in court to argue her motion to interpose a second amended complaint and six months before the district court issued its order dismissing her first amended complaint. During this time period, the school district advised the district court and Albert's counsel twice by letter and a third time at the hearing on Albert's motion to amend that it did not believe additional briefing or argument were necessary. And Albert specifically defended the merits of her emotional-distress claims in her memorandum opposing the school district's first motion to dismiss. On this record, Albert's argument that she "never had the opportunity" to oppose dismissal of her first amended complaint is unavailing.

Moreover, Albert has not demonstrated how strict compliance with the procedural requirements of rule 115.03 would have prevented the dismissal of her claims. Besides using separate headings to distinguish her intentional- and negligent-infliction-of-emotional-distress claims, the first amended complaint does not include any new factual allegations or otherwise vary from the original complaint. Albert noted, in her written opposition to the first rule 12 motion, that her "[a]mended [c]omplaint only serves to clarify and relieve any doubt" as to the legal sufficiency of her original complaint. In short, Albert has not demonstrated any prejudice occasioned by the fact that she did not

[1] Albert does not challenge the dismissal of the other claims alleged in her original and first amended complaints.

have a second chance to brief and argue the merits of her emotional-distress claims. Accordingly, we conclude that the district court did not abuse its discretion by considering the school district's second rule 12 motion and turn to the merits of the motion.

When reviewing a district court's rule 12 dismissal of a case for failure to state a claim upon which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). We "must consider only the facts alleged in the complaint, accepting those facts as true," and our standard of review is de novo. *Id.*

To prevent fictitious and speculative claims, tort recovery for intentional infliction of emotional distress is limited to cases involving particularly egregious facts. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 866 (Minn. 2003). To recover on an intentional-infliction-of-emotional-distress claim, a plaintiff must establish four elements: "(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983). Extreme and outrageous conduct is conduct that is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Id.* at 439 (quotation omitted). And the distress must be so severe "that no reasonable [person] could be expected to endure it." *Id.* (quotation omitted).

The gist of Albert's claim is that "[b]y knowing and doing nothing about Davidson's conduct and behavior, [the school district] intentionally ignored or recklessly disregarded the foreseeable risk that [Albert] would suffer extreme emotional distress as a result of said conduct and behavior." The complained-of conduct and behavior includes Davidson not talking to Albert, telling her teammates not to talk to her, embarrassing and verbally attacking her in front of others, excluding her from team functions, and benching her during games. Although, as the district court observed, the display of such conduct by a high school coach may be characterized as childish and unprofessional, it cannot be said that it exceeds the boundaries of decency or is utterly intolerable to the civilized community. *See Langeslag*, 664 N.W.2d at 865 (holding that "insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not constitute extreme and outrageous conduct (quotation omitted)). It is unfortunate that Albert, or any other high school player, would be subjected to the hurtful conduct that Davidson allegedly displayed. But that fact does not make the conduct extreme and outrageous.

Moreover, Albert's claimed resulting emotional distress does not rise to the requisite severity level. Albert alleges she "suffered severe emotional distress, pain and suffering, fear, anxiety, embarrassment, discomfort and humiliation" as a result of Davidson's conduct and this distress prompted her to transfer to another school. Notably, Albert does not assert any facts to support her conclusory allegation that she experiences severe emotional distress; she only claims to suffer from general anxiety, depression, and embarrassment. This court has previously determined that these generalized complaints of distress do not establish distress beyond what a reasonable person could be expected to

endure. *See Elstrom v. Indep. Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. App. 1995) (concluding that "insomnia, crying spells, a fear of answering her door and telephone, and depression" do not sustain an intentional-infliction-of-emotional-distress claim), *review denied* (Minn. July 27, 1995); *Strauss v. Thorne*, 490 N.W.2d 908, 913 (Minn. App. 1992) ("General embarrassment, nervousness and depression are not in themselves a sufficient basis for a claim of intentional infliction of emotional distress."), *review denied* (Minn. Dec. 15, 1992). And Albert does not allege her emotional distress is sufficiently severe to require treatment. *See Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 144 (Minn. App. 1992) (determining that plaintiffs' distress did not reach the level of severity required by law where the plaintiffs were embarrassed or nervous but did not seek psychiatric, psychological, or other treatment for distress). Albert's intentional-infliction-of-emotional-distress claim fails to state a legally sufficient claim for relief.

Albert's negligent-infliction-of-emotional-distress claim likewise must meet rigorous requirements to survive a motion to dismiss. *See K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995) (acknowledging the historic concerns regarding the unintended and unreasonable results of negligent-infliction-of-emotional-distress claims). To prevail on this claim, a plaintiff must establish that she "is within a zone of danger of physical impact, reasonably fears for his or her own safety, and consequently suffers severe emotional distress with resultant physical injury." *Bohdan v. Alltool Mfg., Co.*, 411 N.W.2d 902, 907 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). The only exception to the zone-of-danger rule is when a plaintiff experiences mental anguish or

suffering resulting from "a direct invasion of his rights, such as defamation, malicious prosecution, or other willful, wanton or malicious conduct." *Id.* In all cases, a plaintiff must demonstrate physical manifestations of the severe emotional distress. *Soucek v. Banham*, 503 N.W.2d 153, 164 (Minn. App. 1993).

Albert has not alleged that she was in a zone of danger of physical impact or feared for her safety, and she does not assert a claim for direct invasion of her rights. Further, neither Albert's original nor first amended complaint alleges that she experienced physical manifestations of emotional distress. Accordingly, her negligent-infliction-of-emotional-distress claim is not legally sufficient to withstand dismissal under rule 12.

II. The district court did not abuse its discretion by denying Albert's motion for leave to file a second amended complaint.

"Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion." *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). "[A]mendments should be freely granted, except where to do so would result in prejudice to the other party." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see also* Minn. R. Civ. P. 15.01 ("[L]eave shall be freely given when justice so requires."). But "[a] motion to amend a complaint is properly denied when the additional claim could not survive summary judgment." *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

In her proposed second amended complaint, Albert alleges that the school district condoned and supported actions taken by Davidson that "were intended to and did in fact punish [Albert] for exercising her protected free speech rights under the First and Fourteenth Amendments to the United States Constitution and Article 1, § 3 of the Minnesota Constitution and protected by 42 U.S.C. § 1983." "To state a claim under 42 U.S.C. § 1983, a claimant must allege that the defendant(s), acting under the color of state law, violated his or her rights under the federal constitution or a federal statute." *Johnson v. Morris*, 453 N.W.2d 31, 34-35 (Minn. 1990). But "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037 (1978). In order to hold a school district liable, a claimant must "establish the existence of a governmental custom or failure to receive, investigate, or act on complaints of violations of constitutional rights" by proving

> (1) [t]he existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) [d]eliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) [t]hat plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

Doe v. Special Sch. Dist. of St. Louis Cnty., 901 F.2d 642, 646 (8th Cir. 1990).

The district court concluded that Albert's proposed section 1983 cause of action could not survive summary judgment. We agree. Albert alleges that, following a meeting between Albert, her parents, Davidson, and school district representatives,

Davidson stopped talking to her, told her teammates not to talk to her, and returned her equipment. But Albert does not allege that Davidson treated any other student in the same manner or that the school district authorized Davidson's conduct and behavior to such an extent that it became a school district pattern or custom. Because the new cause of action alleged in Albert's second amended complaint would not withstand a summary-judgment motion, the district court did not abuse its discretion by denying Albert's request for leave to file a second amended complaint.

Affirmed.