NO. COA03-574

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

PATRICIA ANN GIBBS,
Plaintiff-Appellant,

v. Guilford County
No. 00 CVS 5926

GUILFORD TECHNICAL
COMMUNITY COLLEGE,
Defendant-Appellee.

Appeal by plaintiff from order entered 7 October 2002 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 18 March 2004.

*Hicks McDonald Noecker LLP, by David W. McDonald, for plaintiff-appellant.*

*Smith Moore LLP, by Julie C. Theall and Shannon J. Adcock, for defendant-appellee.*

McGEE, Judge.

Patricia Ann Gibbs (plaintiff) filed suit in Guilford County Superior Court against Guilford Technical Community College (defendant) on 6 April 2000 alleging wrongful termination, breach of contract, and intentional infliction of emotional distress. Defendant filed a notice of removal to federal court on 24 May 2000. The Guilford County Superior Court declared the matter inactive and closed the case file without prejudice in an order filed 20 June 2000. Plaintiff filed a motion on 26 June 2000

requesting that the case be remanded to state court. In an order filed 23 July 2000, the United States District Court for the Middle District of North Carolina remanded the case to Guilford County Superior Court because defendant failed to demonstrate that the action arose under federal law.

Defendant filed a motion dated 17 August 2000 to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and to dismiss on the basis of a prior action on the same matters pending in federal court. The trial court entered an order to continue the motion on 18 September 2000. In an order filed 21 September 2000, the trial court denied defendant's motion to dismiss on the basis of a prior action pending and noted that defendant had withdrawn its 12(b)(6) motion. Our Court affirmed the trial court's order in an unpublished opinion, *Gibbs v. Guilford Technical Community College* (COA01-328), on 16 April 2002.

Defendant filed an answer to plaintiff's complaint on 28 May 2002 and moved for summary judgment in a motion dated 19 July 2000. Plaintiff filed a motion dated 2 August 2002 to continue defendant's motion for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(f). In a response dated 12 August 2002, defendant opposed plaintiff's motion for a continuance. In an order filed 7 October 2002, the trial court denied plaintiff's motion to continue and allowed defendant's motion for summary judgment. Plaintiff appeals.

Plaintiff was born with cerebral palsy, a neurological disorder. She earned degrees in elementary education, library

science, and special education. Plaintiff began her employment with defendant in September 1982 as a library assistant. Plaintiff alleged that she was touched inappropriately by a female supervisor in 1986. Plaintiff was transferred to the Compensatory Education Department (CED) on 17 September 1987. The CED educates adults with developmental disabilities with the primary diagnosis of mental retardation. Throughout the years, plaintiff held a variety of positions, and she was periodically assigned teaching positions.

Plaintiff was appointed as a full-time instructor for the 1996-1997 school year, encompassing the ten-month period from 1 July 1996 until 30 April 1997. By letter dated 7 April 1997, plaintiff was notified that because of her unacceptable performance, she was suspended for the duration of her employment agreement, and her contract would not be renewed for the following year. Despite the suspension, plaintiff was paid in full through 30 April 1997, the end of her contract term.

We note that defendant presented two cross-assignments of error. However, in light of our decision, we do not reach the two issues brought forward by defendant.

Several of plaintiff's assignments of error present the argument that the trial court erred by denying her motion to continue defendant's motion for summary judgment. Plaintiff cites several cases for the proposition that "it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery

has not been dilatory in doing so." Plaintiff contends that defendant failed to answer her discovery requests, that plaintiff was not dilatory in proceeding with discovery, and that plaintiff was prejudiced by defendant's incomplete and evasive responses to discovery. Accordingly, plaintiff argues that the trial court abused its discretion in denying her continuance motion. For the reasons stated below, we disagree.

"Motions to continue pursuant to Rule[] 56(f) . . . of our Rules of Civil Procedure are granted in the trial court's discretion." *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 721, 496 S.E.2d 607, 611 (1998). "Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision 'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.'" *Brewer v. Cabarrus Plastics, Inc.*, 160 N.C. App. 688, 690, 586 S.E.2d 819, 821 (2003) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)), *disc. review denied*, 358 N.C. 153, 592 S.E.2d 554 (2004).

In the case before us, plaintiff filed suit on 6 April 2000 and her motion to continue was not denied until 7 October 2002, two and one-half years after the lawsuit was filed. Plaintiff emphasizes, and we recognize, that discovery was not permissible during this entire period as a result of defendant's attempt to remove the action to federal court and because of an appeal to this Court on another issue. However, despite these lapses when discovery was not practical, plaintiff still had a total of almost

thirty-six weeks to conduct discovery: (1) 6 April 2000 until 24 May 2000, the time between the date the complaint was filed and the date the notice of removal to federal court was filed (7 weeks, 6 days); (2) 20 July 2000 until 20 October 2000, the time between when the case was remanded to state court and when defendant filed notice of appeal to this Court based on the trial court's denial of defendant's motion to dismiss (12 weeks, 5 days); and (3) 6 May 2002 until 26 August 2002, the time between when the mandate issued from this Court on the prior appeal and when the trial court heard plaintiff's motion to continue (16 weeks). Despite these opportunities for conducting discovery, plaintiff's first written discovery was dated and served on 13 June 2002. In defendant's response dated 15 August 2002, defendant objected to all but two of plaintiff's requests.

Plaintiff cites several cases as examples of this Court holding that a summary judgment motion was improperly heard and ruled upon. For example, in *Ussery v. Taylor*, 156 N.C. App. 684, 577 S.E.2d 159 (2003), our Court reversed the trial court's grant of summary judgment based on the plaintiff's argument that he was not given reasonable time to conduct discovery. In *Ussery*, the plaintiff filed the complaint on 13 December 2001 and served written requests for discovery the next day. *Ussery*, 156 N.C. App. at 684-85, 577 S.E.2d at 160. Approximately one month later, on 17 January 2002, the defendants filed a motion for summary judgment. *Id.* at 685, 577 S.E.2d at 160. The defendants responded incompletely to the plaintiff's requests on 5 February 2002. *Id.*

The plaintiff filed notices of depositions on 14 February 2002 to be taken in late April. *Id.* However, the defendants' summary judgment motion was heard on 20 February 2002 and granted on 25 February 2002. *Id.*

The facts of *Ussery* are distinguishable from those in the case before this Court. In *Ussery*, the plaintiff was prompt in filing his first discovery request. In our case, plaintiff's first written discovery request was not filed until over two years from the date of the complaint. Further, in *Ussery*, the summary judgment motion was heard and ruled upon approximately ten and one-half weeks after the complaint was filed. In contrast, summary judgment was not granted in the case before us until almost two and one-half years after plaintiff filed her complaint.

Plaintiff also cites *Kirkhart v. Saieed*, 107 N.C. App. 293, 419 S.E.2d 580 (1992), which involved a trial court prematurely granting a summary judgment motion. In *Kirkhart*, the plaintiff's first request for documents was served on 9 March 1990. *Kirkhart*, 107 N.C. App. at 294, 419 S.E.2d at 580. The defendants partially answered and objected and then subsequently filed a motion for summary judgment on 6 August 1990. *Id.* Ten days later, the plaintiff filed a motion to compel discovery. *Id.* At the 27 February 1991 hearing on the summary judgment motion, the plaintiff moved for a continuance based on the argument that there were outstanding discovery requests, an outstanding motion to compel production, and that the information sought was critical to the plaintiff's case. *Id.* The trial court denied the motions to

continue and compel and granted summary judgment in favor of the defendants. *Id.* However, our Court reversed because the plaintiff was prejudiced since he "did not have access to the documents necessary to establish his case by the time of the hearing[.]" *Kirkhart*, 107 N.C. App. at 297-98, 419 S.E.2d at 582.

The case before us is distinguishable on the ground that in *Kirkhart*, there was no evidence that the plaintiff was dilatory in seeking discovery. Furthermore, there was an outstanding motion to compel production of specific documents that the plaintiff had requested from the defendants. Our Court found that these documents were required in order for the plaintiff to establish his case. In contrast, in the case before our Court, as discussed above, there is evidence that plaintiff delayed in filing her first discovery request. Further, unlike *Kirkhart*, at the time of the summary judgment hearing in the instant case, there was no outstanding motion to compel production of documents. Thus, we do not find *Kirkhart* to be controlling.

In light of the significant amount of time plaintiff was afforded to conduct discovery prior to the hearing on the motion for summary judgment, we conclude that the trial court did not err in denying plaintiff's motion to continue. We recognize that defendant's response to plaintiff's request for documents was incomplete. However, due to plaintiff's dilatory tactics, we nonetheless hold that the trial court did not err. Accordingly, this argument is overruled.

Plaintiff next argues in multiple assignments of error that

the trial court erred by granting summary judgment in favor of defendant on plaintiff's breach of contract claim. Within this argument, plaintiff asserts three points: (1) that the trial court erred by concluding that her employment was for a definite term; (2) that defendant's nonrenewal of plaintiff's appointment was based upon an illegal and discriminatory motive; and (3) that the reasons defendant gave for nonrenewal were discriminatory on their face or transparent pretexts for discrimination. For the reasons stated below, we find plaintiff's argument to be without merit.

"Our standard of review from the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Herring v. Liner*, ___ N.C. App. ___, ___, 594 S.E.2d 117, 119 (2004). "To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach." *Claggett v. Wake Forest University*, 126 N.C. App. 602, 608, 486 S.E.2d 443, 446 (1997). Black's Law Dictionary 200 (8th ed. 2004) defines "breach of contract" as a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance."

In the present case, plaintiff was employed pursuant to a document that described her position and stated that her "appointment period" was from 1 July 1996 until 30 April 1997.

Plaintiff argues that her employment was based on "a written year-to-year contract" and that the contract "did not terminate automatically at the expiration of the appointment." As support for the assertion that her contract did not terminate automatically, plaintiff refers to a prior determination by the Employment Security Commission that plaintiff was not eligible for unemployment benefits when defendant reduced her appointment in 1989 from twelve months to ten months. The decision was based on the idea that plaintiff had reasonable assurance that she would provide services for defendant the following school year.

Plaintiff cites *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971) for her assertion that teaching contracts are year-to-year contracts. However, the language from *Still* which describes teaching contracts in this manner is from a specific statute which is not applicable to our case and is no longer in effect. *Still*, 279 N.C. at 260, 182 S.E.2d at 407. Contrary to plaintiff's contention, the relevant language from *Still* states that

> [t]he nature of school operations is such that, in the absence of evidence of a contrary intent, a contract for the employment of a school teacher is presumed to be intended by the parties to *continue to the end of the school year* and not to be terminable by either party prior to that time and without cause and without the consent of the other party.

*Still*, 279 N.C. at 259, 182 S.E.2d at 407 (emphasis added). Accordingly, plaintiff is not entitled to a presumption that her contract would continue for the 1997-1998 school year. Rather, plaintiff was appointed for a specific term which expired on 30 April 1997. Thus, the trial court did not err in finding that

plaintiff's employment was for a definite term.

Pursuant to defendant's "Management Manual," defendant "at its sole discretion, reserve[d] the right of nonrenewal of any employment agreements issued by the college." In this case, defendant exercised its right of nonrenewal by letter dated 7 April 1997. Although defendant exercised this right before plaintiff's appointment period expired, defendant paid plaintiff the balance of her salary due under the contract, thus performing its contract with plaintiff. Accordingly, the trial court did not err in granting summary judgment in favor of defendant on plaintiff's breach of contract claim.

We note that because plaintiff contends that her contract did not expire automatically, she takes her first argument one step further and asserts that she was terminated for reasons which contravene public policy. However, because we conclude that the trial court did not err in finding that plaintiff's contract was for a definite term, which defendant did not breach, we do not reach the additional argument asserted by plaintiff.

Plaintiff next argues the trial court erred by granting summary judgment in favor of defendant on plaintiff's claim for wrongful discharge in violation of public policy. In her complaint, plaintiff alleged that defendant terminated her because of her age and handicap, thus violating the public policy set out in N.C. Gen. Stat. § 143-422.2 (2003) which provides that

> [i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or

> abridgment on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

For the reasons stated below, we find plaintiff's argument unpersuasive.

It is well established that "'the tort of wrongful discharge arises only in the context of employees at will.'" *Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 174, 557 S.E.2d 577, 577 (2001) (quoting *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 588, 440 S.E.2d 119, 125, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994)), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002). *See also Houpe v. City of Statesville*, 128 N.C. App. 334, 343, 497 S.E.2d 82, 89, *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998) ("Wrongful termination may be asserted 'only in the context of employees at will,' and not by an employee 'employed for a definite term or . . . subject to discharge only for "just cause."'" (quoting *Wagoner*, 113 N.C. App. at 588, 440 S.E.2d at 125 (citation omitted)).

As stated above, we conclude that plaintiff was employed for a definite term and was not an employee at will. Accordingly, she cannot assert a claim for wrongful discharge in violation of public policy. Thus, we hold that the trial court did not err in granting defendant's motion for summary judgment on plaintiff's claim.

Plaintiff next argues the trial court erred by granting summary judgment in favor of defendant on plaintiff's claim of infliction of emotional distress. Plaintiff argues that under the

facts of the case before us, "intentional discrimination in employment in violation of N.C. Gen. Stat. § 143-422.2 is sufficient to support a claim for intentional infliction of emotional distress [IIED.]" As previously stated, N.C. Gen. Stat. § 143-422.2 provides that

> [i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

We note that plaintiff cites no cases to support her contention that intentional discrimination in violation of N.C. Gen. Stat. § 143-422.2 is "sufficiently outrageous to shock the collective conscience of the community[.]" For the reasons stated below, we do not find plaintiff's argument persuasive.

"The essential elements of IIED are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.'" *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (quoting *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (citation omitted)). "In ruling on a motion for summary judgment, whether a defendant's alleged acts may be reasonably regarded as extreme and outrageous is initially a question of law." *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987). "Conduct is extreme and outrageous when it is '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.'" *Smith-Price v. Charter Behavioral Health*, ___ N.C. App. ___, ___, 595 S.E.2d 778, 782 (2004) (quoting *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311 (citation omitted), *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985)). Furthermore, the statute of limitations for an IIED claim is three years. *See* N.C. Gen. Stat. § 1-52(5) (2003); *Carter v. Rockingham Cty. Bd. of Educ.*, 158 N.C. App. 687, 689, 582 S.E.2d 69, 72 (2003).

We agree with the trial court that defendant committed no acts within the three-year statute of limitations to support plaintiff's claims. Plaintiff's forecast of evidence shows that plaintiff may have been touched inappropriately by another employee in 1986, that she was transferred numerous times over the next ten years by defendant, that she was never promoted beyond the entry-level position of instructor, and that she was terminated from employment by defendant effective 30 April 1997. The inappropriate touching occurred fourteen years prior to the filing of plaintiff's complaint and thus falls well outside the statute of limitations. Similarly, plaintiff's last transfer occurred in December 1996, three years and four months before plaintiff filed her complaint. Therefore, all of plaintiff's transfers also fall outside the applicable statute of limitations. The only action by defendant falling within the statute of limitations is defendant's 7 April 1997 notice to plaintiff that plaintiff's employment contract would not be renewed for the next school year. This action does not rise

to the level of extreme and outrageous conduct by defendant. While plaintiff may have had strained working relations with defendant, defendant's actions toward plaintiff did not extend beyond "all possible bounds of decency[.]" *Smith-Price*, ___ N.C. App. at ___, 595 S.E.2d at 782 (citation omitted). Accordingly, we hold that the evidence presented by plaintiff does not demonstrate conduct rising to the level of extreme and outrageous conduct sufficient to support a claim for IIED and we affirm the trial court's granting of defendant's motion for summary judgment on this claim.

We also recognize that plaintiff emphasizes that she did not specify in her complaint whether she was alleging intentional infliction or negligent infliction of emotional distress (NIED). Plaintiff notes that the theories are separate from one another and have different proof requirements. Nonetheless, without citing any authority, plaintiff argues that the pleading requirements for NIED and IIED are the same. Thus, plaintiff argues that even if defendant's actions do not support a claim for IIED, defendant's actions certainly support a claim for NIED.

"To state a claim for intentional infliction of emotional distress ('IIED'), a plaintiff must allege facts showing that the defendant engaged in '(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another.'" *Chapman v. Byrd*, 124 N.C. App. 13, 19, 475 S.E.2d 734, 739 (1996) (quoting *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997). In contrast, "to state a claim for negligent

infliction of emotional distress, a plaintiff must allege that: '(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . ., and (3) the conduct did in fact cause the plaintiff severe emotional distress.'" *Hickman v. McKoin*, 337 N.C. 460, 462, 446 S.E.2d 80, 82 (1994) (quoting *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (citation omitted)). Contrary to plaintiff's assertion, the pleading requirements for NIED and IIED are not identical.

The allegations for plaintiff's third claim for relief, "infliction of emotional distress" are as follows:

> 33. The allegations of paragraphs 1-32 are incorporated herein by reference as if fully restated.
>
> 34. Defendant's conduct toward plaintiff is extreme and outrageous and exceeds all bounds usually tolerated by a decent society.
>
> 35. Defendant knew at the time of its actions that plaintiff was fragile, and that its actions would result in emotional distress to plaintiff. Defendant acted with callous disregard to the consequences of its treatment of plaintiff.
>
> 36. Defendant's conduct in fact caused severe emotional distress to plaintiff.
>
> 37. As a result of defendant's actions, plaintiff suffered severe emotional distress.
>
> 38. Plaintiff has suffered damages exceeding $10,000.00 according to proof at trial.

We hold that although plaintiff did not specifically designate in the claim heading whether she was alleging IIED or NIED, the substance of the allegations indicates that only IIED is alleged. Accordingly, we do not reach the issue regarding NIED.

Affirmed.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).