STATE OF MICHIGAN

COURT OF APPEALS

SHEILA KNUBBE,

Plaintiff-Appellant,

V

DETROIT BOARD OF EDUCATION, MAMIE HUMPHREY, MARVIN WEINGARDEN, BARBARA SCHLACHTER, WALTER MCLEAN, DOROTHY BLAKELY STANTON, IRENE NORDE, NADINE TIBBS-STALLWORTH, DETROIT FEDERATION OF TEACHERS, JOHN ELLIOT, and KEITH JOHNSON,

Defendant-Appellees,

and

MARVIN GREEN,

Defendant.

UNPUBLISHED
November 13, 2003

No. 240076
Wayne Circuit Court
LC No. 01-110323-CZ

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition to defendants Detroit Federation of Teachers, John Elliot and Keith Johnson ("the Union defendants") and defendants Detroit Board of Education, Mamie Humphrey, Marvin Weingarden, Barbara Schlachter, Walter McLean, Dorothy Blakely Stanton, Irene Norde and Nadine Tibbs-Stallworth ("the Board defendants"), pursuant to MCR 2.116(7) and (8) on the basis of res judicata, collateral estoppel, and the applicable statutes of limitation. We affirm.

I. FACTUAL HISTORY

Plaintiff was employed with the Detroit Public Schools for over thirty-five years – from January 28, 1963 until March 27, 1998 – teaching mathematics. Plaintiff alleges that until September 21, 1995, her performance as a teacher was never characterized as anything but satisfactory. However, on that date, the Board began to investigate complaints about plaintiff's

teaching performance and it was reported that she was not teaching from any plans and that her students were unruly and ill prepared. In January 1996, plaintiff was transferred to a different high school. Thereafter, she received unsatisfactory ratings and was charged with "Unsatisfactory Instructional Performance." Plaintiff ceased teaching in January 1997.

In March 1997, plaintiff was informed that the Union had decided not to arbitrate her grievances concerning the unsatisfactory rating the Board had given her. Following several hearings, in May 1997, the Board informed plaintiff that it had decided not to proceed on the charge "with the intent of terminating [her] employment with the Detroit Board of Education." Plaintiff filed an appeal with the State Tenure Commission (STC) on June 11, 1997. In February 1998, the STC hearing referee found that the Board established by a preponderance of the evidence that plaintiff "failed to plan, prepare, develop, and provide appropriate lessons and instructional activities to her students," and "failed to effectively control her students and maintain a proper atmosphere for learning." Thereafter, the Board terminated plaintiff's employment on March 27, 1998.

Plaintiff filed an appeal of the STC's order with this Court, which this Court dismissed for failure to file any exceptions below to the decision. See *Knubbe v Detroit Board of Education*¸ unpublished order of the Court of Appeals, entered July 14, 2000 (Docket No. 211020). Plaintiff also filed unfair labor practice charges against the Union and the Board before the Michigan Employment Relations Commission (MERC) under the Public Employment Relations Act (PERA), MCL 423.201 *et seq*., on September 26, 1997. In May 1998, the hearing referee of MERC recommended dismissal of plaintiff's charge as to the Union because "the Teacher Tenure Commission's decision that just cause existed for the Charging Party's discharge is a complete defense to her charge that the Respondent Detroit Federation of Teachers violated its duty of fair representation." With regard to the Board, the referee also found that plaintiff failed to state a claim for which relief could be granted. Plaintiff filed exceptions to the decision, and on remand was given the opportunity to file an amended charge setting forth the factual basis for her claims. In October 1998, the MERC dismissed plaintiff's action for failure to file an amended charge by August 31, 1998.

Plaintiff appealed the MERC's dismissal to this Court, which affirmed. *In re Detroit Bd of Ed*, unpublished opinion per curiam of the Court of Appeals entered February 16, 2001 (Docket No. 215333). The Michigan Supreme Court denied plaintiff's application for leave to appeal on November 30, 2001, and the United States Supreme Court denied her petition for a writ of certiorari on June 28, 2002.

Thereafter, plaintiff commenced the instant action on March 27, 2001, filing a six-count complaint alleging age discrimination, civil conspiracy, breach of employment contract, discharge against public policy, union's breach of duty of fair representation, and intentional infliction of emotional distress. On May 29, 2001, the Union and individual defendants Elliott and Johnson, moved for summary disposition pursuant to MCR 2.116(C)(7) and (8), arguing that the action was barred by res judicata, collateral estoppel, and the applicable statute of limitation, and asking for sanctions against plaintiff for filing a frivolous claim against them. Plaintiff sought to amend her complaint on September 7, 2001, seeking to add claims of fraud against the Board defendants and Union defendants.

Following a hearing on September 28, 2001, the trial court granted the Union defendants' motion for summary disposition, ruling that the claims against them were barred by res judicata and the statute of limitations. The trial court also denied plaintiff's motion for leave to file an amended complaint. On October 19, 2001, the trial court entered an order of dismissal with prejudice as to the Union defendants and imposed sanctions on plaintiff's counsel in the amount of $500 because the complaint against the Union defendants was frivolous under MCR 2.114(D) and (E). In the meantime, on October 12, 2001, plaintiff filed a motion to recuse the trial court for bias and prejudice against her. On October 26, 2001, the trial court denied the motion, and on November 20, 2001, the chief judge of the Wayne Circuit Court denied plaintiff's motion for recusal of the trial court.

Plaintiff also filed a second motion for leave to file an amended complaint on November 16, 2001, which the trial court denied. Meanwhile, on November 21, 2001, the Board defendants filed a motion for summary disposition based on the statute of limitations, collateral estoppel, and res judicata, pursuant to MCR 2.116(C)(7) and (8), which the trial court granted. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

This Court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(7), "the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties." *Kerbersky v Northern Michigan University*, 458 Mich 525, 529; 582 NW2d 828 (1998).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden, supra* at 119. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id*.

This Court reviews questions of law de novo. *In re Lafayette Towers*, 200 Mich App 269, 273; 503 NW2d 740 (1993). Whether a cause of action is barred by the statute of limitations is also reviewed de novo. *Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-341; 573 NW2d 637 (1997). Likewise, the applicability of res judicata and collateral estoppel are questions of law that we review de novo on appeal. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

III. REVIEW OF PLAINTIFF'S CLAIMS

A. SUMMARY DISPOSITION WITH REGARD TO THE BOARD DEFENDANTS

Assuming, arguendo that plaintiff correctly asserts that the trial court erred in dismissing plaintiff's claims based on the statute of limitations and res judicata, we nonetheless conclude

that the Board defendants were entitled to summary disposition with regard to each of plaintiff's claims on the basis of collateral estoppel. "Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). "An issue is necessarily determined only if it is 'essential' to the judgment." *People v Gates*, 434 Mich 146, 158; 452 NW2d 627 (1990), citing 1 Restatement Judgments, 2d, § 27, p 250, comment h, p 258. For collateral estoppel to apply, "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment[,] . . . the parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel." *Nummer v Treasury Dep't*, 448 Mich 534, 542; 533 NW2d 250 (1995). In order for collateral estoppel to apply to determinations made during prior administrative proceedings, "[t]he administrative determination must have been adjudicatory in nature and provide a right to appeal, and the Legislature must have intended to make the decision final absent an appeal." *Id*. Collateral estoppel applies to the findings of the STC, *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 125; 592 NW2d 408 (1998), even where the decision of the STC has not been reviewed on the merits by this Court, *Viera v Saginaw Bd of Ed*, 91 Mich App 555, 558-559; 283 NW2d 796 (1979).

In this case, central to each of plaintiff's claims is that she was wrongfully discharged from her teaching position. The gravamen of plaintiff's complaint is that the Board defendants' conduct in evaluating her performance as unsatisfactory and ultimately discharging her was improper and without factual support. The STC squarely addressed this issue and determined that the Board defendants did not act improperly in finding plaintiff's performance as a teacher to be unsatisfactory and in discharging her on that basis. Thus, the STC fully adjudicated and determined that plaintiff's discharge was for cause. Further, with regard to plaintiff's claim that an Individualized Development Plan (IDP) had not been developed for her as required by the Teachers' Tenure Act and plaintiff's contract, the STC found that there had been an IDP prepared, with plaintiff's input, and that the IDP had been provided to plaintiff. Under the standards set forth in *Nummer*, *supra*, plaintiff is collaterally estopped from relitigating the question of whether she was properly discharged for cause and whether the proper procedures regarding the IDP had been followed. Because the question whether plaintiff was properly discharged is essential to each of her claims against the Board defendants, these defendants were entitled to summary disposition under MCR 2.116(C)(7) on the basis of collateral estoppel.

B. SUMMARY DISPOSITION WITH REGARD TO THE UNION DEFENDANTS

At the outset, we agree with the Union defendants that each of plaintiff's claims against them are cognizable only as an unfair representation claim and that res judicata barred relitigation of the claim. *Vaca v Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967); *Steele v Louisville & N R Co*, 323 US 192; 65 S Ct 226; 89 L Ed 173 (1944); *Goolsby v Detroit*, 419 Mich 651, 664; 358 NW2d 856 (1984); *Lamphere Schools, supra* at 116-117. Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same

parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Res judicata bars litigation in a second action not only of claims actually litigated in the first action, but also of claims arising out of the same transaction, which the parties, exercising reasonable diligence, could have litigated, but did not. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

Plaintiff's complaint alleges, in substance, that the Union defendants failed to properly represent her in her conflicts with the Board defendants. Plaintiff's claims against the Union defendants, however, are subsumed under the unfair representation claim, which was litigated or could have been litigated in the MERC. Additionally, there is sufficient identity of parties for res judicata purposes. The teachers union was a party to the administrative proceedings. In addition, defendants John Elliot, a former officer of the union, and Keith Johnson, a member of the union's professional staff, are in privity with the union because they are or were agents of the union. See *Viele v DCMA*, 167 Mich App 571, 580; 423 NW2d 270 (1989) (defining "privity" to include "a person so identified in interest with another that he or she represents the same legal right"). Further, the MERC's order dismissing plaintiff's unfair labor practice charge against the Union defendants and the Board defendants constituted an adjudication on the merits for res judicata purposes. See *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 399 Mich 449, 457-458; 249 NW2d 121 (1976). Finally, this Court's affirmance of the MERC's order dismissing plaintiff's unfair labor practice charge has res judicata effect for purposes of subsequent actions between these parties (plaintiff and the teachers union) and their privies. Therefore, the trial court properly granted summary disposition to the Union defendants on the basis of res judicata. *Pierson Sand, supra* at 380-282.

We also agree that plaintiff's claims against the Union defendants were barred by MCL 423.216(a), which prescribes a six-month period of limitation for breach of the duty of fair representation. *Leider v Fitzgerald Ed Ass'n*, 167 Mich App 210; 421 NW2d 635 (1988). Any claim that the union did not fairly represent plaintiff before the STC was known to plaintiff at least by September 26, 1997, the date she filed her unfair labor practice charge with the MERC against the Union defendants and the Board defendants. Accordingly, because plaintiff's claims against the Union defendants were cognizable only as a breach of the duty of fair representation, her subsequent complaint, filed on March 27, 2001, was time-barred. Thus, summary disposition on the basis of the statute of limitation was proper.

Although the trial court did not reach the issue of collateral estoppel when granting the Union defendants' motion for summary disposition, we find the Union defendants correctly argue that this provides an additional basis for affirming the trial court's order. As discussed previously, because plaintiff's claim that she was wrongfully discharged is the foundation for each of her claims against the Board defendants, and because this issue was previously decided adversely to plaintiff, the Union defendants were also entitled to summary disposition under MCR 2.116(C)(7) on the basis of collateral estoppel. *Dearborn Heights School Dist No 7 v MEA/NEA*, 233 Mich App 120, 124-131; 592 NW2d 408 (1998).

C. PLAINTIFF'S MOTION TO AMEND HER COMPLAINT

We conclude that the trial court did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint to add two counts of fraud against the Board and Union defendants. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phillips v Deihm*,

213 Mich App 389, 393; 541 NW2d 566 (1995). This Court has held that an independent action for fraud may not be maintained on the basis of intrinsic fraud, which arises out of the action itself. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). However, under the fraud exception to res judicata, a prior judgment may be challenged for extrinsic fraud, which arises outside the facts of a case. *Id*.

In *Daoud v De Leau*, 455 Mich 181; 565 NW2d 639 (1997), the Court found that an independent action for fraud arising out of the conduct of a party to a lawsuit does not exist, concluding that "Where statutes and court rules provide effective means for dealing with a judgment fraudulently obtained through perjury, it is neither sound law nor sound policy to permit a separate action for fraud." *Id*. at 200. Accordingly, under *Daoud*, plaintiff may not litigate her fraud claims in the present action. As stated by the Court, this result is founded upon "[t]he confluence of principles related to res judicata, collateral estoppel and proximate cause" and need for finality in litigation. *Id*. at 202. Further, to the extent that plaintiff asserts fraud with respect to the IDP, an amendment would have been futile because of the collateral estoppel effect of the STC's finding that an IDP had been prepared.

D. PLAINTIFF'S MOTION FOR RECUSAL

We also conclude that the trial court did not err in denying plaintiff's motion for recusal. Plaintiff failed to show actual bias or prejudice to warrant disqualification. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495-497; 548 NW2d 210 (1996). While the trial court ruled against plaintiff on various matters, this does not establish bias or prejudice for purposes of disqualification under MCR 2.003. The gist of plaintiff's claim of impropriety and bias is based on the trial court's alleged reactions and facial expressions in court. However, the record reveals that the proceedings in this case were far from sedate. Under the circumstances, we find that the record does not indicate that the trial court was prejudiced against plaintiff.

We likewise find that the trial court did not err by awarding the Union defendants $500 in sanctions under MCR 2.114 on the ground that plaintiff's complaint against them was frivolous. *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). We agree with the Union defendants that, by filing a complaint against them alleging a breach of their duty of fair representation long after the MERC had already decided this matter adversely to plaintiff, and after this Court had affirmed the MERC's decision, plaintiff and her counsel disregarded that the claim was barred by res judicata, collateral estoppel, and the statute of limitation. Under the circumstances, the trial court did not clearly err in awarding a sanction of $500.

We reject, however, the Board defendants' and the Union defendants' requests for sanctions under MCR 7.216(C)(1). MCR 7.216(C)(1) permits sanctions if this Court determines that an appeal is vexatious. This Court has imposed sanctions when an appeal is without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 268; 548 NW2d 698 (1996). In this case, we are not convinced that plaintiff's appeal is vexatious. See *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991); *Richardson v DAIIE*, 180 Mich App 704, 709; 447 NW2d 791 (1989).

E. CONSTITUTIONAL VIOLATIONS

Finally, we find no merit to plaintiff's claim that the trial court repeatedly violated her federal constitutional rights, including her rights under the First Amendment, the Ninth Amendment, and the Fourteenth Amendment, as well as her civil rights and human rights. The record discloses that plaintiff has been accorded the process due her under the federal and state constitutions.

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper