LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT

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Kathryn L. McGraw,
Plaintiff/Appellant

CASE NO. A-030-01115
(Tribal Court Case No. C-206-0115)

v.

The Estate of Albert Colby Jr.,
Defendant/Appellee

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OPINION AND ORDER

This case arises from a workplace romance between Appellant Kathryn McGraw and her former supervisor, the Decedent, Albert Colby Jr. Appellant asks this Court to reverse the Tribal Court's order that granted summary disposition in favor of the Appellee, the Estate of Albert Colby Jr.

I. Background

Appellant commenced her employment in January of 2013 as the Administrative Assistant for the Tribal Administrator, Mr. Albert Colby Jr. The two entered into a consensual romantic relationship in June of 2014, when, while in Grand Rapids for work-related training, the Appellant accepted an invitation from Mr. Colby to accompany him "to dinner and [a] show." FAC ¶¶ 20-21. In the weeks that followed, fearing their relationship would cost him his job, the decedent pressured her to quit hers. During their

first conversation, in response to decedent's statement that "one of us has to resign and it's not going to be me," FAC ¶ 35, Appellant refused to resign. During a second conversation, Appellant acquiesced to his demand in hopes of placating him. Shortly thereafter, she re-asserted that she would not resign, only to be met with screaming that led her repeat her offer to resign. On July 17, 2014, she tendered a letter of resignation drafted by Mr. Colby, ending her employment two weeks later.

Appellant initiated this action on January 27, 2015. The First Amended Complaint (FAC) seeks redress for two counts. The first count pleads violations of the Fair Employment Statute, alleging that Mr. Colby "alter[ed] the terms and conditions of [Appellant]'s employment based on the[ir] sexual relationship," FAC ¶ 47, and "on verbal and sexual conduct that occurred between" the parties. FAC ¶ 48. The second count alleges intentional infliction of emotional distress (IIED) in violation of the Naawchigedaa Torts Statute (Torts Statute). She needed counseling "to deal with the emotional harm caused by" Mr. Colby, FAC ¶ 59. His actions caused her to suffer "severe emotional distress," FAC ¶ 60.

The Appellee filed for summary disposition on the grounds that "the plaintiff's claim under the FES is untimely and because plaintiff's 'Intentional Infliction of Emotional Distress' count fails to state a claim upon which relief can be granted and/or lacks a genuine issue of material fact necessary to support the claim." Brief in Support of Motion for Summary Disposition p. 2-3. Following a hearing, the Court granted the motion by Order and Opinion dated October 23, 2015. The Court refused to toll the 180-day filing deadline, concluding that the plain language of the FES barred the fair employment claim. The Court also disposed of the IIED claim, holding that "none of the purported conduct contains that extra element of intentional cruelty necessary for the Court to conclude that it was outrageous or exceeded all bounds of decency." Opinion at 4-5. Further, the claim did "not include the requisite degree of emotional distress for an IIED claim under the Torts Statute." *Id.* at 5.

Ms. McGraw timely appealed on November 19, 2015, identifying the three bases for dismissal as erroneous.[1] She seeks to reinstate both FES and IIED claim. As to FES, she argues that the Court should have equitably tolled the FES's 180-day filing deadline. As to IIED, she maintains the claim is cognizable because (1) Appellee's conduct was outrageous as a matter of law, and (2) Appellant suffered severe emotional distress. Oral arguments were set for May 13, 2016, but the parties stipulated to adjourn the hearing after Mr. Colby walked on April 30. The parties requested a status conference by letter received by the court clerk on November 29, 2016. The Court ordered the substitution of the Estate of Mr. Colby as Appellee on January 17, 2017, and heard oral arguments from the parties during a status conference held February 3, 2017.

[1] During a scheduling conference held December 21, 2015, Justice Cahill disclosed that he represents a mutual client with co-counsel for the Appellee, William Rastetter. Appellant consented to Justice Cahill's participation in the conference, but objected to participation in further proceedings. The Court determined that disqualification was not warranted because "Justice Cahill has not previously been and is not currently 'in practice with' William Rastetter within the meaning of LTBB Court Rule 5.203(C)(2)." Modified Scheduling Order, February 16, 2016.

II. Jurisdiction

Article IX, Section C, paragraph 1 of the Constitution of the Little Traverse Bay Bands of Odawa Indians states that "[t]he judicial power of the Tribal Court shall extend to all civil and criminal cases arising under this Tribal Constitution, statutes, regulations, or judicial decisions of the Little Traverse Bay Bands of Odawa Indians." Furthermore, paragraph 5 of Article IX, Section C states that "[t]he Tribal Appellate Court shall have jurisdiction over any case on appeal from the Tribal Court."

III. Standard of Review

A motion for summary disposition under LTBB Court Rule XVII "shall be granted by the Court if it appears there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." LTBB Court Rule XVII. The Tribal Court's decision on a motion for summary disposition is a conclusion of law that the Appellate Court reviews *de novo*, without deference to the decision of the lower court. LTBB Rule of Appellate Procedure 7.501(E)("A conclusion of law shall be reviewed by the Tribal Appellate Court *de novo, i.e.*, reviewed as though it is the first time for the matter to be decided.").

IV. Analysis

The Tribal Court granted summary disposition under LTBBRCP XVI(b)(6), which authorizes dismissal where a complaint fails to state a claim upon which relief may be granted, and XVII, summary disposition. Where, as here, "matters outside the pleadings are presented to and not excluded by the Court, the [XVI(b)(6)] motion shall be treated as one for summary disposition and disposed of as provided in Rule, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule." LTBBRCP XVI.

Under LTBBRCP XVII, the Court shall grant a motion for summary disposition "if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This Court has yet to articulate a legal standard for summary disposition under Rule XVII. The quoted language is nearly identical to Michigan Court Rule 2.116(C)(10), and in formulating the standard applicable to a motion for summary disposition, the case law of Michigan courts applying parallel language is instructive.

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A court must consider the pleadings, affidavits, depositions, admissions, other documentary evidence, and the inferences that can be drawn therefrom in the light most favorable to the nonmoving party. *Ross v. Auto Club Group*, 269 Mich. App. 356 (2006). Once the moving party satisfies its initial burden through such evidence, "[t]he burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof

at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Quinto v Cross & Peters Co.*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (internal citations omitted).

The Appellant asks this Court to overturn the Tribal Court's decision dismissing both counts of the Complaint. First, she avers that Mr. Colby forced Ms. McGraw to resign her position, altering the terms of her employment in violation of the Fair Employment Statute. See FAC, ¶¶ 47-48. Second, she alleges he caused her "emotional harm," FAC, ¶ 62, "which resulted in her suffering severe emotional distress in violation of the Naawchigedaa Torts Statute," FAC ¶ 63. We address the claims in turn.

A. Fair Employment Statute claim

In enacting the Fair Employment Statute ("FES"), the Tribal Council observed that the Tribal Government and its economic enterprises serve sometimes conflicting objectives of "preserving tribal heritage while adapting to the present world . . . ." WOTCL §14.101. Striking a balance between the two, the FES legislatively embodies "traditional cultural values" in the form of "fair employment rights." *Id.*

One such adaptation to the modern world enshrines sovereign immunity, a legal principle that empowers governments to dictate the terms on which they are subject to litigation. The FES does just that. It delineates the conditions for an aggrieved individual to bring a charge of employment discrimination, and prescribes the extent to which the Tribal Council waives the immunity in WOTCL §14.104(A) and (B). The latter provides:

> The Tribe clearly and expressly waives its sovereign immunity to Equitable Remedies as set forth in this Statute for officials, individual employees and/or managers and the Tribe clearly and expressly waives its sovereign immunity for Damages for officials, individual employees and/or managers who act beyond the scope of their duties and authority in which the actions include either acting with malice or with reckless indifference to the rights afforded under this Statute as set forth within in Statute and limits such waiver to remedies as set forth within this Statute.

WOTCL §§14.105 and 14.106 further limit an FES suit. Appellant invokes §14.106, entitled, "Remedies before the Tribal Court for Violations by an Individual Employee or Manager." Subsection (1) states that a "charge of violation must be filed with the Tribal Court within one-hundred and eighty (180) days of the alleged violation."

This Court examined §14.105, a companion to §14.406, in *Shomin v. LTBB*, A-020-0212 (2015). In *Shomin*, an FES claim was filed "approximately three years after the alleged violation," *id.* at 1, and the Tribal Court dismissed the complaint as barred by the Tribe's sovereign immunity. Without referencing sovereign immunity, this Court affirmed "that the Tribal Court was correct to conclude that the complaint was barred for untimeliness."

Id. at 2. Before that, the Tribal Court construed the same provision in *Wemigwase v. Little Traverse Bay Bands of Odawa Indians*, C-138-1111 (LTBB Tribal Ct 2013), a case filed about four months after the FES claim accrued. The court dismissed the complaint "as barred by the statute of limitations," *id.* at 6, holding it "lacks the subject matter jurisdiction for any action brought outside the 180-day statutory limit." *Id.*

Returning to the facts at hand, more than 180 days elapsed between the alleged violation and the date the complaint was filed. Appellant concedes she missed the cutoff, but proposes it can be equitably tolled, or suspended, because the statutory deadline does not deprive the Court of jurisdiction to hear the matter. Directing the Court to federal jurisprudence, she suggests that §14.104 serves as a claim-processing rule that serves only "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Under federal law, the upshot is that where Congress waives immunity for a limited time without tying the time limit to jurisdiction, courts retain their discretion to toll the deadline. See *United States v. Wong*, 135 S.Ct. 1625 (2015)(slip op., at 12-13). Appellant suggests the same analysis should revive her FES claim.

The history of Appellant's precedents is important. In *Wong*, the Supreme Court considered two claims ostensibly barred by operation of the Federal Torts Claims Act's (FTCA), 28 U.S.C. §2401(b), statutes of limitations. The FTCA states that a claim "shall be forever barred" unless it is presented to the proper federal agency within two years of accruing, and where denied by the agency, appealed in an appropriate court within six months. *Id.* In the first case, a plaintiff sued the Immigrant and Naturalization Service for false imprisonment. *Id.*, at 2. To consolidate her FTCA claim with related claims in a separate suit, she requested leave to amend her complaint. *Id.* The federal district court granted the plaintiff leave, but not until after the six-month filing deadline, costing her the FTCA claim. *Id.*, at 2-3. The Ninth Circuit Court of Appeal, sitting en banc, determined that the time limits are not jurisdictional, making equitable tolling an option. *Id.* In the second case, a car on a highway in Arizona crashed through a median barrier, killing a passenger. *Id.*, at 3. The passenger's family sued the State of Arizona, and four years into the litigation learned that the Federal Highway Administration (FHWA) had approved the barrier without crash-testing and concealed its negligence. *Id.* The family brought an FTCA claim in a district court, which dismissed because the two-year statute of limitations foreclosed a tort claim. *Id.* On appeal, the Ninth Circuit applied its decision in the first case, reversing the district court. *Id.*

Before the Supreme Court on a writ of certiorari, the government argued that the expiration of an FTCA deadline eliminated courts' jurisdiction because Congress conditioned the FTCA's waiver of sovereign immunity on strict compliance with the statutory requirements. *Id.* at 14-15. The Court disagreed because in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), it had proclaimed that immunity waivers are deemed jurisdictional only where the statute clearly so states. *Id.* at 15. As a result, the Court held, the FTCA filing deadlines are not jurisdictional and are subject to equitable tolling as circumstances warrant. *Wong* thus preserved the rule announced in *Irwin*, "that

the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. 89, 95-96.

As in *Irwin* and *Wong*, this Court faces the question whether strict construction of an immunity waiver precludes the court from equitably tolling a time limit where tolling normally would be available in a suit against non-government defendants. The question is a matter of legislative intent, which must be discerned from the language and structure of the FES. If the Council intended the Court's tolling authority to extend to the FES, then the Court can assess whether the circumstances warrant tolling; if not, then the Court may not hear a filing after the time limit, regardless of the reason it was tardy.

As noted above, sovereign immunity enables a legislature to control the terms on which the government is subject to legal action. In deference to the Council's determination, waivers of sovereign immunity are strictly construed. However, the Court in *Irwin* observed that equitable tolling "amounts to little, if any, broadening of the congressional waiver." *Id.* at 96. And the analysis can cut in either direction: Refusal to toll could produce in an immunity waiver narrower than the Council intended. See *id.* at 94. With these considerations in mind, we examine the statute.

The FES provides that "the Tribe clearly and expressly waives its sovereign immunity for Damages for officials, individual employees and/or managers who act beyond the scope of their duties and authority in which the actions include either acting with malice or with reckless indifference to the rights afforded under this Statute . . . **and limits such waiver to remedies as set forth within this Statute."** WOTCL §14.104(B)(emphasis supplied). Because the waiver of immunity is limited "to remedies as set forth within the Statute," and the remedies provision, WOTCL §14.106(A), precludes the filing of a charge after 180 days of the alleged violation, sovereign immunity bars Appellant's claim.

To the Supreme Court, "it makes no difference that a time bar conditions a waiver of sovereign immunity" because the Court previously opted "to treat time bars in suits against the Government, whenever passed, the same as in litigation between private parties." 135 S.Ct. 1625 (slip op., at 18). But the decision referenced in *Wong* was made to repair inconsistency across the Supreme Court's statutes of limitation cases. This Court has no parallel commitment because no such inconsistency exists in this jurisdiction.

On the other hand, the jurisdictional grant in WOTCL §14.103(A) is separate from the statutory filing deadline in WOTCL §14.106(A). As Appellant points out, this statutory structure has been construed as evidence of legislative intent to allow equitable relief. *Id.*, at 8 ("This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional."). Additionally, traditional Odawa values favor fully adjudicating the matter. Among the invaluable wisdom Andrew J. Blackbird disclosed, he relayed the custom of Odawa ogemak to hear and resolve disputes on the merits. Appellant contends that this custom carries greater force where the defendant is an individual — enough force that this Court should depart from *Shomin* by applying a different standard for individuals.

On balance, we think it unwise to create different rules, particularly because the FES prescribes identical time limits for suits against the Government and individuals. Moreover, where the documented practices of the ogemak and the Constitution, laws, and court rules adopted by the Tribe collide, this Court is bound to enforce the latter. WOTCL §14.106(A) requires that "[a]ny charge of violation must be filed with the Tribal Court within one-hundred and eighty (180) days of the alleged violation." We hold that the Court lacks jurisdiction to adjudicate an FES charge unless the plaintiff strictly complies with the statute of limitations. It is up to the Council to craft exclusions to the deadlines, as it has in the Naawchigedaa Torts Statute.[2]

In any event, "plaintiff cannot show that [s]he is entitled to equitable tolling even if federal tolling principles are applied." *McClure v. City of Detroit*, Case No. 2:11-CV-12035 (E.D. Mich. 2014). As a general matter, equitable tolling is appropriate in exceptional circumstances. The Supreme Court, for example, has permitted tolling where a plaintiff filed on time, but in the wrong jurisdiction, "or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. 89, 97 (internal citations omitted). Similarly, in *Wong*, bureaucratic delay was responsible for one missed deadline, and concealment by a federal agency of evidence responsible for the second. Appellant offers no such reasons for missing the filing deadline. As in *Irwin*, "the principles of equitable tolling described above do not extend to what is, at best, a garden variety claim of excusable neglect." *Irwin*, at 96. For these reasons, we cannot countenance Appellant's non-compliance with the FES.

B. Intentional Infliction of Emotional Distress under the Torts Statute

Count II of the Complaint alleges the decedent intentionally inflicted emotional distress on Appellant in violation of the Naawchigedaa Torts Statute. The Tribal Council enacted the Torts Statute "[t]o provide civil remedies to private persons . . . who are injured by the wrongful acts of others." WOTCL §6.5302. A cause of action arises "when the defendant engages in extreme and outrageous conduct that cause the plaintiff to suffer severe emotional distress." WOTCL §6.5306(A)(4). An IIED charge involves four elements: (1) the defendant engaged in extreme and outrageous conduct; (2) with intent or recklessness; (3) that caused; (4) the plaintiff to suffer severe emotional distress. To establish a prima facie IIED case, a plaintiff must establish all four elements. The motion for summary disposition tests whether the allegations sustain a cause of action with respect to elements one and four. We do not reach the fourth element, because the decedent's conduct was insufficiently extreme and outrageous.

1. Extreme and outrageous conduct

The motion for summary disposition asserts the Complaint failed to state an IIED claim upon which relief could be granted because the decedent's alleged behavior did not rise to the level of extreme and outrageous conduct.

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[2] Section V, Statute of Limitations, provides: "A plaintiff seeking relief under this Statute must file his or her claim with the Tribal Court within three years of the date that the injury occurs or becomes known."

The Statute provides, by way of example, that "outrageous conduct is conduct without just cause or excuse and exceeds all bounds of decency. Such conduct can be proven by a showing of continuous and repetitive conduct, conduct by a superior or someone in a supervisory position, conduct directed at young children, the elderly, or a person who has a medical condition that causes him or her to be particularly sensitive to such conduct, or any other conduct that a reasonable person would consider to be outrageous." WOTCL 6.5306(A)(4)(b). Appellant proposes that any behavior in these circumstances is *per se* (i.e., "in itself" or inherently) outrageous. If Appellant is correct, then the decedent's actions establish the first element of the claim because he was her direct supervisor.

Applying the canon of construction *ejusdem generis* (Latin for "of the same kind") to the series, the final phrase, "any other conduct that reasonable person would consider to be outrageous," extends to the preceding examples the proposition that a reasonable person would consider them outrageous. As a matter of statutory construction, subsection (b) lends itself to an interpretation deeming each of the examples in the series *per se* outrageous. Applied here, the plain language of the statute would dictate that outrageous conduct "can be proven by a showing of . . . conduct by a superior or someone in a supervisory position . . ." WOTCL 6.5306(A)(4)(b).

Problematically, however, "conduct" is included in the supervisory relationship example, and in every other example in WOTCL 6.5306(A)(4)(b)'s series. In other words, none of the examples describes "conduct"—they describe situational context. As a result, categorizing the examples as *per se* outrageous would mean that every interaction between every supervisor and a subordinate is outrageous. Given that outrageous conduct is "without just cause or excuse and exceed[ing] all bounds of decency," it is exceedingly unlikely the Council intended to designate as outrageous all supervisory conduct. Moreover, the examples refer only to outrageous conduct, not to the full element, extreme *and* outrageous conduct. The Statute does not define extreme conduct, and these modifiers typically are not defined in isolation. According to the Restatement (Second) of Torts, "[l]iability has been found only where the conduct has been 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." §46, Cmt. d (1965).

In practice, assigning the label "extreme and outrageous" to all conduct by a superior is not viable. The more sensible and harmonious reading accounts for the potential for authority figures to injure their subordinates through an abuse of their position. A supervisor's behavior still must "exceed[] all bounds of decency" and be "utterly intolerable in a civilized community" to qualify as extreme and outrageous. Having rejected the argument that supervisory conduct automatically satisfies the first element of an IIED claim, the question before the Court is whether the decedent's combative argumentation and shows of anger were utterly intolerable actions that exceeded all bounds of decency.

The brunt of the conduct at issue occurred during July of 2014. Prior to that, during a span of a few days in June of 2014, the Appellant first broached the topic of her "relationship issues," ¶ 18, accepted the decedent's invitation to "dinner and show," ¶¶

21-22, and became "romantically involved" with him. ¶ 23. About two weeks after those developments, in regard to Appellant's former boyfriend, the decedent remarked "that he 'knew someone who could kill for him and get away with it.'" ¶ 27. The decedent researched the personnel manual and other laws, and shared with Appellant his belief that no specific provision prohibited their relationship. ¶ 29. Nevertheless, in the days that followed the decedent "became extremely concerned that co-workers would find out about the[ir] relationship." ¶ 31. He "repeatedly engaged in conversations . . . trying to convince [Appellant] to resign." ¶ 55. As his suspicions grew that government colleagues were aware of the parties' relationship, the conversations escalated into arguments, see ¶¶ 34-39, and he became "extremely angry, he yelled at [Appellant] during these exchanges and physically intimidated [Appellant] in an attempt to coerce her into resigning. ¶ 56. She tried, during a third argument, to walk back her prior agreement, to which the decedent responded "[y]ou said you were going to resign . . . You have not seen my temper." Deposition Transcript, at 69. Feeling threatened by this statement, she again consented to resign. ¶ 59. Later that day, she turned in a two-week resignation notice drafted by the decedent. ¶ 60.

Even accepting the allegations as true, and even as "conduct by a superior," the conduct alleged is not "without just cause or excuse and exceed[ing] all bounds of decency." The record evinces a romantic relationship both parties rushed into without foresight. Concerned about the incompatibility of their romantic relationship with their employment, the decedent impelled Appellant to make her employment a casualty in order to continue their romantic relationship. Absent from any of their communications is any threat more concrete than "you have not seen my temper." None of the decedent's actions or words, including his offhand assertion that he knew someone who could kill, manifest specific ill will toward Appellant.

In the context of a surreptitious intimate relationship that the parties mutually decided to hide from their colleagues, this pattern of behavior does not nearly approach "extreme and outrageous." Rather, the conduct pertains to a disagreement with a domestic dynamic that derives from the parties' conscious choice to pursue a romantic relationship at the risk of jeopardizing their employment. There are no factual developments that could establish a genuine dispute as to the outrageousness of the decedent's conduct, which is therefore an insufficient predicate to state an IIED cause of action.

V.

The Appellate Court **AFFIRMS** the decision of the Tribal Court granting the Motion for Summary Disposition.

SO ORDERED.

/s/
HONORABLE SEAN E. CAHILL

Dated: September 6, 2017