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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2011-2012

2101017

Vannessa McGlathery

v.

Alabama Agricultural and Mechanical University et al.

Appeal from Madison Circuit Court
(CV-10-901609)

BRYAN, Judge.

Vannessa McGlathery appeals from a judgment granting the Rule 12(b)(6), Ala. R. Civ. P., motions to dismiss of Alabama Agricultural and Mechanical University ("the university"); the Board of Trustees of the university ("the board"); the

individual members of the board ("the board members"), in their official capacities;[1] Dr. Andrew Hugine, Jr. ("the president"), the president of the university, in his official capacity; and Nancy Washington Vaughn, the university's director of human resources, in her individual capacity. We affirm.

Procedural History

On December 16, 2010, McGlathery sued the university, the board, the board members, the president, Vaughn, and Dr. Tommy Coleman, a member of the university's faculty.[2] McGlathery's complaint contained the following pertinent factual allegations:

> "7. Plaintiff, Vannessa McGlathery commenced employment with the University as a Technical Assistant in approximately 1998.
>
> "8. In approximately 2006, Ms. McGlathery was assigned to serve as Administrative Support Coordinator at the AAMU Research Institute ('AAMURI').

[1]The board members are Dr. Raymond Burse, James Montgomery, Odysseus M. Lanier, Rev. D. Tom Bell, Jr., Norman Hill, Chasidy Privett, Chris Robinson, Jerome Williams, Andre Taylor, and Lucien B. Blankenship.

[2]Dr. Coleman is not a party to this appeal; therefore, we have omitted any discussion of the claim against him.

"9. AAMURI's facilities are located on the University's campus, but AAMURI is not a state agency and is not a subsidiary of the University. Rather, AAMURI is a Section 501(c)(3) nonprofit corporation and is a private entity independent of the University.

"....

"11. While working at AAMURI, Ms. McGlathery served as a dual employee of both the University and AAMURI.

"....

"22. On or about July 20, 2010, Nancy Washington Vaughn issued a letter stating that Ms. McGlathery's employment with the University would end on August 6, 2010.

"23. Ms. Vaughn has no authority to terminate any employee of the University.

"24. On or about August 6, 2010, Ms. McGlathery instituted a grievance alleging that her employment with the University had been improperly terminated.

"25. On or about August 11, 2010, Ms. Vaughn issued a letter to Ms. McGlathery stating that Ms. McGlathery was not eligible to file a grievance because she had not been an employee of the University. Ms. Vaughn's letter to Ms. McGlathery stated in pertinent part as follows:

> "'The Office of Human Resources has determined that the matter for which you seek redress is not subject to the [university] grievance procedure because you are an employee of the AAMURI. [...] As an employee of the AAMURI, your employment rights have not [sic] adversely affected due to a violation of [the university's]

> policies and procedures. Therefore, [the university] is constrained from approving your recent request for a grievance hearing.'
>
> "26. The Defendants are legally bound to follow the policies set forth in the University's Staff Handbook, adopted by the Board of Trustees on October 29, 1993.
>
> "27. The Staff Handbook is applicable to Ms. McGlathery's employment with the University.
>
> "28. On or about September 1, 2010, Ms. McGlathery filed an amended and supplemental grievance alleging that she was indeed an employee of the University and that the University had not abided by its adopted policies in attempting to terminate her employment.
>
> "29. The Defendants have failed or refused to respond to Ms. McGlathery's amended and supplemental grievance."

Based on those factual allegations, McGlathery stated five claims against the university, the board, the board members, and the president (collectively referred to as "the university defendants") and one claim against Vaughn. The first claim against the university defendants asserted that McGlathery's dismissal violated § 16-49-23, Ala. Code 1975, because, she asserted, that Code section granted the board the exclusive and nondelegable authority to dismiss university employees. That claim sought a judgment declaring that § 16-

49-23 granted the board the exclusive and nondelegable authority to dismiss university employees, that her dismissal violated § 16-49-23, that she was entitled to reinstatement, and that she was entitled to wages and benefits she had lost as a result of her dismissal.

McGlathery's second claim against the university defendants also asserted that her dismissal violated § 16-49-23 because, she asserted, that Code section granted the board the exclusive and nondelegable authority to dismiss university employees; however, the second claim sought a writ of mandamus directing the university defendants to reinstate McGlathery and to pay her the wages and benefits she had lost as a result of her dismissal.

McGlathery's third claim against the university defendants asserted that her dismissal violated policy 9.3 of the university's staff handbook ("policy 9.3") because, she asserted, she had not been given three weeks' notice of her dismissal and her dismissal had not been approved by the president. McGlathery's complaint alleged that policy 9.3 stated:

> "Staff employees are employees at will and may be terminated without cause by the University upon

> three weeks notice. Such terminations must ultimately be approved by the President. Termination without cause shall not affect the employee's right to recover unemployment compensation."

The third claim against the university defendants sought a judgment declaring that McGlathery's dismissal was invalid because it violated policy 9.3, that she was entitled to reinstatement, and that she was entitled to wages and benefits she had lost as a result of her dismissal.

McGlathery's fourth claim against the university defendants asserted that her dismissal without three weeks' notice and without the approval of the president constituted a breach of contract and sought reinstatement and the wages and benefits she had lost as a result of her dismissal. McGlathery's fifth claim against the university defendants asserted that her dismissal was not "in accordance with the laws of the State of Alabama or the policies and procedures of the University" and sought a writ of mandamus directing the university defendants to reinstate her and to pay her the wages and benefits she had lost as a result of her dismissal.

McGlathery's sole claim against Vaughn asserted that Vaughn had intentionally interfered with McGlathery's business or contractual relations with the university and sought

compensatory and punitive damages.

The university defendants and Vaughn filed Rule 12(b)(6) motions to dismiss, and McGlathery filed a pleading in opposition. Following a hearing, the trial court, on April 21, 2011, entered a judgment granting the Rule 12(b)(6) motions. Because it did not dispose of McGlathery's claim against Dr. Coleman, the trial court certified the judgment as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P.

In its judgment, the trial court concluded that Article I, § 14, Alabama Constitution of 1901 ("§ 14"), barred all of McGlathery's claims against the university defendants insofar as those claims sought wages and benefits. The trial court further concluded that McGlathery's first two claims against the university defendants failed to state a valid claim for declaratory relief and a writ of mandamus, respectively, because § 16-49-23 authorized the board to delegate its authority to dismiss university employees. The trial court concluded that McGlathery's third claim against the university defendants failed to state a valid claim for declaratory relief because the staff handbook did not constitute an "administrative regulation" for purposes of the declaratory-

relief exception to § 14. The trial court concluded that the fourth claim against the university defendants failed to state a valid claim for a writ of mandamus because policy 9.3 stated that staff employees of the university were employees at will who could be dismissed without cause and the language stating that dismissals without cause were to be made with three weeks' notice and with the ultimate approval of the president did not constitute contractually binding promises that would support a breach-of-contract claim.

The trial court concluded that the fifth claim against the university defendants failed to state a valid claim for a writ of mandamus because McGlathery's dismissal did not violate § 16-49-23 and the language of policy 9.3 stating that dismissals without cause were to be made with three weeks' notice and with the ultimate approval of the president did not constitute contractually binding promises.

The trial court concluded that McGlathery's claim of intentional interference with business or contractual relations against Vaughn failed to state a claim upon which relief could be granted because Vaughn, as a co-employee of McGlathery, was not a "third party" or a "stranger" to the

relationship between McGlathery and the university and because Vaughn was entitled to state-agent immunity.

On May 20, 2011, McGlathery filed a postjudgment motion, which the trial court denied on June 15, 2011. McGlathery then timely appealed to this court. Due to lack of jurisdiction, we transferred the appeal to the supreme court, which transferred it back to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Standard of Review

> "On appeal, a dismissal is not entitled to a presumption of correctness. Jones v. Lee County Commission, 394 So. 2d 928, 930 (Ala. 1981); Allen v. Johnny Baker Hauling, Inc., 545 So. 2d 771, 772 (Ala. Civ. App. 1989). The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail. Fontenot v. Bramlett, 470 So. 2d 669, 671 (Ala. 1985); Rice v. United Ins. Co. of America, 465 So. 2d 1100, 1101 (Ala. 1984). We note that a Rule 12(b)(6) dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. Garrett v. Hadden, 495 So. 2d 616, 617 (Ala. 1986); Hill v. Kraft, Inc., 496 So. 2d 768, 769 (Ala. 1986)."

Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993).

Analysis

Initially, we note that McGlathery has not argued on appeal that the trial court erred in concluding that § 14 barred her claims against the university defendants insofar as those claims sought wages and benefits. Therefore, she has waived the issue whether the trial court erred in that regard. See Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its brief, that issue is waived."). Consequently, we affirm the trial court's judgment insofar as it concluded that § 14 barred McGlathery's claims against the university defendants insofar as those claims sought wages and benefits.

We also note that McGlathery has not argued on appeal that the trial court erred in dismissing her claims against the university defendants insofar as those claims were based on the university defendants' alleged violation of policy 9.3. Therefore, she has waived the issue whether the trial court erred in that regard. Id. Consequently, we affirm the trial court's judgment insofar as it dismissed McGlathery's claims against the university defendants insofar as those claims were based on the university defendants' alleged violation of

policy 9.3.

McGlathery does argue that the trial court erred in concluding that § 16-49-23 authorized the board to delegate its authority to dismiss university employees. Before June 9, 2011,[3] § 16-49-23 provided:

> "The board of trustees has the power to organize the university by appointing a president, whose salary shall be fixed by the board, and by employing a corps of instructors, who shall be nominated to the board in writing by the president and who shall be styled the faculty of the university and such other instructors and officers as the interests of the university may require; and to remove any such instructors or other officers, and to fix their salaries or compensation and increase or reduce the same at its discretion; to regulate, alter or modify the government of the university, as it may deem advisable; to prescribe courses of instruction, rates of tuition and fees; to confer such academic and honorary degrees as are usually conferred by institutions of similar character; and to do whatever else it may deem best for promoting the interest of the university."

(Emphasis added.)

McGlathery argues that the language of § 16-49-23 providing that the board "has the power ... to remove any such instructors or other officers" grants the board the exclusive and nondelegable authority to dismiss university employees.

[3]Section 16-49-23 was amended effective June 9, 2011.

The trial court, on the other hand, concluded that the language of § 16-49-23 providing that the board "has the power ... to regulate, alter or modify the government of the university, as it may deem advisable," grants the board the power to delegate its authority to dismiss university employees.

In IMED Corp. v. Systems Engineering Associates Corp., 602 So. 2d 344, 346 (Ala. 1992), the supreme court stated:

> "The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n of Tuscaloosa County, 589 So. 2d 687 (Ala. 1991)."

Section 16-49-23, as it existed before June 9, 2011, provided that the board "has the power ... to remove any such instructors or other officers" and "to regulate, alter or modify the government of the university, as it may deem advisable." Section 6-49-23 did not contain any language prohibiting the board from delegating its authority "to remove

any such instructors or other officers," and the language granting the board the power "to regulate, alter or modify the government of the university, as it may deem advisable," is broad enough to include the power to delegate its authority "to remove any such instructors or other officers." Accordingly, we conclude that the trial court did not err in determining that the board had the power to delegate its authority to dismiss university employees.

McGlathery also argues that the amendment of § 16-49-23 that became effective on June 9, 2011, indicates that the board did not have the power to delegate its authority to dismiss university employees under § 16-49-23 as it existed before June 9, 2011. As amended effective June 9, 2011, § 16-49-23 provides:

> "The board shall not engage in activity that interferes with the day-to-day operation of the university. The primary responsibility of the board of trustees is to set policy for the university and prescribe rates of tuition and fees. The board also has the power to organize the university by appointing a president, whose salary shall be fixed by the board. The president shall appoint a corps of instructors who shall be styled the faculty and such other instructors and officers as the interest of the university may require, remove any instructors or officers, fix their salaries or compensation, and define the authority or duty of such instructors or officers. The president may regulate, alter, and

> modify the organization of the university, subject to review and concurrence of the board. The president shall prescribe courses of instruction within academic programs that have been approved by the board. The president may confer academic degrees and such honorary degrees as are usually conferred by institutions of similar character upon the recommendation of the faculty."

The June 9, 2011, amendment of § 16-49-23 granted the president some of the powers that its predecessor had granted to the board; however, it contains no language indicating that its predecessor prohibited the board from delegating its authority to dismiss university employees. Accordingly, we find no merit in McGlathery's argument that the June 9, 2011, amendment indicates that the board did not have the power to delegate its authority to dismiss university employees before June 9, 2011.

McGlathery also argues that, even if the trial court correctly concluded that § 16-49-23 authorized the board to delegate its authority to dismiss university employees, it erred by assuming that a delegation of that power by the board had occurred in the absence of any evidence establishing that it had occurred. Specifically, McGlathery argues:

> "There is no evidence Vaughn has authority to terminate employees on behalf of the Board of Trustees. To the contrary, McGlathery alleged in

> paragraph 23 of her Complaint, that 'Ms. Vaughn has no authority to terminate any employee of the University.' (C. 20.) Thus, even assuming that the Board of Trustees could delegate termination authority, there was no evidence that McGlathery was terminated pursuant to a valid delegation of such authority."

McGlathery's principal brief at p. 27.

However, viewed in the context of her complaint as a whole, the import of paragraph 23 of McGlathery's complaint was that Vaughn did not have authority to dismiss university employees because, according to McGlathery, § 16-49-23 granted the board the exclusive and nondelegable power to dismiss university employees. Paragraph 23 does not allege that, if § 16-49-23 permits the board to delegate the power to dismiss university employees, Vaughn was not authorized to dismiss university employees because the board had taken no action to delegate its authority to dismiss university employees to her. Therefore, McGlathery's complaint did not raise the issue whether the board had taken any action to delegate its authority to dismiss university employees to Vaughn, and thus that issue was not before the trial court. Accordingly, we find no merit in McGlathery's argument that the trial court erred by assuming that the board had delegated its power to

dismiss university employees.

McGlathery also argues that the trial court erred on the ground that it stated in its judgment that, "if [McGlathery's] contentions [that § 16-49-23 did not permit the board to delegate its powers] were correct, then [McGlathery] must also allege that her employment with the University was approved by the Board." However, because we have concluded that the trial court correctly concluded that § 16-49-23 permitted the board to delegate its powers, the issue whether that statement of the trial court is correct is moot.

McGlathery next argues that the trial court erred in dismissing her claim of intentional interference with business or contractual relations against Vaughn in her individual capacity because, McGlathery says, she alleged in her complaint that Vaughn's actions were beyond her authority and malicious. In Henderson v. Early, 555 So. 2d 130 (Ala. 1989), Faye M. Henderson sued a co-employee, Mary A. Early, and attempted to state a claim of intentional interference with business or contractual relations. The portion of her complaint attempting to state that claim alleged:

"'INTERFERENCE WITH BUSINESS RELATIONSHIP

> "'... Plaintiff avers that Defendant, Mary A. Early, intentionally, deliberately, maliciously, and wilfully interfered with her long time business relationship with Central Bank of the South thereby causing her damage.
>
> "'... Plaintiff avers she was wrongfully and unjustly discharged because of the critical comments of Defendant, Mary A. Early, as said comments were fabricated and false, and were made to further Mary A. Early's own personal goals.
>
> "'... Because of Defendant, Mary A. Early's actions Plaintiff was terminated.'"

555 So. 2d at 131 (emphasis added). The trial court dismissed Henderson's claim pursuant to Rule 12(b)(6), and Henderson appealed, contending that her complaint alleged all the elements of a prima facie case of intentional interference with business or contractual relations. Affirming the trial court's judgment, the supreme court stated:

> "To support a claim based on the tort of intentional interference with business or contractual relations, the plaintiff must prove the following:
>
> > "'"(1) The existence of a contract or business relation; (2) defendant's knowledge of the contract or business relation; (3) intentional interference by the defendant with the contract or business relation; and (4) damage to the plaintiff as a result of defendant's interference. However, defendant has an opportunity to prove justification as an affirmative defense to plaintiff's claim."'

> "Hickman v. Winston County Hosp. Bd., 508 So. 2d 237, 238 (Ala. 1987) (quoting Lowder Realty, Inc. v. Odom, 495 So. 2d 23, 25 (Ala. 1986)).
>
> "In an action against a co-employee, the plaintiff must also prove that the co-employee was not acting on behalf of the employer or otherwise within the scope of the co-employee's employment and that the co-employee was acting with actual malice. Hickman, at 239.
>
> "In this case, Henderson failed to allege in her complaint all the components for a cause of action based on the tort of intentional interference with business or contractual relations. Therefore, Henderson failed to state a claim for which relief can be granted under any provable set of facts or cognizable theory of law in Alabama. Fontenot [v. Bramlett, 470 So. 2d 669 (Ala. 1985)]."

Id. at 131-32 (emphasis added).

Henderson's complaint alleged the four essential elements common to all claims of intentional interference with business or contractual relations, and it alleged that Early had acted maliciously. However, although the complaint alleged that Early's "'comments were fabricated and false, and were made to further Mary A. Early's own personal goals,'" it did not allege that Early was acting outside the scope of her employment in making the comments and thus failed to allege an essential element of a claim of intentional interference with business or contractual relations against a co-employee. Id.

at 131. The allegation that Early's "'comments were fabricated and false, and were made to further Mary A. Early's own personal goals,'" was not tantamount to an allegation that Early was acting outside the scope of her employment when she made the comments. Id.; see Autrey v. Blue Cross & Blue Shield of Alabama, 481 So. 2d 345, 347-48 (Ala. 1985). In Autrey, the supreme court stated:

> "'"The liability of a corporation for the torts of its employees, whether agent or servant, is grounded upon the principle of 'respondeat superior,' not the principles of agency. The factual question to be determined is whether or not the act complained of was done, either by agent or servant, while acting within the line and scope of his employment. The corporation or principal may be liable in tort for the acts of its servants or agents, done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them."' (Citations omitted.)
>
> "National States Insurance Co. v. Jones, 393 So. 2d 1361, 1367 (Ala. 1980) (quoting from Old Southern Life Insurance Co. v. McConnell, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974))."

Id. (emphasis added). Thus, an allegation that an employee has acted without his or her employer's authority is not tantamount to an allegation that the employee has acted outside of the scope of his or her employment. Id.

In the present case, McGlathery's complaint alleged that Vaughn was the university's director of human resources and thus a co-employee of McGlathery. Therefore, McGlathery was required to allege not only the four essential elements common to all claims of intentional interference with business or contractual relations but also the two additional essential elements applicable when such a claim is brought against a co-employee -- i.e., that the co-employee acted with actual malice and that the co-employee "was not acting on behalf of the employer or otherwise within the scope of the co-employee's employment." Henderson, 555 So. 2d 132 (emphasis added). Although McGlathery's complaint alleged that Vaughn lacked authority to dismiss McGlathery, it did not allege that Vaughn's actions were outside the scope of her employment with the university. Therefore, the trial court did not err in dismissing McGlathery's claim of intentional interference with business or contractual relations against Vaughn.

McGlathery also argues that the trial court erred in dismissing her claim of intentional interference with business or contractual relations against Vaughn on the ground that Vaughn was entitled to state-agent immunity. However, because

we have determined that the dismissal of that claim is due to be affirmed on the ground that McGlathery failed to allege an essential element of a claim of intentional interference with business or contractual relations against a co-employee, we do not reach McGlathery's argument regarding state-agent immunity.

For the reasons discussed above, we affirm the trial court's judgment.

AFFIRMED.

Thompson, P.J., and Pittman and Thomas, JJ., concur.

Moore, J., concurs in the result, without writing.