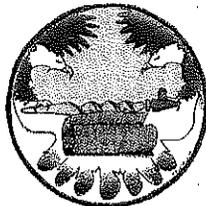


**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
CIVIL DIVISION OF TRIBAL COURT**

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**KATHRYN L. MCGRAW,
Plaintiff,**

v.

CASE NO.: C-206-0115

**ALBERT COLBY, JR., in his official and
individual capacity
Defendant.**

ORDER GRANTING MOTION FOR SUMMARY DISPOSITION

October 1, 2015
Hon. Jocelyn K. Fabry

INTRODUCTION

The Court must determine whether to grant the Defendant's Motion for Summary Disposition. The Plaintiff claims the Defendant violated her employment rights and intentionally subjected her to emotional distress. Because the Plaintiff's Fair Employment Statute ("FES") claim was not filed timely and because she failed to state a claim upon which relief could be granted under the Naawchigedaa Torts Statute, the Court grants the motion. The analysis of the Court follows below.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action arises out of the resignation of the Plaintiff, allegedly forced by the Defendant during the course of their romantic relationship which began while he was her supervisor. The Plaintiff alleges that her romantic relationship with the Defendant began while she was working as his administrative assistant. The Plaintiff alleges that the Defendant forced her to submit a letter of resignation in July 2014, out of fear that someone within the Tribe would discover their relationship. The Plaintiff further alleges that she did not want to resign, but felt threatened by the Defendant to do so and was fearful of him, particularly because in June 2014, he had referenced knowing someone who could kill her ex-boyfriend and get away with it. The Plaintiff alleges that she and the Defendant had more than one argument on the issue of her resignation, during which the Defendant was yelling and angry. The Plaintiff eventually succumbed to his request and submitted a letter of resignation on July 17, 2014 that the Defendant had drafted for her. The Plaintiff ended her relationship with the Defendant approximately one month later in August 2014. She subsequently sought counseling and victims services following her separation from employment and the end of the romantic relationship.

On January 27, 2015, the Plaintiff filed a *Complaint* seeking damages and attorney fees. The Plaintiff's *Complaint* alleged that the Defendant had forced Plaintiff to resign because of their sexual relationship in violation of the Fair Employment Statute and that he intentionally inflicted emotional distress upon her in violation of the Naawchigedaa Tort Statute. Pl's Comp. at p. 3, 8. The Plaintiff subsequently filed *Plaintiff's First Amended Complaint* on February 6, 2015.

On August 12, 2015, the Defendant filed *Defendant Albert Colby, Jr.'s Motion for Summary Disposition*. The Plaintiff filed *Plaintiff's Response to Defendant's Motion for Summary Disposition* on September 14, 2015. The Defendant filed *Defendant Albert Colby, Jr.'s Reply Brief to Plaintiff's Response to Defendant's Motion for Summary Disposition* on September 24, 2015. On October 1, 2015, the parties appeared before the Court for the *Motion Hearing*.

DISCUSSION

Summary disposition is appropriate when the plaintiff fails to state a claim for which relief can be granted and when there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. LTBBRCP Rule XVI (b)(6) and Rule XVII. The party seeking summary disposition carries the burden of establishing that there is an absence of evidence to support the non-moving party's case. Although the Court considers evidence in the light most favorable to the non-moving party, the non-moving party must show that there is a genuine issue for trial. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

I. Fair Employment Statute claim

The Court grants the *Defendant Albert Colby, Jr.'s Motion for Summary Disposition* as to the Plaintiff's Fair Employment claim due to the Plaintiff's untimely filing of the claim. The Fair Employment Statute requires that any charge of violation must be filed with the Tribal Court within one hundred-eighty (180) days of the alleged violation. WOTCL § 14.106. In this matter, the Plaintiff submitted her letter of resignation on July 17, 2014, with her employment concluding two weeks later. The Plaintiff filed her *Complaint* with the Court on January 29, 2015. She concedes that the filing was outside of the 180-day timeframe provided by the FES, even using the last day of her employment as the beginning of the 180-day timeframe, which results in a filing that was two (2) days late. The FES claim was filed untimely. In the absence of a timely filing the Plaintiff cannot avail herself of the remedies set forth in the Fair Employment Statute. WOTCL 14.106(A); *See Shomin v. LTBBOI*, Case No. A-20-0212 (C-135-1011) (2015); *Wemigwase v. LTBBOI et al.*, Case No. 138-1111 (2013). Therefore, the Court must grant the Defendant's motion.

The Plaintiff argues that the Court should allow the claim to proceed as there would be no prejudice to the defendant in going forward and that traditional concepts of justice would allow for a full hearing on the merits. However, it is not the Court's role to consider the public policy justifications when a statute is clear on its face as written, just as the Fair Employment Statute is. The limitation provision within the Fair Employment Statute contains no exceptions nor does it lend itself to anything other than its literal interpretation. Summary disposition as to the FES claim is therefore granted as a matter of law.

II. Naawchigedaa Torts Statute claim

The Defendant argues that the Plaintiff has failed to state a claim for which relief can be granted as to her Torts Statute claim. In determining whether the Plaintiff has stated a claim for which relief is available, the Court considers the facts alleged as true and in the light most favorable to the Plaintiff. To recover for IIED, the plaintiff has the burden of proving: (1) that the defendant engaged in extreme and outrageous conduct, (2) the plaintiff suffered severe emotional distress, (3) and that the distress was intentionally or recklessly caused by the defendant's conduct. WOTCL 6.5306(A)(4). The Code further defines outrageous conduct.

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).

In this case, the Court cannot identify any factual allegations rising to a level sufficient to support IIED liability. The Torts Statute sets a high bar for IIED claims and the Plaintiff's claims do not meet that standard. The pleadings do not include allegations of any conduct from the defendant toward the plaintiff that exhibits the degree outrageousness as that contemplated by the Code.

The Plaintiff argues that based on the statute, any conduct by a supervisor meets the first element, to wit: outrageous conduct, such that once the Plaintiff pleads conduct by a supervisor toward an employee, the Plaintiff then need only show that the conduct caused emotional distress. The Court does not adopt this interpretation of WOTCL 6.5306(A)(4)(b). The first sentence of that section defines outrageous conduct, indicating it is "conduct without just cause or excuse and exceeds all bounds of decency." *Id.* The second sentence of the section provides examples of ways that such conduct can be proven. *Id.* That is, conduct by a supervisor toward an employee may be outrageous conduct and the supervisor/employee context is a factor to consider in determining if the conduct is outrageous, but it does not mean the conduct is *per se* outrageous simply because it was the conduct of a supervisor. The record evidence and allegations of conduct in this case may lead a reasonable person to believe that the defendant's behavior was intimidating, overbearing, and even a misuse of authority, but 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, even in the supervisor/employee context.

In addition, the Plaintiff's claims do not include the requisite degree of emotional distress for an IIED claim under the Torts Statute. The Code does not further define severe emotional distress, so it is appropriate to look to other jurisdictions for persuasive authority. The Michigan Supreme Court, in interpreting Michigan common law tort actions, which similarly includes a showing of the plaintiff's severe emotional distress, qualifies severe emotional distress as "so severe that no reasonable person could be expected to endure it." *Roberts v. Auto-Owners Ins. Co.*, 422 Mich 594, at 608-609, citing the Restatement Torts, 2d, § 46 (1965). In this case, the Plaintiff pled that the Defendant's conduct resulted in her seeking counseling and victims services after her resignation. While the Court is sympathetic to her claims, the record does not indicate that she has suffered severe emotional distress, as a matter of law, such that no reasonable person could be expected to endure it. Accordingly, the defendant is entitled to summary disposition on the intentional infliction of emotional distress claims as the Plaintiff has failed to include allegations rising to the level of outrageous conduct by the Defendant or that she suffered severe emotional distress.

CONCLUSION

For the foregoing reasons, the Court finds that the Defendant is entitled to judgment as a matter of law. Therefore, the Court GRANTS the *Defendant, Albert Colby Jr.'s Motion for Summary Disposition* and the claims are **DISMISSED**.

IT IS SO ORDERED this 23rd day of October 2015.

Hon. Jbcelyn K. Fabry
Pro Tempore LTBB Judge