

NOT FOR PUBLICATION

NO. 24651

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

DELORES A. McCLANE, Plaintiff-Appellant, v.
DELTA AIRLINES, INC., a foreign corporation, Defendant-Appellee,
and DONALD MAXWELL, individually and in his official capacity
as Station Manager for DELTA AIRLINES; WILLIAM PURSLEY,
individually and in his official capacity as a
Supervisor for DELTA AIRLINES; JOHN DOES 1-10;
JANE DOES 1-10; DOE BUSINESS ENTITIES 1-10; DOE
PARTNERSHIP 1-10, DOE UNINCORPORATED ORGANIZATIONS 1-10
and DOE GOVERNMENTAL AGENCIES 1-10, Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 97-0805)

NORMA T. ARA
DELORES A. McCLANE, PLAINTIFF-APPELLANT
THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

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SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C.J., Nakamura, and Fujise, JJ.)

In this employment discrimination case, Plaintiff-Appellant Delores A. McClane (McClane) appeals from the Judgment in favor of Defendant-Appellee Delta Airlines, Inc. (Delta) filed on October 5, 2001, in the Circuit Court of the First Circuit (circuit court). McClane sued her then employer, Delta, and two of members of Delta's Honolulu management, Donald Maxwell (Maxwell) and William Pursley (Pursley). McClane's complaint alleged claims of race discrimination (Count I); age discrimination (Count II); retaliation (Count III); negligent retention (Count IV); intentional infliction of emotional distress (Count V); negligent infliction of emotional distress (Count VI); punitive damages (Count VII); and injunctive relief

(Count VIII). The circuit court's October 5, 2001, Judgment referenced the following stipulation and orders that collectively dismissed all of the claims raised by McClane in her complaint: 1) stipulation dismissing Maxwell and Pursley from the action with prejudice; 2) order granting Delta's motion for partial judgment on the pleadings as to Count IV (negligent retention) and Count VI (negligent infliction of emotional distress); 3) order granting Delta's motion for partial summary judgment based on (a) the failure to exhaust administrative remedies and (b) the statute of limitations, which dismissed the allegations in paragraphs 16(a), 16(b), 16(c), 17 (first paragraph only), 18, and 22 of the complaint; 4) order granting Delta's motion for summary judgment on Count I (race discrimination) and Count III (retaliation); and 5) order granting Delta's motion for summary judgment on Count II (age discrimination), Count VII (punitive damages), and Count VIII (injunctive relief).^{1/}

McClane's pro se brief challenges the dismissal of each of her claims against Delta.^{2/} McClane also argues that the

^{1/} The Honorable Dexter D. Del Rosario issued the order granting Delta's motion for partial summary judgment on the pleadings as to Count IV and Count VI. The Honorable Victoria S. Marks issued the remaining orders referenced in the October 5, 2001, Judgment.

^{2/} Plaintiff-Appellant Delores A. McClane (McClane) does not raise any issue in her points of error on appeal or in the argument section of her opening brief that challenges the stipulation dismissing Donald Maxwell (Maxwell) and William Pursley (Pursley) from the action. Her appeal is therefore limited to the alleged errors associated with her claims against Defendant-Appellant Delta Airlines, Inc. (Delta).

circuit court erred in denying her requests for 1) the production of the complete personnel files of Maxwell and Pursley;^{3/} 2) the admission of audio tapes in evidence; and 3) a jury trial. After a careful review of the record and the briefs submitted by the parties, we resolve the issues raised by McClane on appeal as follows:

1. The circuit court properly dismissed McClane's claims of race discrimination, age discrimination, and retaliation. Certain of the allegations on which these claims were based were barred by McClane's failure to exhaust administrative remedies or the statute of limitations. See Hawaii Revised Statutes (HRS) § 368-11 (1993 and Supp. 2004); HRS § 368-12 (1993); Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 460, 879 P.2d 1037, 1043 (1994). With respect to the non-barred allegations, 1) McClane failed to establish a prima facie case of discrimination or retaliation or 2) after Delta provided a legitimate, nondiscriminatory explanation for its actions, McClane failed to respond with evidence that Delta's stated explanations were a pretext for discrimination or retaliation.

^{3/} In addition to challenging the trial court's refusal to order disclosure of the personnel files of Maxwell and Pursley, McClane generally alleges in her points of error that the circuit court erred in failing to compel Delta to produce other documents she requested. McClane, however, does not specify which of the other non-produced documents she is challenging. Nor does she present meaningful argument on why she was entitled to discovery of the other non-produced documents. We therefore limit our review of McClane's claims of discovery error to the court's refusal to compel the disclosure of the personnel files of Maxwell and Pursley. Hawai'i Rules of Appellate Procedure Rule 28(b)(4)(7) ("Points not argued may be deemed waived.")

Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 378-79, 14 P.3d 1049, 1059-60 (2000) (applying the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to discrimination claims); Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 425-26, 32 P.3d 52, 69-70 (2001) (applying McDonnell Douglas formula to retaliation claims). Accordingly, there was no genuine issue as to any material fact regarding McClane's discrimination and retaliation claims and Delta was entitled to judgment as a matter of law. Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c).

2. The circuit court properly dismissed McClane's claim of intentional infliction of emotional distress (IIED) because, as a matter of law, the conduct alleged by McClane was not sufficiently outrageous to support a claim for IIED. Shoppe, 94 Hawai'i at 387, 14 P.3d at 1068.

3. The circuit court properly dismissed McClane's claims of negligent retention and negligent infliction of emotional distress because those claims were barred by the exclusive remedy provision of Hawai'i's Workers' Compensation statute. HRS § 386-5 (1993); Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 18, 936 P.2d 643, 654 (1997); Kahale v. ADT Automotive Servs., Inc., 2 F. Supp.2d 1295, 1302 (D. Haw. 1998).

4. The circuit court properly dismissed McClane's claims for punitive damages and injunctive relief because those

claims were incidental to and derivative of the other causes of action in McClane's complaint that were appropriately dismissed. Ross, 76 Hawai'i at 466, 879 P.2d at 1049.

5. McClane's complaint did not include a separate count for constructive discharge. To the extent that her complaint alleged a constructive discharge claim, the circuit court properly dismissed that claim because McClane failed to exhaust her administrative remedies and because, as a matter of law, a reasonable person in McClane's position would not have felt she was forced to quit due to intolerable and discriminatory working conditions. Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1411 (9th Cir. 1996).

6. The circuit court did not abuse its discretion in denying McClane's request for the disclosure of the complete personnel files of Maxwell and Pursley in light of the other discovery provided to McClane by Delta and the privacy interests associated with those files. Acoba v. General Tire, Inc., 92 Hawai'i 1, 9, 986 P.2d 288, 296 (1999).

7. McClane attached purported "transcripts" of tape recorded conversations she had during meetings with Delta's management as exhibits to 1) her memorandum in opposition to Delta's motion for partial summary judgment based on (a) the failure to exhaust administrative remedies and (b) the statute of limitations and 2) her memorandum in opposition to Delta's motion

for summary judgment on Count I (race discrimination) and Count III (retaliation). The transcripts were not verbatim transcriptions of the conversations but contained numerous gaps and omissions, McClane's summaries of portions of the conversations instead of what was actually said, and McClane's editorial comments.

We reject McClane's claim that the circuit court committed reversible error in denying the admission of her audio tapes in evidence. The available record shows that McClane's counsel did not offer the audio tapes in evidence.^{4/} In

^{4/} The following colloquy took place at the hearing on Delta's motion for partial summary judgment based on the failure to exhaust administrative remedies and the statute of limitations:

The Court: I've reviewed everything that's been submitted. Do you have anything to add?

. . . .

[McClane's Counsel]: None, Your Honor, except that we did bring copies of the tapes, if that would help Your Honor in this matter in overcoming [Delta's] counsel's understood objections.

The Court: Well, I think you need to work that out with counsel. I know that they indicated in their reply that they wanted them, those exhibits [McClane's purported transcripts], stricken because the tapes weren't properly authenticated.

[McClane's Counsel]: That's correct, Your Honor. So we will do that. Would Your Honor like us to supplement if we are able to work it out with counsel?

The Court: I don't think that's going to be necessary.

[McClane's Counsel]: Okay. Thank you, Your Honor.

The circuit court then went on to orally grant Delta's motion. The above colloquy shows that McClane's counsel did not offer the audio tapes in evidence at the hearing.

McClane did not make the transcript of the hearing on Delta's motion for summary judgment on Count I (race discrimination) and Count III (retaliation) part of the record on appeal. Thus, she did not show that the audio tapes

addition, contrary to McClane's contention, Delta did object to the accuracy and authenticity of the transcripts. The transcripts were inadmissible in the form presented. Hawaii Rules of Evidence (HRE) Rules 901 and 1002. Moreover, after reviewing the transcripts attached to McClane's pleadings, we conclude that the transcripts do not support McClane's claims of discrimination or retaliation and do not provide evidence that Delta's legitimate, non-discriminatory explanations for its actions were pretextual.

8. McClane was not entitled to a jury trial on her claims because the circuit court, in granting Delta's motions for summary judgment and judgment on the pleadings, properly dismissed all of McClane's claims before trial.

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were offered in evidence at that hearing or meet her burden of demonstrating error with respect to that hearing. State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000) (holding that the appellant has the burden of demonstrating error in the record). McClane also did not make the audio tapes themselves part of the record on appeal.

NOT FOR PUBLICATION

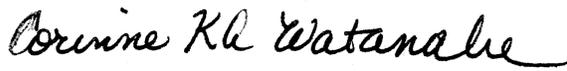
IT IS HEREBY ORDERED that the October 5, 2001, Judgment filed in the Circuit Court of the First Circuit is affirmed.

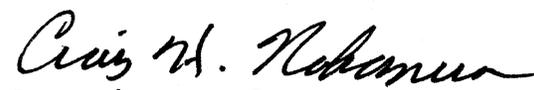
DATED: Honolulu, Hawai'i, July 22, 2005.

On the briefs:

Delores A. McClane,
Plaintiff-Appellant Pro Se.

Barry W. Marr, Esq.
Sarah O. Wang, Esq.
Melanie Mito May, Esq.
for Defendant-Appellee.


Acting Chief Judge


Associate Judge


Associate Judge