

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 27, 2015 Session

**SHERRIE L. DURHAM v. TENNESSEE DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT, ET AL.**

**Appeal from the Circuit Court for Davidson County
No. 06C95, 07C1141, 07C2251, 08C1991 Donald P. Harris, Senior Judge**

No. M2014-00428-COA-R3-CV - Filed February 27, 2015

The trial court denied Plaintiff's motion to recuse and granted Defendants' motion to dismiss for failure to prosecute. We reverse in part, affirm in part, and remand for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right: Judgment of the Circuit Court is Reversed in
Part; Affirmed in Part; and Remanded**

ARNOLD B. GOLDIN, J., delivered the opinion of the Court, in which Brandon O. Gibson, J., and KENNY ARMSTRONG, J., joined.

Sherrie L. Durham, Pro se, appellant.

William J. Marett, Jr., and Jay C. Ballard, Nashville, Tennessee, for the appellees, Tennessee Department of Labor and Workforce Development, Linda McDaniel, Michael Thomason, Don Ingram, Tennessee Department of Personnel and Tennessee Board of Professional Responsibility.

OPINION

This appeal arises from four separately-filed actions consolidated in the trial court. Plaintiff/Appellant Sherrie L. Durham ("Ms. Durham") is an attorney and was employed as a hearing officer by the Tennessee Department of Labor and Workforce Development ("the Department"). In January 2006, she filed a complaint alleging violations of Tennessee Code Annotated § 8-50-116, violation of 42 U.S.C. § 1983, negligent failure to supervise and train employees, negligence *per se* for violations of unspecified state and federal statutes,

retaliatory supervisory harassment, retaliatory discharge in violation of public policy, and intentional and negligent infliction of emotional distress. She named as Defendants the Department, James Neeley (“Mr. Neeley”), Commissioner; the State of Tennessee, by and through Phil Bredesen, Governor (“Governor Bredesen”), and Paul Summers, Attorney General (“Attorney General Summers”); Lynda McDaniel (“Ms. McDaniel”), in her individual capacity and in her official capacity as chief unemployment appeals hearing officer; Michael Thomason (“Mr. Thomason”), in his individual capacity and in his official capacity as director of appeals operations; and Don Ingram (“Mr. Ingram”), in his individual capacity and in his official capacity as the Department’s administrator of employment security (collectively, “Defendants”).

After years of protracted litigation and an inactive period of more than two years, on March 12, 2013, the trial court issued notice that the matter would be dismissed absent entry of an order to set for trial within thirty days. On March 28, Ms. Durham filed a motion to set; on May 13, 2013, Defendants filed a motion to dismiss for failure to prosecute. The trial court granted Ms. Durham’s motion to set, held Defendants’ motion to dismiss in abeyance, and the matter eventually was set to be tried by a jury in February 2014. On the morning of the pre-trial conference held on January 21, 2014, Ms. Durham moved to continue the matter and for recusal of the trial judge. She also moved the trial court to declare the statutes governing the appointment of special judges unconstitutional¹ and to strike the trial court’s pre-trial order setting the conference. By order entered January 29, 2014, the trial court granted Defendants’ motion to dismiss for failure to prosecute and denied Ms. Durham’s motion to recuse.

In its January 29, 2014, order, the trial court found that Ms. Durham’s motion to recuse was not timely filed, that the grounds Ms. Durham asserted as a basis for recusal “[had] long been known to her,” that there was no basis for recusal, and that Ms. Durham was attempting to “force” the trial court to continue the matter. The trial court stated:

Despite the untimeliness of her recusal motion and the lack of a legal basis for recusal, plaintiff insists in her argument that if the court were to deny her motion she would appeal. The court considers the late filing of the Motion to Recuse and plaintiff’s insistence that she will appeal denial of her motion as a blatant attempt by plaintiff to force the court to again continue the trial of this matter. This action, coupled with the record in this cause, evidences a persistent failure by plaintiff to prosecute this action which warrants dismissal of these consolidated cases in their entirety.

¹Senior Judge Donald P. Harris ultimately presided as special judge in this matter in the trial court.

Ms. Durham filed a timely notice of appeal to this Court. After a number of delays and the adjudication of several motions in this Court, oral argument was heard by the Western Section sitting in Nashville in January 2015. We reverse in part, affirm in part, and remand for further proceedings.

Issues Presented

In her brief, Ms. Durham raises eight issues for our review. The issues presented by this appeal, as we consolidate and perceive them, are:

- 1) Whether the trial court erred by denying Ms. Durham's motion to recuse.
- 2) Whether the trial court erred by dismissing the matter for failure to prosecute.
- 3) Whether the trial court erred by dismissing Defendant James Neeley, in his individual capacity, from the matter.

Discussion

We begin our discussion by observing that, notwithstanding dismissal of this matter for failure to prosecute, the technical record in this case contains seven volumes consisting of more than 700 pages. However, although it is apparent from the orders entered by the trial court that a number of hearings were held in the matter, the record transmitted for our review includes only one transcript volume, which is a partial transcript of the January 21, 2014, hearing in the trial court. Further, the partial transcript is limited to the trial court's ruling on Ms. Durham's motion to recuse. Because of the long procedural history and the nature of the ultimate disposition of this matter in the trial court, the issues presented by this appeal require a detailed recitation of the trial court record. We accordingly first review the long procedural history of this matter in the trial court.

Procedural History

In her original complaint, as amended in February 2006, Ms. Durham asserted seven causes of action, including: 1) violation of Tennessee Code Annotated § 8-50-116; 2) violation of 42 U.S.C. § 1983; 3) negligent failure to supervise and train employees under the Governmental Tort Liability Act, codified at Tennessee Code Annotated §§ 29-20-101-404; 4) violations of state and federal statutes, regulations, and rules; 5) retaliatory supervisory harassment; 6) violation of public policy; and 7) intentional and negligent infliction of emotional distress. She prayed for injunctive relief, including an injunction prohibiting Defendants from retaliating against her and from instructing her to violate state or federal law; for compensatory damages in the amount of \$500,000; punitive damages in the amount of \$500,000; pre-judgment and post-judgment interest; and reasonable attorney's fees and costs.

Upon Defendants' motion, the trial court dismissed Ms. Durham's claim for compensatory damages on her federal Section 1983 claim in June 2006. The trial court denied a motion for default judgment filed by Ms. Durham and also denied Defendants' motion to dismiss Ms. Durham's claim for injunctive relief on her Section 1983 claims.

In August 2006, Defendants filed a motion to dismiss Ms. Durham's claims for relief pursuant to the Governmental Tort Liability Act ("GTLA") for lack of jurisdiction. Defendants also moved for dismissal of Ms. Durham's claims for violations of unspecified state and federal statutes, regulations, rules, and public policies; her common-law claim of retaliatory supervisory harassment; her claims against Defendants in their individual capacities; and her claims for intentional and negligent infliction of emotional distress. In September 2006, the trial court granted Defendants' motion to dismiss Ms. Durham's claims under the GTLA and her claim for the negligent infliction of emotional distress.

Following a hearing on September 1, 2006, the trial court also denied a motion to recuse filed by Ms. Durham on August 18, 2006. In September 2006, the trial court entered a scheduling order and set the case to be tried on July 16, 2007. Following stalled discovery, Defendants filed a motion to amend the scheduling order in November 2006, which the trial court granted following a hearing in January 2007. Ms. Durham filed another motion to recuse the trial judge, Barbara Haynes ("Judge Haynes") in April 2007, which the trial court denied in May 2007. In the meantime, on April 13, 2007, the trial court, on its own motion, entered a scheduling order re-scheduling discovery.

In January 2008, Ms. Durham filed a single pleading styled "Motion to Set, Motion to Recuse and Notice of Deposition." In her pleading, Ms. Durham asserted, *inter alia*, that Judge Haynes was a defendant in an action that she had separately filed under docket No. 07-C-1141. Defendants opposed the motion in January 2008. In March 2008, Ms. Durham filed a motion to set separate jury trials, asserting that her original action, docketed as No. 06-C-95, was "taken off the jury docket by Judge Haynes for the sole purpose of assisting the defendants." On March 26, 2008, the matter was transferred from Judge Haynes to Senior Judge Donald P. Harris ("Judge Harris"), sitting as special judge, and Judge Haynes recused herself by order entered April 10, 2008.

Following transfer of the matter to Judge Harris, in May 2008, Defendants moved to consolidate the matter with Ms. Durham's separately filed actions docketed as No. 07-C-1141 and No. 07-C-2251. On May 14, 2008, Defendants also moved the court to hold the matter in abeyance "for all purposes, including the filing of a Tenn. R. Civ. P. 12 motion or a responsive pleading[.]" It appears that no further action was taken in the matter until October 31, 2008, when Ms. Durham filed a motion to set trial. In her motion to set, Ms.

Durham asserted that Defendants had not engaged in any discovery attempt for more than a year and that the matter was ready to be heard.

On December 19, 2008, the trial court entered an order consolidating actions No. 06-C-95 and No. 07-C-114 (to be referred to as No. 06-C-95); ordering dispositive motions to be filed no later than February 1, 2009; setting oral argument on all dispositive motions to be heard on March 24, 2009; ordering that a motion to dismiss filed by Judge Haynes also would be heard at the March 24 hearing; setting a trial date of June 23, 2009; and reserving other issues. In January 2009, Defendants filed a motion for summary judgment; in February 2009, Ms. Durham filed a motion to extend time to file a response and to change the trial date; and in March 2009 the trial court entered a new scheduling order and ordered that the trial would be reset following a hearing on April 13, 2009. By agreement of the parties, the hearing date was reset to May 6, 2009.

Ms. Durham responded to Defendants' motion for summary judgment on April 3, 2009; Defendants responded to her response on April 27, 2009; and, following a hearing on May 6, the trial court took the motion under advisement by order entered May 21, 2009. In its order, the trial court consolidated case No. 07-C-2251 and another action filed by Ms. Durham and docketed No. 08-C-1991 into case No. 06-C-95. The trial court entered another scheduling order that required: 1) Ms. Durham to file a consolidated complaint no later than June 10, 2009; 2) Defendants to file a consolidated answer within 30 days of receipt of Ms. Durham's complaint; 3) the parties to complete discovery by October 10, 2009; 4) the parties to file any dispositive motion no later than November 10, 2009; and 5) the parties to submit proposed jury instructions no later than December 10, 2009. The trial court set the matter for a jury trial to begin January 11, 2010. On June 15, 2009, the trial court denied Defendants' motion for summary judgment.

Ms. Durham filed a 108-page consolidated complaint (hereinafter, "complaint") on July 10, 2009. In her complaint, Ms. Durham named as Defendants: the Department; the State, by and through Governor Bredesen and Attorney General Bob Cooper ("Attorney General Cooper"); Mr. Neeley, in his individual capacity and in his official capacity; Ms. McDaniel, in her individual capacity and in her official capacity; Mr. Thomason, in his individual capacity and in his official capacity; Mr. Ingram, in his individual capacity and in his official capacity; Bob Henningsen ("Mr. Henningsen"), in his individual capacity and in his official capacity as Deputy Commissioner of the Department; John Doe, in his individual capacity and in his official capacity; and Jane Doe, in her individual capacity and in her official capacity. Ms. Durham asserted seven causes of action, namely: 1) violation of Tennessee Code Annotated §§ 8-50-116 and 50-1-304; 2) violation of 42 U.S.C. § 1983; 3) violation of state and federal statutes, regulations and rules (which were not specified in Ms. Durham's complaint); 4) violation of public policy, which Ms. Durham asserted arose from

harassment of and retaliation against Ms. Durham; 5) intentional and negligent infliction of emotional distress; 6) violation of Tennessee Code Annotated § 8-50-601; and 7) violation of Tennessee Code Annotated 50-1-304, the Tennessee Public Employee Political Freedom Act. In her prayer for relief, Ms. Durham sought:

1) A temporary injunction that orders the defendants to immediately return the plaintiff to her position as an unemployment hearing officer with the Tennessee Department of Labor.

2) A final injunction that orders the defendants to return the plaintiff to her position as an unemployment hearing officer with the Tennessee Department of Labor.

3) A final injunction that prohibits defendants and all of those in active concert with them from issuing or recommending others to issue any form of discipline to the plaintiff unless such activity is for legitimate work-related conduct. The final injunction should prohibit the defendants and all of those in active concert with them from imposing the discipline until they obtain a court order authorizing the same.

4) A final injunction that orders the defendants to remove from the plaintiff's personnel file all reviews, warnings and documentation, that has been issued since December 2004.

5) A jury trial.

6) Judgment against the defendants in their individual capacities and their official capacities and the Tennessee Department of Labor and the State of Tennessee for back pay and damages for lost benefits.

7) Reinstatement or front pay.

8) Judgment against the defendants in their individual capacities for compensatory damages for embarrassment, mental anguish, humiliation, stress, anxiety, inconvenience, violation of constitutional rights and loss of enjoyment of life and future employment in the amount of ten million dollars.

9) Judgment against the defendants in their individual capacities for punitive damages in the amount of ten million dollars.

10) Judgment against the defendants in their official capacities and the Tennessee Department of Labor and the State of Tennessee for compensatory and actual damages in the amount of three million dollars.

- 11) Judgment against all defendants for treble damages.
- 12) Reasonable attorney's fees, expenses and costs.
- 13) Prejudgment interest and if applicable, post-judgment interest.
- 14) Such other and further relief that the plaintiff is entitled to receive as the court deems just and proper.

On July 17, 2009, Defendants moved to strike Ms. Durham's complaint. In August 2009, the trial court granted Defendants' motion with respect to portions of Ms. Durham's complaint, and Defendants again moved for summary judgment on September 11, 2009. On September 28, the trial court set oral argument on Defendants' motion to be heard on October 27, 2009.

Defendants filed their answer in the matter on October 12, 2009. Following numerous motions by the parties and responses thereto, in January 2010, Ms. Durham filed motions to enforce Local Rule 27.05(d), to expedite the matter, or to set a trial date.² Ms. Durham proposed trial dates of March 11 and 12, 2010, asserting that the parties were available on those dates and that the dates were open on the trial court's docket. Defendants filed a response in opposition to Ms. Durham's motion to set and asserted that, according to the court clerk, no jury was available on the proposed dates. By order entered February 12, 2010, the trial court set the matter to be tried on June 28 through July 2, 2010.

Following lengthy proceedings regarding the continuance of the hearing of Defendants' motion for summary judgment and a motion for sanctions filed by Ms. Durham against Mr. Ingram in November 2009, on March 4, 2010, the trial court denied Ms. Durham's motion for continuance and set Defendants' motion for summary judgment to be heard on March 10, 2010. The trial court granted Ms. Durham's motion to extend the time for her response to Defendants' motion until March 8, 2010. Following a hearing on March 10, the trial court denied Defendants' motion for summary judgment by order entered June 3, 2010. In June 2010, Ms. Durham voluntarily nonsuited her claims for violations of state and federal statutes, rules and regulations, and public policy. She also nonsuited her claim for the negligent infliction of emotional distress.

On June 14, 2010, Defendants moved the trial court to continue the trial on the basis that individual Defendants Mr. Neeley, Ms. McDaniel, Mr. Thomason, Mr. Ingram and Mr. Henningsen had appealed, as an appeal as of right under the collateral order doctrine, the trial

²Rule 27.05(d) of the Local Rules of Davidson County provides: "If a case is continued, it must be continued to a date certain. The reason for the continuance must be contained in the order."

court's denial of their defenses of qualified and good faith immunity. The Department, the State, and the individual Defendants in their official capacities moved to continue the matter pending resolution of the appeal pending in this Court. The trial court denied Defendants' motion on the basis that their second motion for summary judgment was identical to their first motion for summary judgment, which the trial court had denied in June 2009, and that Defendants had the opportunity to file an appeal from the court's 2009 order, but failed to do so. The trial court ordered that the trial would proceed against the Department, the State, and the individual Defendants in their official capacities.

Ms. Durham filed a pleading styled "Notice of Causes of Action" on June 24, 2010. In her notice, Ms. Durham stated that she intended to proceed on counts one, two, six, and seven of her complaint, namely: violation of Tennessee Code Annotated §§ 8-50-116 and 50-1-304; violation of 42 U.S.C. § 1983; violation of Tennessee Code Annotated § 8-50-601; and violation of Tennessee Code Annotated § 50-1-304, the Tennessee Public Employee Political Freedom Act. Defendants filed several motions in limine, and Ms. Durham filed a notice of voluntary nonsuit of claims asserted in counts four, five, and six of her complaint against the Defendants in their individual and official capacities. Apparently, the trial that was scheduled to begin June 28, 2010, was continued due to the illness of Ms. Durham's attorney, who had filed a notice of appearance in the matter in April 2010.³

On August 12, 2010, we granted Ms. Durham's motion to dismiss Defendants' appeal of the trial court's June 3, 2010, order denying their motion for summary judgment. On September 28, Ms. Durham moved the court to set the matter for a pre-trial conference and for trial. By agreement of the parties, a pre-trial conference was set for December 7, 2010.

On January 10, 2011, Ms. Durham filed a notice that her attorney was no longer her attorney of record. Ms. Durham also filed a motion seeking additional time to secure new counsel and moved the trial court to hold the matter in abeyance pending a notice of appearance by new counsel.⁴ Four days later, on January 14, 2011, Ms. Durham moved the court for "an order of protection concerning discovery" and to alter or amend any orders entered by the court since July 1, 2010. She stated that she had "recently learned that the [c]ourt may have signed an order concerning a June 2011 trial date[,] that her attorney "did not consult her before agreeing to a June trial date[.]" and that she had recently accepted a new position which made it "impossible for [her] to participate in a lengthy trial in June of 2011." She further asserted that both parties had motions pending before the court that had

³Ms. Durham represented herself prior to April 2010.

⁴It does not appear that Ms. Durham secured new counsel, and she represented herself for the remainder of the proceedings in the trial court and on appeal.

not been heard and that her attorney did not have the authority to enter into an agreement allowing Defendants to conduct additional discovery. She stated that she “[had] no knowledge of what [had] happened in [the] case since the last court date” and that numerous attempts to contact her attorney had been unsuccessful. Ms. Durham’s attorney filed a motion to withdraw in February 2011.⁵ In April 2012, the case was transferred from the third circuit to the eighth circuit of the Davidson County Circuit Court .

After an inactive interval of more than two years, on March 12, 2013, the trial court clerk issued notice that the case would be dismissed if an order setting it for trial was not filed within thirty days. Ms. Durham filed a motion to set on March 28, 2013. In her motion, Ms. Durham stated that she had contacted Judge Harris and William Maret of the Attorney General’s Office (defense counsel) by email to obtain convenient trial dates.

On May 13, 2013, Defendants filed a motion to dismiss for failure to prosecute. Defendants requested, in the alternative, to be given ninety days in which to locate and consult with the individual Defendants and witnesses. In their contemporaneously filed response to Ms. Durham’s motion, Defendants asserted that Ms. Durham had failed to take any action in the matter for twenty-seven months, that she had not hired new counsel, and that she had failed to produce discovery material. They also asserted that all but one individual Defendant had left state service, that several had experienced health issues or moved away from the Nashville area, and that the change in administrations following the 2010 elections had resulted in the relocation or reassignment of those familiar with the facts.

The trial court set Ms. Durham’s motion to set for trial to be heard on May 29, 2013. Following the May hearing, the trial court granted Ms. Durham’s motion to set, subject to a hearing on Defendants’ motion to dismiss, and set the matter to be tried on February 3, 2014. The trial court held Defendants’ motion to dismiss in abeyance, granted Defendants ninety days in which to supplement their motion with affidavits or other evidence concerning the availability of witnesses, and granted Ms. Durham ninety days in which to oppose the motion. The trial court ordered that either party would be permitted to file a dispositive motion relating to some or all of the issues, provided a hearing on any motion did not delay the trial date.

Defendants filed a supplemental motion to dismiss for failure to prosecute on July 15, 2013. In their supplemental motion, Defendants moved, in the alternative, for dismissal of Mr. Neeley, who they averred was incapacitated following a stroke. Defendants attached an affidavit of Michael Beckham, M.D., (“Dr. Beckham”) in support of their motion. The trial court set Defendants’ motion to dismiss to be heard on August 28, 2013.

⁵It does not appear from the record that the trial court granted the motion to withdraw.

Ms. Durham filed her response to Defendants' motion to dismiss on the August 28 hearing day. She asserted that there was neither a factual nor legal basis on which to dismiss the case and that "dismissal would occur only as the result of judicial misconduct." Ms. Durham also filed a response to Defendants' supplemental motion to dismiss, asserting that Defendants' claim that Mr. Neeley was incapacitated was "not credible." Ms. Durham asserted that Dr. Beckham resided more than one-hundred miles from Mr. Neeley; that Mr. Neeley continued to serve as chairman of the Tennessee Council on Vocational Education, chairman of the Tennessee Center for Labor-Management Relations, and chairperson of the Tennessee Council on Career and Technical Education ("CTE"); that he was an active member of those boards; that he was appointed to the CTE in May 2013 and was quoted as having addressed the CTE in a June newsletter; and that, in July 2013, he sold a condominium in Nashville. She asserted that "[e]ven the affidavit [of Dr. Beckham] itself confirms that his condition is not dire." Ms. Durham additionally filed a motion to compel discovery regarding Mr. Neeley's alleged incapacity, and a motion to set the matter for trial. In her motion to set, Ms. Durham averred that she had contacted Judge Harris and Mr. Marett to obtain a convenient trial date.

Following the August 28 hearing, by order entered December 5, 2013, the trial court granted Defendants' motion to dismiss Mr. Neeley in his individual capacity but denied dismissal of Mr. Neeley in his official capacity. The trial court denied Defendants' motion to dismiss for failure to prosecute with respect to the remaining Defendants. It also denied Ms. Durham's motion to compel discovery regarding Mr. Neeley's medical condition and mental capacity. By order entered December 9, 2013, the trial court set a pre-trial conference to be held on January 21, 2014. On January 17, 2014, Defendants filed a response in opposition to a motion to continue filed by Ms. Durham that morning and renewed their motion to dismiss for failure to prosecute. In their motion, Defendants asserted that Ms. Durham had emailed the trial court and defense counsel that morning, notifying them that she intended to file a motion to continue the February 3, 2014, trial. Defendants averred that Ms. Durham stated: "Due to a medical condition that requires major surgery, Ms. Durham will not be able to attend and participate in the trial that is set for February 3, 2014." Defendants asserted that Ms. Durham provided no further description, no medical proof, and no physician's statement, and that her motion was unsigned.⁶

⁶The record transmitted on appeal includes a supplemental volume containing a motion to continue signed by Ms. Durham. The motion includes a certificate of service indicating that the motion was mailed to defense counsel on January 17, 2014. The supplemental volume also contains Ms. Durham's undated affidavit attesting to her medical condition. Ms. Durham's affidavit contains a certificate of service indicating that it was delivered to defense counsel and the trial judge on January 21, 2014. Ms. Durham's motion to continue and affidavit were added to the record by agreement of the parties in July 2014.

On or about January 21, 2014, Ms. Durham filed a single pleading that was styled as a reply to Defendants' response, a response to Defendants' renewed motion to dismiss, a motion to recuse, a motion to declare statutes unconstitutional, and a motion to strike the court's pre-trial order.⁷ The matter came before the trial court on January 21, with defense counsel and Ms. Durham in attendance. By order entered January 29, 2014, the trial court denied Ms. Durham's motion to recuse, finding that it was not timely filed and that the grounds asserted in her motion had "long been known to her" and did not warrant recusal. The trial court noted Ms. Durham's "insistence that she [would] appeal denial of her motion[,"] characterizing it "as a blatant attempt . . . to force the court to again continue the trial of [the] matter." The trial court opined that Ms. Durham's motion to recuse and "insistence" that she would appeal denial of the motion, coupled with the record, "evidence[d] a persistent failure by [Ms. Durham] to prosecute [the] action which warrant[ed] dismissal[.]" The trial court accordingly dismissed the consolidated action in its entirety for failure to prosecute. The trial court entered final judgment in the matter on January 29, 2014, and Ms. Durham filed a timely notice of appeal to this Court. With this procedural background in mind, we turn to the issues presented on appeal.

Dismissal for Failure to Prosecute

We turn first to whether the trial court erred by dismissing this matter for failure to prosecute. Rule 41.02(1) of the Tennessee Rules of Civil Procedure provides that a defendant may move for dismissal of an action for failure by the plaintiff to prosecute it.⁸ It is well-settled that appellate review of a trial court's dismissal of an action for failure to prosecute is under the abuse of discretion standard. *White v. College Motors, Inc.*, 370 S.W.2d 476, 476 (Tenn. 1963); *Jones v. Mortgage Menders, LLC*, M2014-00140-COA-R3-CV, 2014 WL 7069665, at *3 (Tenn. Ct. App. Dec. 12, 2014) (no perm. app. filed). An abuse of discretion occurs when a trial court employs an incorrect legal standard, reaches a conclusion that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or uses reasoning that results in an injustice to the complaining party. *Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012) (citations omitted). If a trial court's discretionary determination is within the range of acceptable alternatives, we will not

⁷Ms. Durham's pleading was filed stamped in the trial court on May 21, 2014. The pleading contains a Clerk's Note stating that it originally was placed in the trial court's file without a "filed" stamp; that the order entered by the trial court on January 29, 2014, indicates that Judge Harris was aware of the pleading on January 21, 2014; and that the pleading had been inserted into the record in chronological order despite the May 2014 filed stamp.

⁸Tennessee Rule of Civil Procedure 41.02(1) provides:

(1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

substitute our judgment for that of the trial court. *Id.* Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made[.]" *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) (citation omitted).

Ms. Durham asserts that the trial court abused its discretion by dismissing the matter for failure to prosecute because she promptly responded to the court clerk's March 2013 notice and set the matter for trial. Her argument, as we understand it, is that the trial court erred by granting Defendants' motion to dismiss rather than exercising its discretion to deny her January 2014 motion to continue. Ms. Durham submits that the trial court could have simply denied her motions and proceeded to trial in February 2014, as scheduled. She further asserts that much of the delay in this matter resulted from the actions of Defendants. Ms. Durham additionally asserts that the trial court "retaliated against [her] for filing a motion to recuse." She does not dispute that she informed the trial court that she would appeal any denial of her motion to recuse under Rule 10B of the Tennessee Supreme Court Rules but points out that section 2.04 of Rule 10B provides that "[t]he filing of a petition for recusal appeal does not automatically stay the trial court proceeding."⁹

Defendants, on the other hand, assert that the trial court properly exercised its discretionary authority when it dismissed this matter. They contend that, after allowing the action to lay dormant for more than two years, Ms. Durham sought yet another continuance shortly before trial. Defendants assert that Ms. Durham failed to provide any medical evidence to substantiate her assertion of any illness or medical condition that would prevent her from participating in the trial scheduled for February 2014. Defendants submit in their brief to this Court that Ms. Dunham "displayed a willful contempt for normal civil procedure, including responding to discovery requests . . . and adherence to established deadlines for prosecution of her action." They submit that there was a "respite from [Ms. Durham's] dilatory tactics while she was represented by counsel," that Ms. Durham's counsel attempted to resolve discovery issues and set the matter for trial, and that Ms. Durham dismissed her counsel and "resumed her pattern of disregard and delay by filing a motion to hold the case in abeyance[.]" Defendants assert that Ms. Durham made no attempt to move the matter forward until faced with an administrative dismissal of the matter and that she then "used specious claims of medical necessity and baseless allegations of judicial bias to again seek delay[.]" Defendants assert that dismissal for failure to prosecute was warranted in light of the entirety of the record.

⁹We note that Rule 10B further provides that any party may move either the trial court or this Court for a stay of the matter, and that the courts may stay the matter on their own initiative pending our determination on appeal.

Upon review of the record, we observe that this matter was prosecuted continuously from the date it was filed until February 2011, when Ms. Durham and her legal counsel apparently parted ways. We also observe that Ms. Durham responded promptly to the trial court's March 2013 notice directing her to set the matter or face dismissal for failure to prosecute. Further, it appears from the record that the actions of both parties contributed to the many delays in this matter.

We are not insensitive to the breadth and scope of the claims asserted in the varied motions filed by Ms. Durham. We note that, in January 2014, Ms. Durham filed a motion to set aside the trial court's December 2013 order setting a pre-trial conference, asserting that the trial court signed the order despite Defendants' failure to file a motion to set a pre-trial conference as required by Rule 16 of the Tennessee Rules of Civil Procedure. Notwithstanding Ms. Durham's earlier reliance on the Local Rules of Davidson County, she appears to have discounted Rule 18.02, which provides: "To expedite cases, the court may take reasonable measures including dismissal or entering a scheduling order to enforce the time standard set forth above." Local Rule 18.01, furthermore, provides: "All civil cases must be concluded or an order setting the case for trial obtained within twelve (12) months from the date of filing unless the court has directed a shorter or longer period." Additionally, Ms. Durham not only moved for a continuance of the matter but challenged the constitutionality of the statutes under which Judge Harris was assigned to the action.¹⁰

Although a trial court's dismissal of an action for failure to prosecute is subject to an abuse of discretion standard of review, our supreme court has observed that "dismissal for failure to prosecute is analogous to a default judgment." *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003). It is a "drastic sanction[]" and is disfavored by the courts. *Id.* (citations omitted). "Dismissals based on procedural grounds like failure to prosecute and default judgments run counter to the judicial system's general objective of disposing of cases on the merits." *Id.* (citations omitted). Further, we have noted "that discretionary decisions 'are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Langlois v. Energy Automation Sys., Inc.*, 332 S.W.3d 353, 357 (Tenn. Ct. App. 2009) (quoting *Peagues v. Ill. Cent. R. Co.*, 288 S.W.3d 350, 353 (Tenn. Ct. App. 2008) (quoting *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007))). Thus, although a trial court may dismiss an action as a sanction, we have noted that the court's power to sanction is "most effective when utilized with discretion and restraint." *Peagues*, 288 S.W.3d at 354. "[T]he punishment must fit the offense." *Id.* (quoting *Alexander v. Jackson Radiology Assoc., P.A.*, 156 S.W.3d 11, 15 (Tenn. Ct. App. 2004)). Accordingly,

¹⁰We observe that Ms. Durham did not move to amend her complaint to add a claim challenging the relevant statutes. Rather, Ms. Durham's allegations with respect to those statutes, as we perceive them, were made in the context of her motion to recuse.

lesser sanctions than dismissal are favored as a sanction for failure to prosecute. *Urtuzuastegui v. Kirkland*, 366 S.W.3d 128, 137 (Tenn. Ct. App. 2011) (quoting *Langlois*, 332 S.W.3d at 357)).

Notwithstanding the long procedural history of this lawsuit, we observe that the trial court appears to have dismissed this matter, in large part, in response to Ms. Durham's January 2014 motions, which the trial court apparently perceived as an attempt to manipulate it into further continuing the matter. To the extent that the trial court based its decision on the entirety of the procedural history of the matter, as noted above, both parties contributed to the delay of the trial in this case. Despite Defendants' assertion that Ms. Durham's consolidated complaint contained factual assertions and prayers for relief identical to those collectively asserted in her four separately-filed actions, Defendants nevertheless filed multiple motions to dismiss and for summary judgment in this action, thereby contributing to the many delays. We also observe that Ms. Durham complied with the trial court's March 2013 order to set the matter; that Defendants did not move for dismissal for failure to prosecute until after Ms. Durham filed her motion to set; and that the trial court had broad discretionary authority to deny Ms. Durham's January 2014 motion to continue¹¹ and proceed to trial in February 2014, as scheduled. Additionally, under Tennessee Supreme Court Rule 10B 2.04, any potential appeal by Ms. Durham of the trial court's denial of her motion to recuse would not have necessarily delayed the proceedings in the trial court. We accordingly conclude that the trial court erred by dismissing this matter for failure to prosecute and reverse on this issue.

¹¹Under the abuse of discretion standard of review, we have affirmed trial courts' decisions denying motions to continue "even where a party's illness or injury is the reason for the request." *Howell v. Ryerkerk*, 372 S.W.3d 576, 581 (Tenn. Ct. App. 2010) (citing *See, e.g., Smith v. Daniel*, 46 F.2d 740, 742 (6th Cir.1931) (finding no abuse of discretion where court refused to grant continuance on ground of illness of counsel and physical inability of plaintiff to proceed with trial and instead ordered plaintiff from her sickbed to attend trial without the assistance of counsel); *Mills v. Crane*, 1987 WL 9165, at *3 (Tenn. Ct. App.1987) (finding no abuse of discretion where plaintiff became ill the day before trial and filed an affidavit with medical report stating that, due to his medical condition, he would be unable to sit for long periods of time or to undergo the stress of trial); *State v. Seals*, 735 S.W.2d 849, 852–53 (Tenn. CIM. App.1987) (finding no abuse of discretion where defendant sustained injuries in automobile accident two days before the trial date); *State v. Robinson*, 622 S.W.2d 62, 74 (Tenn. CIM. App.1980) (finding no abuse of discretion where defendant was recuperating from surgery performed a month earlier); *Hamilton v. State*, 555 S.W.2d 724, 727 (Tenn. CIM. App.1977) (finding no abuse of discretion where defendant was partially paralyzed by a stroke hours before trial). "While a party's illness or injury may be a factor for the trial court's consideration, such an illness or injury does not entitle a party to a continuance as a matter of right." *Id.* (citing *State v. Seals*, 735 S.W.2d at 853).

Motion to Recuse

We turn next to whether the trial court erred by denying Ms. Durham's January 2014 motion to recuse. Supreme Court Rule 10, Code of Judicial Conduct Rule 2.11 provides that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned[.]” It is well-settled that “[t]he right to a fair trial before an impartial tribunal is a fundamental constitutional right.” *Bean v. Bailey*, 280 S.W.3d 798, 803 (Tenn. 2009) (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)). Under Article VI, § 11 of the Tennessee Constitution, Tennessee Code Annotated § 17-2-101 (2009), and Tennessee Supreme Court Rule 10 (the Code of Judicial Conduct), a judge may not preside over a matter in which the judge has an interest in the outcome. *Hooker v. Haslam*, 393 S.W.3d 156, 161 (Tenn. 2012) (citations omitted). The purpose of this prohibition is to “guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court [] reached a prejudged conclusion because of interest, partiality, or favor.” *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002) (citation omitted). Additionally, the courts have emphasized that “the preservation of the public’s confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.” *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. App. 1998) (citations omitted). Therefore, even in cases wherein a judge sincerely believes that he can preside fairly and impartially, he should recuse himself if a reasonable person “in the judge’s position, knowing all the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.” *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564–65 (Tenn. 2001) (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). It is an objective test, and it is designed to avoid both actual bias and the appearance of bias, “since the appearance of bias is as injurious to the integrity of the judicial system as actual bias.” *Id.* at 565 (citation omitted).

Adverse rulings, however, do not provide grounds for recusal. *Id.* Additionally, although “bias” and “prejudice” generally “refer to a state of mind or attitude that works to predispose a judge for or against a party[,] . . . [n]ot every bias, partiality or prejudice merits recusal.” *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994). Rather, “[t]o disqualify, prejudice must be of a personal character, directed at the litigant, [and] ‘must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from . . . participation in the case.’” *Id.* (quoting *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 697 (Mo. App. 1990)). “Personal bias involves an antagonism toward the moving party, but does not refer to any views that a judge may have regarding the subject matter at issue.” *Id.* (citing *United States v. Baker*, 441 F.Supp. 612, 616 (M.D. Tenn. 1977); 46 Am.Jur.2d “Judges” § 167 (1969)). Moreover, “[i]mpersonal prejudice resulting from the judge’s background experience does not warrant disqualification.” *Id.* (citation omitted). Where “the bias is based upon [the judge’s] actual

observance of witnesses and evidence given during the trial, the judge’s prejudice does not disqualify the judge.” *Id.* (citation omitted). “However, if the bias is so pervasive that it is sufficient to deny the litigant a fair trial, it need not be extrajudicial.” *Id.* (citing *Baker*, 441 F.Supp. at 617). Disqualification of a judge “is required ‘when a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge’s impartiality.’” *Hooker v. Haslam*, 393 S.W.3d 156, 161 (Tenn. 2012) (quoting *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008) (quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001))). We review a trial court’s denial of a motion for recusal under a *de novo* standard of review. Tenn. S. Ct. R. 10B, § 2.06.

In her January 2014 motion, Ms. Durham contended that the “strong” appearance of bias on the part Judge Harris, coupled with his “unlawful appointment,” required Judge Harris to recuse himself from the matter. Ms. Durham alleged that Judge Harris “was hand picked by the defendants” and was neither elected nor “randomly assigned to the case.” She asserted that Judge Harris’s “conduct in the case” was “so far beyond the pale of normalcy” that it could only be attributed to bias and a conspiracy between the judge and Defendants. Ms. Durham further asserted that Judge Harris’s “entire employment depends upon the defendants who without oversight or recourse can hire or fire him as they see fit.” Her argument, as we perceive it, is that not only are the statutes governing the appointment and assignment of special judges unconstitutional, but that any special judge would be biased against her because the judge’s “employment” depends upon the State.

In its January 2014 order, the trial judge observed that Ms. Durham’s motion to recuse was not timely filed and that she had long-known of the statutes and their implications, but waited until shortly before trial to assert that he had a personal interest in the matter. We note that Ms. Durham’s motion to recuse contained nothing to support her allegations that Defendants “hand picked” Judge Harris. There is nothing in the record to support Ms. Durham’s allegations of conspiracy. On the contrary, the record reflects that the trial court went to great lengths to accommodate all of the parties in this matter and to move the action to trial. To the extent that Ms. Durham relies on Judge Harris’s position as an employee of the State for the proposition that he has a financial interest in the matter because he is financially compensated by the State, we note that all of the State’s judges are State employees. Assuming, for the sake of argument, that all State judges have some sort of personal interest in the outcome of this lawsuit because they are State employees, the “Rule of Necessity” would apply to Ms. Durham’s motion to recuse, absent evidence of a particularized and distinct bias, prejudice, or appearance of impropriety. *See Hooker*, 393 S.W.3d at 167 n.8 (Tenn. 2012); *Gay v. City of Somerville*, 878 S.W.2d 124, 128 (Tenn. Ct.

App. 1994).¹² Finding no evidence of particularized bias or prejudice on the part of Judge Harris, we affirm the trial court’s denial of Ms. Durham’s motion to recuse.

Dismissal of Defendant James Neeley

We turn finally to Ms. Durham’s assertion that the trial court erred by granting Defendants’ motion to dismiss Mr. Neeley from this action. We begin our discussion of this issue by noting that the trial court dismissed Mr. Neeley, in his individual capacity only, by order entered August 28, 2013. It denied Defendants’ motion to dismiss Mr. Neeley in his official capacity.¹³ We also observe that, although the parties appear to perceive the trial court’s order as dismissing Mr. Neeley on the basis of medical or mental incapacity, the trial court’s order dismissed Mr. Neeley, in his individual capacity, for failure to prosecute. With these observations in mind, we turn to the arguments forwarded by the parties on appeal.

In her brief, Ms. Durham asserts that the trial court erred by dismissing Mr. Neeley on the basis that he was medically incompetent to participate in the action without making findings with respect to Mr. Neeley’s medical condition and without affording Ms. Durham the opportunity to engage in discovery. She further asserts that Dr. Beckham’s affidavit was hearsay and that she was not afforded the opportunity to challenge it. Defendants, on the other hand, assert that Dr. Beckham’s affidavit is proof of Mr. Neeley’s medical condition and that Ms. Durham presented no proof to refute it.

Upon review of the record, we note that, in his July 2013 affidavit, Dr. Beckham stated that he was Mr. Neeley’s primary care physician; that Mr. Neeley suffered a stroke in December 2012; that Mr. Neeley was receiving physical therapy and rehabilitation services in a residential treatment facility at the time the affidavit was executed; and that, as a result of the stroke, Mr. Neeley was mentally and physically impaired. Dr. Beckham stated that it was his “considered medical opinion” that Mr. Neeley was “unable to attend or participate in the rigors of a multiple day jury trial” and that Mr. Neeley would “continue to be so impaired for the foreseeable future.” Dr. Beckham further stated that Mr. Neeley had suffered memory loss and that “there is no specific medical treatment to help reverse memory loss after a stroke.”

¹²The Rule of Necessity is “a well-settled principle at common law” permitting a judge to participate in a case notwithstanding a potential personal interest “‘if the case cannot be heard otherwise.’” *U.S. v. Will*, 449 U.S. 200, 213 (1980) (quoting F. Pollocak, A First Book of Jurisprudence 270 (6th ed. 1929)).

¹³In January 2014, the trial court ultimately granted Defendants’ motion to dismiss the matter in its entirety for failure to prosecute. We separately discuss dismissal of Mr. Neeley, in his individual capacity, in light of the procedural history of the matter in the trial court.

We observe that, although Defendants assert that Ms. Durham failed to refute Dr. Beckham's affidavit, the trial court denied Ms. Durham's motion to conduct discovery on the question of Mr. Neeley's mental capacity and medical condition. Further, we note that Defendants did not move to dismiss Mr. Neeley on the basis of incompetency and that the trial court made no findings with respect to Mr. Neeley's medical condition or mental capacity. Further, although it appears from the trial court's order that the matter was heard by the court on August 28, 2013, the record before us contains no transcript that potentially would offer additional insight into the trial court's ruling.

Neither party, moreover, cites us to any case law supporting the arguments made in their briefs. In the context of dismissal of a party for mental incompetency, we have held that the party alleging incompetency bears the burden of proving it. *Ralson v. Hobb*, 306 S.W.3d 213, 220 (Tenn. Ct. App. 2009). Additionally, Rule 25.02 of the Tennessee Rules of Civil Procedure provides that the court may, upon motion, allow an action to proceed against a party's representative if a party becomes incapacitated. In the context of motions to continue, we have affirmed trial courts' decisions denying such motions "even where a party's illness or injury is the reason for the request[,]” and have held that trial courts are not required to continue a matter "simply because" a "medical excuse" is before it. *Howell v. Ryerkerk*, 372 S.W.3d 576, 581 (Tenn. Ct. App. 2010) (citation omitted).

As noted, the only evidence offered by Defendants in support of their motion to dismiss Mr. Neeley was Dr. Beckham's affidavit; the trial court made no findings with respect to Mr. Neeley's medical condition or mental capacity; it did not provide any legal basis for its ruling; and it did not permit Ms. Durham to conduct discovery in order to refute the assertions made by Dr. Beckham in his affidavit. Defendants did not file a motion to dismiss Mr. Neeley on any ground other than failure to prosecute. Without explanation or reasoning, the trial court granted Defendants' motion to dismiss Mr. Neeley, in his individual capacity, for failure to prosecute.

Under the abuse of discretion standard of review applicable to dismissal of a matter for failure to prosecute, we will reverse the trial court's judgment if the trial court uses an incorrect legal standard, bases its decision on a clearly erroneous assessment of the evidence, reaches a conclusion that is illogical, or uses reasoning that results in an injustice to the complaining party. *Jones*, 2014 WL 7069665, at *3. In light of the foregoing discussion, dismissal of Mr. Neeley in his individual capacity for failure to prosecute was not grounded in logic where the basis for dismissal (failure to prosecute) was unrelated to the basis advanced by Defendants (medical and/or mental incapacity). We accordingly reverse the trial court's dismissal of Mr. Neeley.

Holding

We affirm the trial court's judgment denying Ms. Durham's motion to recuse; reverse dismissal of Ms. Durham's action for failure to prosecute; and reverse dismissal of Mr. Neeley, in his individual capacity, for failure to prosecute. In light of the foregoing, this matter is remanded to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed one-half to the Appellant, Sherrie L. Durham, and one-half to the Appellees, the State of Tennessee; the Tennessee Department of Labor and Workforce Development; James Neeley; Lynda McDaniel; Michael Thomason; Don Ingram; and Bob Henningsen.

ARNOLD B. GOLDIN, JUDGE