STATE OF MICHIGAN

COURT OF APPEALS

LISA PENNA,

Plaintiff-Appellant,

v

MGM GRAND DETROIT, L.L.C., MICHAIL KRAVARITIS, GREGORY VANSTONE, and LISA JOHNSON-HANNAH,

Defendants-Appellees.

UNPUBLISHED
December 3, 2002

No. 233499
Wayne Circuit Court
LC No. 99-929162-CK

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Plaintiff, an African-American, filed suit against defendants alleging that she was wrongfully terminated from her position as assistant manager of the Brown Derby Restaurant at the MGM Grand Detroit. Plaintiff appeals as of right from an order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that defendants breached her employment contract by terminating her without giving the requisite sixty days' notice. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Oade v Jackson National Life Ins Co of Michigan*, 465 Mich 244, 251; 632 NW2d 126 (2001). When deciding such a motion, a court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Where no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law. *Id*. See MCR 2.116(C)(10), (G)(4). This Court reviews de novo a ruling on a motion for summary disposition. *Smith, supra*.

The construction of unambiguous contractual language is a question of law, whereas the construction of ambiguous contractual language is a question of fact. *Saint Paul Fire & Marine Ins Co*, 228 Mich App 101, 107; 577 NW2d 188 (1998). If a contract, although inartfully worded, admits of only one interpretation, it is not ambiguous. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Contractual language is construed

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

according to its plain and ordinary meaning, and the court should avoid technical or strained constructions. *Saint Paul Fire*, *supra* at 107.

Here, the parties' letter of employment provided as follows:

> 7. Termination Right: Either party shall have the right to terminate this agreement and your employment hereunder, without cause, on 60 days notice, without further obligations to the other.

The employee handbook provided: "In cases of serious misconduct, . . . [employees] may be subject to immediate separation with 'just cause.'" Taken together, the terms of plaintiff's employment clearly and unambiguously provided for sixty days' notice when either party sought to terminate the agreement *without cause*, but allowed for immediate termination—i.e., without notice—when an employee is terminated for "serious misconduct," described as "just cause." Therefore, if defendants terminated plaintiff's employment for cause, they did not breach the sixty-day notice provision.

The employee handbook addressed certain behavior for which an employee could be subject to immediate termination.[1] Unacceptable conduct included the use of language that could be offensive to others, sexual harassment, and "discourteous conduct of a flagrant nature." Among the reasons given by defendants for plaintiff's discharge were complaints that she made inappropriate comments regarding race, male genitalia, and religion. Although the precise nature of the investigation undertaken by defendants before discharging plaintiff is unclear, no evidence was presented to refute that plaintiff made the comments or that such comments constituted grounds for immediate termination. Thus, because plaintiff failed to establish a genuine issue of material fact regarding the making of these comments and whether they constituted "just cause" for immediate termination, the trial court properly granted summary disposition to defendants on plaintiff's breach of contract claim.

Plaintiff next argues that summary disposition was improperly granted on her race discrimination claim. We disagree.

In her complaint, plaintiff alleged race discrimination in violation of the Civil Rights Act, MCL 37.2102 *et seq*. The statutory provision in question, MCL 37.2202(1)(a), provides that an employer cannot "[f]ail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." A prima facie case of disparate treatment can be established by direct or indirect evidence. Because plaintiff here did not present any direct evidence of discrimination by defendants, she must establish a prima facie case of disparate treatment using the burden-shifting framework in *McDonnell Douglas*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). A prima facie case is established by evidence that (1) the plaintiff was a member of the protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was discharged under circumstances giving rise to an inference of unlawful discrimination, i.e.,

[1] Neither party provided the handbook in its entirety; therefore, it is unknown whether the handbook contained any contractual disclaimer.

other similarly situated persons outside the protected class were treated differently. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). See also *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (Brickley, J.). Once a plaintiff has sufficiently established a rebuttable presumption of discrimination, the burden of production shifts to the defendant to articulate a "legitimate, nondiscriminatory" reason for the plaintiff's termination. *Hazle*, *supra* at 464-465. Once the defendant produces such evidence, the presumption of discrimination "drops away," and the burden reverts back to the plaintiff to demonstrate that the defendant's reasons were mere pretext for discrimination. *Id*. at 465. Thus, to survive summary disposition, the plaintiff must demonstrate that the evidence, when construed in her favor, is "'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id.*, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998) (Weaver, J.).

Here, plaintiff contends that the trial court improperly granted summary disposition to defendants because she had failed to demonstrate that her employment situation was identical in all respects to other non-minority employees. We find no error in the trial court's analysis. To be similarly situated, all relevant aspects of the employment situation between two persons must be nearly identical. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 370; 597 NW2d 250 (1999). See also *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). As the trial court aptly noted, although plaintiff presented evidence of misconduct and absenteeism by other employees who were not members of the protected class and who were not discharged, plaintiff failed to demonstrate either that the positions and duties of these employees were nearly identical to hers, or that the alleged misconduct or absenteeism of these employees was of a similarly egregious nature to hers. Thus, we conclude that plaintiff failed to present a prima facie case of race discrimination.

Moreover, even assuming that plaintiff could establish a prima facie case of discrimination, she has failed to demonstrate the existence of a genuine issue of material fact whether defendants' nondiscriminatory reasons for her termination were pretextual. Defendants met their burden to articulate legitimate, nondiscriminatory reasons for plaintiff's termination, e.g., complaints that plaintiff made inappropriate and offensive comments to other cast members, and absenteeism. In the absence of any indication that plaintiff's race played any role whatsoever in defendants' decision to discharge her, we conclude that the trial court properly granted summary disposition to defendants.

Affirmed.

/s/ Peter D. O'Connell
/s/ Barbara B. MacKenzie