STATE OF MICHIGAN

COURT OF APPEALS

JOYCE LYONS,

Plaintiff-Appellant,

v

FLINT BOARD OF EDUCATION and FLINT SCHOOL DISTRICT,

Defendants-Appellees,

and

THOMAS W. KUTCHERY,

Defendant.

UNPUBLISHED
October 5, 1999

No. 209407
Genesee Circuit Court
LC No. 96-048246 CZ

Before: Doctoroff, P.J., and Markman and Sullivan*, JJ.

PER CURIAM.

In this gender discrimination case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) is reviewed to determine whether the affidavits, pleadings, depositions, or other documentary evidence submitted by the parties establish a genuine issue of material fact to warrant a trial. *Id.* On appeal, as below, all reasonable inferences are resolved in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

The Elliott-Larsen civil rights act provides: "An employer shall not . . . (a) Fail 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." MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).

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

To establish a prima facie case of gender discrimination, plaintiff must prove by a preponderance of the evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) other, similarly situated, employees outside the protected class were unaffected by the employer's adverse action. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 181 n 30; 579 NW2d 906 (1998)(Weaver, J); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 455 NW2d 688 (1997)(Brickley, J). Once the plaintiff has established a prima facie case, a presumption of discrimination arises, and the burden shifts to the defendant to overcome the presumption by articulating a legitimate, nondiscriminatory reason for the employer's adverse action. *Lytle, supra* at 173. If the defendant sufficiently articulates such a reason for the termination, the presumption of discrimination is extinguished. *Id.* at 174. The burden then shifts back to the plaintiff to establish, by a preponderance of admissible evidence, that there was a genuine fact issue with respect to whether the defendant's proffered reasons were not the true reason for the adverse action, but were a pretext for discrimination. *Id.*

Here, plaintiff has not met her burden of establishing a prima facie case of gender discrimination because she has not demonstrated that similarly situated male employees were treated differently. To show that an employee was similarly situated, the plaintiff must prove that "all of the relevant aspects of his employment situation were nearly identical to those of [another employee's] employment situation." *Town, supra* at 699-700 (citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). Which aspects of an employment situation are relevant depends on the circumstances surrounding the alleged adverse employment action. See *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 653; 513 NW2d 441 (1994); *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992).

Here, in response to defendants' motion for summary disposition, plaintiff argued that several male employees who committed acts similar to the incident at issue were not fired. However, after reviewing the documentary evidence submitted by the parties, we conclude that the employees to which plaintiff refers were not similarly situated. First, the incident involving Richard Campbell occurred more than twenty years ago, no one was injured, there were no witnesses, and the threatened employee admitted that Campbell never actually produced the knife he had threatened to use. Thus, Campbell's conduct differs significantly from plaintiff's conduct. Second, the 1994 incident involving Michael Patrick was dissimilar because, while Patrick used a school vehicle to drive to another location where he shot and injured a man, the assault did not involve another employee and did not occur on school property. Furthermore, plaintiff and Patrick were not employed in similar positions. Unlike Patrick, who was employed as a roofer, plaintiff's position required direct contact with children on a daily basis.

Third, the 1991 incident involving John Allison does not support plaintiff's claim because Allison was terminated once the true circumstances of the incident became known to the board of education. Fourth, the 1990 incident involving Dan Malone was dissimilar because, while a knife was found in Malone's briefcase when he was stopped for speeding while driving a school bus, there was no indication that Malone ever took the knife out of his briefcase or threatened anyone with the knife. Therefore, Malone's conduct was not similar to plaintiff's conduct. Finally, plaintiff points to the fact

that Simbler was not terminated for his involvement in the incident. However, because Simbler did not use a weapon on school property, he was not similarly situated to plaintiff.

Moreover, as noted by the trial court, all of the incidents to which plaintiff referred, with the exception of Simbler's involvement in the incident giving rise to the instant case, occurred before the 1995 enactment of MCL 380.1311(2); MSA 15.41311(2), which provides for the expulsion from the school district of any student found to be possessing a dangerous weapon in a weapon free school zone. See Historical and Statutory Notes following MCL 380.1311; MSA 15.41311. William McLean's deposition testimony indicated that, because elementary school students are expelled if found with a dangerous weapon in a weapon free school zone, it was "a very bad example" for plaintiff, who dealt with school children on a daily basis, to have a weapon while on the job. Thus, because plaintiff failed to demonstrate that any similarly situated male employee was treated differently, she failed to establish a prima facie case of gender discrimination.

Furthermore, even if plaintiff had established a prima facie case of gender discrimination, she failed to raise a genuine fact issue with respect to whether defendant's proffered reason for the termination was merely a pretext for discrimination. *Lytle*, *supra* at 174. Plaintiff need not prove that gender was the sole factor or even the main reason for terminating her employment. *Schellenberg v Rochester Mich Lodge No 2225 of Benevolent Protected Order of Elks*, 228 Mich App 20, 35; 577 NW2d 163 (1998). Rather, to survive summary disposition, "a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, 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." *Lytle*, *supra* at 176.

Here, defendants' proffered reason for plaintiff's discharge was their determination that plaintiff's possession of a knife and her assault of a coworker on school grounds was unacceptable employee behavior. To demonstrate that defendants' stated reason was merely a pretext for discrimination, plaintiff relied on the evidence she submitted to demonstrate a prima facie case of gender discrimination. However, as stated above, the evidence submitted by plaintiff with respect to male employees who were not terminated after engaging in certain conduct does not raise a genuine fact issue with respect to whether plaintiff's termination was motivated by discrimination because the conduct of the male employees to which plaintiff refers was not similar to that of plaintiff.

In addition, the affidavit of James Pirtle does not raise a fact issue with respect to whether defendants' reason for terminating plaintiff's employment was a pretext for discrimination. Pirtle attested that "[i]t has been the policy and practice of the Flint Board of Education and the Flint School District to consider mitigating factors with respect to the termination of male employees' employment when such men have had a weapon and/or engaged in violent behavior on school property." However, without evidence that the incidents to which Pirtle refers were similar to the incident at issue in the instant case, Pirtle's affidavit does not indicate that the termination of plaintiff's employment was motivated by gender discrimination rather than the legitimate reason given by defendants.

Therefore, because plaintiff failed to establish a prima facie case of gender discrimination and further failed to raise a genuine fact issue with respect to whether defendants' proffered reason for the

termination was merely a pretext for discrimination, we conclude that the trial court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan