

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MAURICE GHOLSTON and ERNEST MOORE,  
  
Plaintiffs-Appellants,

UNPUBLISHED  
November 15, 2012

v

MINORITY AUTO HANDLING SPECIALISTS  
and STEVE GRAHL,

No. 305442  
Wayne Circuit Court  
LC No. 10-008206-CZ

Defendants-Appellees.

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Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Plaintiffs Maurice Gholston and Ernest Moore appeal as of right the trial court's order granting defendants Minority Auto Handling Specialists (Minority Auto) and Steve Grahl's motion for summary disposition under MCR 2.116(C)(8) and (10). We affirm.

**I. FACTS**

**A. BACKGROUND FACTS**

Minority Auto provides dock and warehouse services. Minority Auto hired Gholston and Moore as material handlers in September 2006. Grahl was Minority Auto's general manager during their period of employment. Gholston and Moore were members of a union, and their employment at Minority Auto was subject to a union contract. The contract provides that "fighting, threatening, or attempting bodily injury to another employee or supervisor on the Employer or customer's premises or on the Employers time" is an offense subject to termination. Minority Auto did not have any problems with Gholston or Moore's performance before the altercation that led to their termination.

**B. GHOLSTON AND MOORE'S ALTERCATION**

On February 5, 2008, Gholston and Moore had a verbal altercation. Gholston testified at deposition that he wanted to speak with Moore about their friendship. Moore testified at deposition that Gholston approached him to ask why he was no longer speaking with him, and that he became annoyed because he was trying to focus on his work. Moore testified that the conversation became heated, and that he and Gholston shouted at each other. Moore testified that he used profanity, and Gholston testified that Moore shouted that he was going to kill him.

Gholston testified that it lasted for five minutes. Moore testified that the verbal altercation lasted for ten or 15 minutes.

On February 6, 2008, Gholston and Moore both left work at 4:30 a.m. and started walking to their cars. Moore testified that Gholston asked him if he “wanted to take care of this,” which Moore understood to mean that Gholston wanted to fight with him. Moore testified that he continued walking, that Gholston pushed him, and that he may have pushed Gholston back. Moore testified that Gholston punched him in the face; Gholston testified that he only tried to punch Moore. Moore threatened to call 9-1-1. Moore testified that Gholston told him to go ahead and call 9-1-1, but that when he tried, his phone either fell to the ground or Gholston knocked it from his hands.

According to Moore, he went to his car and retrieved a screwdriver from his glove box. He planned to use the screwdriver to defend himself, because he was afraid for his life. He held the screwdriver at Gholston like a weapon, and they continued to argue.

Gholston testified that Moore “came at [him]” with the screwdriver, but that he was not afraid of Moore because he did not believe that Moore actually intended to hurt him. Gholston took off his jacket and swung it at Moore, knocking the screwdriver to the ground. Moore testified that at that point, he got into his car to leave. Gholston testified that he picked up the screwdriver and threw it at Moore’s car. Moore testified that he stopped his car, and got out to inspect it for damage. After he saw that his car was not damaged, he got back into his car and drove away. Both Moore and Gholston denied that Moore had tried to hit Gholston with the car, but both testified that they could not remember whether Moore hit another vehicle with his car when he was leaving.

After the altercation, Jeffrey Collins, a truck driver, called the police. Collins reported that two men got into a fight in the Minority Auto parking lot, and that one of the men backed into Collins’s truck and damaged it while he was leaving.

On February 7, 2008, Moore reported the incident to Grahl, and Gholston reported the incident to a supervisor. Grahl testified that the night shift supervisor, Matt Daniels, informed him that Gholston and Moore were involved in an altercation. He testified that he suspended Gholston and Moore, pending an investigation.

Grahl testified that during his investigation, he learned that Moore and Gholston got into a verbal argument in the Minority Auto facility the day before the altercation. Grahl testified that Gholston and Moore initially told him that they were fighting about a debt, but later told him that they were fighting about their friendship. Grahl testified that he also interviewed Glen Blunt, a Minority Auto employee who witnessed the incident, and that Blunt told him that Gholston and Moore had been “posing to fight.” According to Grahl, when he interviewed Gholston, Gholston stated that Moore tried to hit him with the car and yelled out the window that he was going to kill him. Gholston told Grahl that after he threw the screwdriver at Moore’s car, Moore stopped, backed up, and tried to hit Gholston with the car again. While Moore was backing up, he hit another truck in the parking lot.

Grahl testified that he spoke with the truck's owner, Gary Radcliff, and confirmed that the truck was damaged. Grahl testified that he also spoke with Collins, who indicated that one of the men had lunged at the other with what appeared to be a knife before the getting into the car and hitting the truck.

After concluding his investigation, Grahl recommended that Minority Auto terminate Gholston and Moore's employments. Minority Auto issued termination notices to Gholston and Moore on February 19, 2008, which stated that Minority Auto was terminating them for "fighting, threatening, or attempting bodily injury to another employee or supervisor on the Employer or customer's premises or the Employers time." Gholston and Moore filed grievances with their union. The union denied their grievances. Gholston and Moore then appealed to the Industrial Board Arbitration Committee, which deferred review of their case while this lawsuit was pending.

### C. OTHER ALTERCATIONS AT MINORITY AUTO'S WORKPLACE

To support their claim that Minority Auto treated Gholston and Moore differently than similarly situated employees, they submitted evidence of four other physical altercations at Minority Auto's workplace.

The first incident was between Gary Schlact, a white employee, and Rudy Medina, a Hispanic employee. Schlact threw a work glove across the lunchroom that hit Medina in the groin. Medina then "chest-butted" Schlact and knocked him down. Grahl testified that Medina initially reported that Schlact later broke a headlight on his car with a baseball bat, but no witnesses actually saw Schlact vandalize Medina's car, and both Schlact and Medina denied that Schlact vandalized Medina's car. Gholston and Moore presented an affidavit from John McPartlin, a Minority Auto employee and union representative, in which McPartlin stated that Schlact broke Medina's headlight. Both Grahl and the union characterized the incident as "horseplay."

The second incident was between David McGowan, a white employee, and Clark Davis, a black employee. Clark Davis submitted a handwritten statement that he referred to McGowan with a derogatory name, and McGowan lifted a metal pipe and came at him with it while yelling. Davis stated that he reported the incident to Grahl, but he did not reprimand McGowan. Davis stated that Grahl told him that he should not have called McGowan the name. Grahl testified that Davis never said that McGowan chased him with a metal pipe.

The third incident was between Ron Mancos, a white employee, and Aaron Laliberte, a white employee. Grahl testified that someone reported that Mancos and Laliberte were involved in a verbal altercation. Mancos initially reported that Laliberte hit his hand, but later reported that Laliberte did not actually hit him. Grahl testified that he concluded that the incident was not a physical altercation, and Minority Auto did not terminate either employee's employment.

The fourth incident involved Ronald Hardy, a white employee. Though Gholston and Moore testified that Hardy was not terminated for misconduct, Minority Auto presented evidence that it terminated Hardy's employment for harassing other employees by driving his forklift up to them, revving the motor, and blowing hot air on them. Grahl testified that Hardy appealed his

termination to the Industrial Board Arbitration Committee, which reinstated Hardy's employment.

When questioned about the incidents, Grahl testified that the other incidents were not as severe as Gholston and Moore's conduct.

Minority Auto presented evidence of a fifth incident between Dennis Downey, a white employee, and Monte DeForest, a white employee. Grahl testified that Downey and DeForest exchanged significant threats, and engaged in screaming, yelling, pushing, and spitting. Grahl suspended and later terminated Downey and DeForest's employments. McPartlin submitted an affidavit that Minority Auto terminated Downey's and DeForest's employment only to support its position in this case.

#### D. OTHER EVIDENCE OF DISCRIMINATION

Both Gholston and Moore testified that Minority Auto had a history of discriminating against black employees. They testified that black employees were given more work and were not allowed to take breaks, and that white employees were promoted more often than black employees. Gholston testified that managers treated white employees with more respect, and talked down to him because he was black.

Blunt and Donald Richardson, former employees of Minority Auto, submitted affidavits. Blunt stated that he witnessed managers, including Grahl, treat black employees worse than white employees. He testified that Minority Auto gave black employees more work, shorter breaks, and passed them over for promotions. Blunt stated that he quit his job at Minority Auto because he felt that Minority Auto was discriminating against him. Richardson's affidavit contained the same allegations.

#### E. PROCEDURAL HISTORY

In July 2010, Gholston and Moore filed this action against Minority Auto, alleging that Minority Auto fired them because they are black, and did not fire non-black employees who engaged in the same or similar conduct. In their answer to the complaint, Minority Auto responded that Gholston and Moore were fired for engaging in conduct prohibited by their union contract, and that their conduct was more serious than the misconduct in the other incidents.

In May 2011, Minority Auto filed a motion for summary disposition under MCR 2.116(C)(8) and (10), arguing that Gholston and Moore did not provide evidence that they had been treated differently than similarly situated employees because their misconduct was more severe. Gholston and Moore argued that their incident was substantially similar to the incidents in which Minority Auto did not fire non-black employees for their conduct. Minority Auto submitted a statement of 23 facts that they claimed differentiated Gholston and Moore's misconduct from that of other incidents in which Minority Auto did not terminate the employees.

#### F. THE TRIAL COURT'S RULING

The trial court heard arguments on the motion on July 19, 2011. The trial court ruled that Gholston and Moore did not establish a prima facie case of discrimination because they did not

establish that Minority Auto treated them differently than similarly situated employees. It concluded that the misconduct in the other incidents was not as serious. The trial court granted Minority Auto's motion for summary disposition.

## II. EVIDENTIARY ISSUES

### A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's determination that evidence is admissible.<sup>1</sup> The trial court's error when admitting or excluding evidence warrants relief if our failure to afford the party relief would be inconsistent with substantial justice, or if the error affected a substantial right of the party.<sup>2</sup>

### B. EVIDENTIARY ISSUES

Gholston and Moore challenge the trial court's consideration of certain evidence. The trial court must base its decision on a motion for summary disposition under MCR 2.116(C)(10) on only admissible evidence.<sup>3</sup>

First, Gholston and Moore challenge Grahl's characterization of the screwdriver as a weapon. A household tool can be a weapon if a person threatens to use it in a manner that could inflict a serious injury.<sup>4</sup> We conclude that the trial court did not improperly characterize the screwdriver as a weapon when the parties do not dispute that Moore threatened to use it against Gholston in a manner that could inflict serious injury.

Next, Gholston and Moore argue that the trial court should not have considered facts contained in the police report because the report is inadmissible hearsay. While the contents of a police report are hearsay,<sup>5</sup> the trial court stated only that "the police were called[.]" The record does not indicate that the trial court considered the contents of the police report when making its ruling. The remainder of the trial court's remarks are attributable to Grahl's testimony at deposition, and do not indicate that it relied on the police report. Thus, we reject this argument as well.

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<sup>1</sup> *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

<sup>2</sup> *Id.*; MCR 2.631(A); MRE 103.

<sup>3</sup> MCR 2.116(G).

<sup>4</sup> See *People v Brown*, 406 Mich 215, 219-223; 277 NW2d 155 (1979).

<sup>5</sup> MRE 801(c); MRE 802; *Solomon v Shuell*, 435 Mich 104, 139; 457 NW2d 669 (1990).

### III. EMPLOYMENT DISCRIMINATION

#### A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition.<sup>6</sup> When the trial court relies on documents outside the pleadings, we review the motion as though it were granted under MCR 2.116(C)(10).<sup>7</sup> Here, the trial court relied on documentary evidence outside the pleadings, so we review the matter as though the trial court granted the motion under MCR 2.116(C)(10).

Summary disposition is appropriate under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.<sup>8</sup> A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.<sup>9</sup>

#### B. LEGAL STANDARDS FOR EMPLOYMENT DISCRIMINATION

“[T]he opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status” is a civil right.<sup>10</sup> An employer may not discharge an employee for any of these reasons.<sup>11</sup> There are two generally recognized, broad categories of intentional discrimination claims: (1) disparate treatment claims, and (2) disparate impact claims.<sup>12</sup> Gholston and Moore claim only disparate treatment in this case.

An employee shows a prima facie case of intentional employment discrimination on the basis of disparate treatment if “the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly

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<sup>6</sup> *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

<sup>7</sup> *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007).

<sup>8</sup> MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

<sup>9</sup> *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

<sup>10</sup> MCL 37.2102(1).

<sup>11</sup> MCL 37.2202(1)(a); *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

<sup>12</sup> *Id.*; see *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177, n 26, (Weaver, J., joined by Boyle and Taylor, JJ.), 185 (Brickley, J., concurring); 579 NW2d 906 (1998).

situated and outside the protected class, were unaffected by the employer's adverse conduct."<sup>13</sup> The purpose of this test is to rule out nondiscriminatory reasons for the employer's action.<sup>14</sup>

### C. APPLYING THE PRIMA FACIE EMPLOYMENT DISCRIMINATION STANDARDS

Here, the parties only dispute whether Gholston and Moore have made a prima facie case of intentional discrimination under the fourth element, which is whether similarly situated individuals outside the protected class were similarly treated. Gholston and Moore argue that the trial court incorrectly concluded that they did not make a prima facie case on this element because it disregarded material facts and did not consider the record in the light most favorable to the nonmoving party. Gholston and Moore argue that they were similarly situated because these situations all involved the same conduct under the union contract, namely "fighting, threatening, or attempting bodily injury," and that all the employees in each of the incidents should have been terminated under the contract. But similar reasons for termination are not enough to make a showing under this element. Employees are similarly situated if all relevant aspects of their employment situations are "nearly identical."<sup>15</sup>

Of the incidents provided by Gholston and Moore, the closest incident to which Gholston and Moore were similarly situated involved the altercation between Schlact and Medina, in which Minority Auto initially thought that a weapon and property damage were involved. Though Gholston and Moore argue that, like their own incident, the incident between Schlact and Medina did involve property damage, we conclude they did not provide any *admissible* evidence that Schlact actually had a baseball bat and used it to break the headlight on Medina's car. They provided only McPartlin's affidavit, which is not admissible.

The trial court can only consider evidence offered in support of or in opposition to a motion for summary disposition to the extent it is admissible.<sup>16</sup> Thus, an affidavit must be based on personal knowledge, state with particularity facts admissible as evidence, and show that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.<sup>17</sup> Inadmissible evidence does not create an issue of material fact.<sup>18</sup> McPartlin's affidavit does not establish that McPartlin had personal knowledge of the incident between Schlact and Medina. Thus, this evidence is not admissible, and does not create an issue of material fact. On the

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<sup>13</sup> *Town v Mich Bell Telephone Co*, 455 Mich 688, 695 (Brickley J., joined by Boyle and Weaver, JJ.), 708-709 (Riley, J., concurring); 568 NW2d 64 (1997); *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

<sup>14</sup> *Town*, 445 Mich at 699-700.

<sup>15</sup> *Smith v Goodwill Industries of West Mich, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000); see *Town*, 445 Mich at 699-700.

<sup>16</sup> MCR 2.116(G)(6).

<sup>17</sup> MCR 2.119(B)(1).

<sup>18</sup> *McCallum v Dept of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992).

undisputed facts, the incident did not involve weapons or serious threats, was short in duration, did not involve police, and did not result in damage to a third person's property.

The second incident between Davis and McGowan is not comparable to Gholston and Moore's incident. To be similarly situated, the conduct must be nearly identical.<sup>19</sup> Viewing the evidence in the light most favorable to the nonmoving parties, McGowan approached Davis in a threatening manner with a metal pipe while yelling, and McGowan was not reprimanded after Davis reported the situation. This incident did not involve a validated complaint of property damage, and no one called the police.

The third incident between Mancos and Laliberte did not involve weapons, a police report, or property damage. And the fourth incident involving Hardy does not support Gholston and Moore's position because, contrary to their assertion, Minority Auto actually terminated Hardy's employment, though the Industrial Board Arbitration Committee later reinstated it.

We conclude that Gholston and Moore did not demonstrate that they were similarly situated with non-protected employees that engaged in similar misconduct. Viewing the evidence in the light most favorable to Gholston and Moore, though other employees engaged in physical misconduct, including physical altercations in which objects were thrown or other employees were struck, in none of the incidents did a third party call the police, and none of the incidents involved a validated report of property damage. Thus, Gholston and Moore have not demonstrated that these incidents were nearly identical, and the trial court correctly concluded that they have not demonstrated a prima facie case of employment discrimination as a matter of law.

#### D. OTHER EVIDENCE OF DISCRIMINATION

Gholston and Moore also argue that the trial court improperly disregarded other evidence of intentional employment discrimination. We disagree. The trial court need only consider the employer's burden to establish a legitimate nondiscriminatory reason for terminating the plaintiff, and the plaintiff's evidence of pretext, *after* the plaintiff has proved his or her prima facie case:

. . . [A] plaintiff may establish a prima facie case of prohibited discrimination by demonstrating that the plaintiff suffered an adverse employment action under circumstances giving rise to an inference of discrimination. *After the prima facie case is established*, the employer has the burden of coming forward with a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the plaintiff has the burden of proving that the stated reason is merely a pretext for discrimination . . . .<sup>[20]</sup>

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<sup>19</sup> *Town*, 455 Mich at 699-700.

<sup>20</sup> *Wilcoxon*, 235 Mich App at 359 (emphasis supplied); see *Town*, 455 Mich at 695-696.



Thus, the trial court did not err when it did not consider Gholston and Moore's evidence that Minority Auto's decision to terminate their employment was a pretext because it was only required to consider that evidence if Gholston and Moore articulated a prima facie case for employment discrimination. Because they have not done so here, the trial court did not err when it did not consider the rebuttal evidence when making its ruling on Minority Auto's motion for summary disposition on the prima facie case.

Affirmed.

/s/ William B. Murphy  
/s/ Peter D. O'Connell  
/s/ William C. Whitbeck