

STATE OF MICHIGAN
COURT OF APPEALS

ANN DISS,

Plaintiff-Appellant,

v

GORDON FOOD SERVICE,

Defendant-Appellee.

UNPUBLISHED

August 14, 2003

No. 239842

Kent Circuit Court

LC No. 00-010657-CZ

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We affirm.

We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999).

1. Sex Discrimination

Plaintiff argues that the trial court erred in granting summary disposition of her sex discrimination claim. A prima facie case of intentional sex discrimination can be made by proving either intentional discrimination or disparate treatment. *Schellenberg v Rochester Michigan Lodge No 2225 of Benevolent and Protective Order of Elks of USA*, 228 Mich App 20, 32; 577 NW2d 163 (1998). The essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex. *Id.* at 34. In order to establish a prima facie case of sex discrimination under the disparate treatment theory, a plaintiff must show that she was a member of a class deserving of protection under the statute, and that, for the same conduct, she was treated differently than a man. *Id.* at 33. The plaintiff has the burden of

establishing a prima facie case of sex discrimination with evidence that is legally admissible and sufficient. *Id.* Once the plaintiff has established a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Hazle v Ford Motor Co*, 464 Mich 456, 464; 628 NW2d 515 (2001). If the employer makes such an articulation, in order to survive a motion for summary disposition, a plaintiff must demonstrate that the reason offered by the defendant was a mere pretext for unlawful discrimination. *Hazle, supra* at 465-466.

In this case, plaintiff did not establish a prima facie case of sex discrimination.¹ As a woman, plaintiff is a member of a protected class. However, plaintiff failed to present evidence that, for the same or similar conduct, she was treated differently than a man. To establish that she was similarly situated to Pete Schoenborn, another of defendant's employees, plaintiff must show that "'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [Schoenborn's] employment situation." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). Contrary to plaintiff's arguments, the sexual relationship of plaintiff and Schoenborn's was only one aspect of each of their respective employment situations. Indeed, defendant asserted that it fired plaintiff because of her poor job performance, not because she engaged in a sexual relationship with Schoenborn. The record submitted to the trial court established that plaintiff's work performance was not "nearly identical" to Schoenborn's employment situation. There was ample evidence that plaintiff's job performance was deficient both before and after the incident with Schoenborn. On the other hand, there was no evidence that Schoenborn's job performance was poor. Accordingly, plaintiff failed to establish a genuine issue of material fact that for the same or similar conduct, she was treated differently than Schoenborn.

Furthermore, we would conclude that summary disposition was appropriate even if plaintiff had established a prima facie case of discrimination. Once a plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises, and the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its decision to terminate the plaintiff's employment. *McDonnell, supra; Hazle, supra* at 464. Defendant articulated numerous legitimate, nondiscriminatory reasons for its decision to terminate plaintiff's employment. According to Julie Ezinga, plaintiff's supervisor, defendant fired plaintiff because of her job performance. Ezinga stated that problems with plaintiff's job performance began after plaintiff changed jobs in July 1999. In her deposition, Ezinga explained in detail the deficiencies in plaintiff's job performance. Ezinga stated that plaintiff's negative job performance included tardiness, unexpected absenteeism, customer complaints, failure to complete tasks and take care of customers' requests, failure to return from vacation on the expected date, her inability to work well with a team, and problems with her honesty. There were several complaints from individuals from Ponderosa, the account that plaintiff serviced. One customer from Ponderosa complained that plaintiff was rude and impatient and failed to properly credit the Ponderosa

¹ Plaintiff had no direct evidence of sex discrimination, thus she had to utilize the indirect method of proof.

account. A Ponderosa general manager telephoned Ezinga and told her that he no longer wanted plaintiff to service the stores in his region. Another Ponderosa franchise representative complained that she wanted another employee returned to the account because plaintiff did not make her feel like she was important as a customer. Both of these complaints were made in June, well before the September incident with Schoenborn. Ezinga also stated that she sometimes spent too much time making personal phone calls and then asked for assistance from teammates to get her work finished. In addition, according to Ezinga, plaintiff once asked a woman in customer service to make up a receipt to show that she had paid for something that she apparently had not actually purchased. In Ezinga's opinion, plaintiff's conduct presented an honesty issue. Ezinga further asserted that plaintiff's dishonesty led to her termination because when Ezinga asked plaintiff about credits for the customers, plaintiff denied knowing about them even though they were in plaintiff's tray. Ezinga also stated that plaintiff's dishonest responses to questions about "whether anything happened between her" and Schoenborn were "part of" the reasons that led to her employment termination.

Because defendant articulated numerous legitimate, nondiscriminatory reasons for its decision to terminate plaintiff's employment, in order to survive a motion for summary disposition, plaintiff was required to "show the existence of evidence '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.'" *Hazle, supra* at 473, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). In plaintiff's brief on appeal, she contends that defendant's proffered reasons for terminating her employment were pretextual because "[d]efendant's serious criticism of [plaintiff's] work performance did not begin until after the Ft. Wayne incident." However, plaintiff failed to present any documentary evidence to support her contention that defendant's proffered reasons for terminating her employment were merely pretextual. See *id.* at 474. When asked if she had any reason to believe that she was fired because she had sex with Schoenborn, plaintiff responded affirmatively. When asked why she believed that, plaintiff responded, "Because of all the events that took place right after, including up to my termination. It was just a few weeks." However, plaintiff did not present any evidence, beyond her bare allegations, that defendant's reason for terminating her employment was pretextual. Accordingly, the trial court did not err in granting defendant's motion for summary disposition of plaintiff's sex discrimination claim.²

² We likewise reject plaintiff's argument that the trial court erred in granting defendant's motion for reconsideration of the trial court's initial decision denying defendant's motion for summary disposition of plaintiff's sex discrimination claim. We review the trial court's decision to grant a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Under MCR 2.119, "[i]f a trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule [MCR 2.119(F)(3)] does nothing to prevent this exercise of discretion." *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000), quoting *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986). MCR 2.119 grants the trial "court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx, supra* at 659. We conclude that the trial court did not abuse its discretion in granting defendant's motion for reconsideration because the trial court's original

(continued...)

2. Privacy Claims

Plaintiff next argues that the trial court erred in granting summary disposition of her invasion of privacy claim. Plaintiff's invasion of privacy claim was based on two types of invasion of privacy: intrusion upon the plaintiff's seclusion or solitude and public disclosure of embarrassing private facts. "There are three necessary elements to establish a prima facie case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable [person]." *Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995). Plaintiff argues that defendant intruded upon her private affairs by repeatedly interrogating her about her sex life.

Plaintiff failed to establish the first element of her prima facie case of intrusion upon seclusion. The first element requires a "secret and private subject matter." *Id.* While matters of sexual relations are regarded as private matters, *id.* at 84, plaintiff testified in her deposition that she told Michelle Crawford about her sexual encounter with Schoenborn. By the time she left Fort Wayne on Saturday, everyone in customer service, sales, and chain accounts had heard about what had happened between her and Schoenborn. Accordingly, due to plaintiff's own conduct, the fact that she had a sexual relationship with Schoenborn was not a secret, and plaintiff therefore failed to establish the first element of her prima facie case of intrusion upon seclusion invasion of privacy claim. The trial court, therefore, properly granted summary disposition of this claim.

The trial court also properly granted summary disposition of plaintiff's public disclosure of embarrassing private facts claim. Establishing a claim of "public disclosure of embarrassing private facts requires (1) the disclosure of information (2) that is highly offensive to a reasonable person and (3) that is of no legitimate concern to the public." *Id.* at 80. In this case, plaintiff established the second and third elements of her public disclosure of embarrassing private facts claim. Disclosing details of an individual's sex life would be highly offensive to a reasonable person and would be of no legitimate concern to the public. *Id.* at 84. However, plaintiff cannot establish the first requirement of her public disclosure of embarrassing private facts claim because defendant made no disclosure. "[T]he term 'publicity' involves a communication to so many persons that the matter is substantially certain to become public knowledge." *Lansing Ass'n of School Administrators v Lansing School Dist Bd of Ed*, 216 Mich App 79, 89; 549 NW2d 15 (1996), rev'd in part on other grounds 455 Mich 285 (1997). A defendant does not invade a plaintiff's right of privacy by communicating a fact concerning the plaintiff's private life to a single person or even to a small group of persons. *Id.* In this case, plaintiff does not specify the nature of defendant's disclosure or identify the people to whom defendant disclosed the private information. Apparently, plaintiff objects to the conduct of her "supervisors" who "circulated the rumors." However, plaintiff alleges no facts indicating that any alleged

(...continued)

decision denying defendant's motion for summary disposition of plaintiff's sex discrimination claim was erroneous. The trial court, therefore, properly granted reconsideration to correct the mistake. In granting reconsideration, the trial court preserved judicial economy and minimized costs to the parties by avoiding an unnecessary trial.

disclosures were made to more than a few people. Accordingly, plaintiff failed to establish the first element of her claim of public disclosure of embarrassing private facts, and the trial court properly granted defendant's motion for summary disposition of this claim.

3. Intentional Infliction of Emotional Distress

Finally, plaintiff finally argues that the trial court erred in granting summary disposition of her intentional infliction of emotional distress claim. "To establish a claim of intentional infliction of emotional distress, the plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Bernhardt v Ingham Regional Medical Center*, 249 Mich App 274, 278; 641 NW2d 868 (2002). To constitute extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress, the conduct must have been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Id.* It is initially a matter for the trial court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). However, if reasonable persons could differ on whether the defendant's conduct was sufficiently extreme and outrageous, it is for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability. *Id.*

Plaintiff's brief on appeal contains general allegations that defendant engaged in extreme and outrageous conduct, but the only specific act or conduct that plaintiff contends was extreme and outrageous is defendant's conduct of offering "to allow a security guard [to] accompany her to the parking lot close to the building where the top management parks their vehicles." Plaintiff also argues generally that defendant "engage[d] in behavior directed toward making [plaintiff] distraught enough to quit" and that, because of defendant's actions, "she endured the humiliation of having her entire department know about her intimate life" and "suffered through her employer[']s clear efforts to force her to leave her employment."

We hold that defendant's conduct, to the extent that the objectionable conduct can be ascertained, does not rise to the required level of extreme and outrageous conduct. It cannot be said that defendant's conduct was so atrocious and intolerable that it would arouse the resentment of an average member of the community and lead him to exclaim, "Outrageous!" *Doe, supra* at 91. Accordingly, because reasonable minds could not differ regarding whether defendant's conduct was extreme and outrageous, the trial court did not err in granting defendant's motion for summary disposition of plaintiff's intentional infliction of emotional distress claim.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray