[Cite as *DeGarmo v. Worthington City Schools Bd. of Edn.*, 2013-Ohio-2518.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lisa DeGarmo,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-961 (C.P.C. No. 11-CVH-1586)
Worthington City Schools Board of Education et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 18, 2013

Daniel H. Klos, for appellant.

Means, Bichimer, Burkholder & Baker Co., L.P.A., Nicole M. Donovsky and *Mark A. Weiker*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Plaintiff-appellant, Lisa DeGarmo, is appealing from the summary judgment granted to defendants-appellees Worthington City Schools Board of Education, Melissa Conrath and William Dunaway. For the following reason, we affirm the decision of the Franklin County Court of Common Pleas.

{¶ 2} DeGarmo assigns three errors for our consideration:

> ASSIGNMENT OF ERROR 1 - THE COURT ERRED WHEN IT FOUND THAT THE PLAINTIFF FAILED TO PROVE A PRIMA FACIE CASE OF GENDER DISCRIMINATION.

ASSIGNMENT OF ERROR 2 - THE COURT ERRED WHEN IT FAILED TO CONSIDER THE FACTS PRESENTED BY THE APPELLANT IN A LIGHT MOST FAVORABLE TO HER AND IGNORING THE FACTS THAT DIRECTLY REBUTTED THE TESTIMONY OF THE WITNESSES AGAINST THE APPELLANT.

ASSIGNMENT OF ERROR 3 - THE COURT ERRED WHEN IT DETERMINED THAT PLAINTIFF HAD NOT OVERCOME THE QUALIFIED PRIVILEGE THAT EXISTS WITH REGARD TO HER CLAIMS FOR FALSE LIGHT DEFAMATION.

{¶ 3} DeGarmo was employed for 11 years as a security monitor with Worthington City Schools Board of Education ("Worthington Schools"). On October 20, 2012, DeGarmo and Dean of Students, Tom Souder, investigated two students in a minivan in Worthington Kilbourne High School's parking lot. DeGarmo approached the van first and observed two students, a male and a female, in the back seat. The male had his pants and under pants down to his knees. The male put his pants back on and the female pulled down her skirt and both quickly exited the van. Souder was about 60-feet away and all he saw was the female and male exit the van and the male adjust his pants.

{¶ 4} Shortly thereafter, Assistant Principal Ken Nally questioned DeGarmo and Souder. DeGarmo claims she never stated she saw any sex or the male's penis. Nally states that DeGarmo did indicate that she saw the male's penis and some sort of sex act.

{¶ 5} Souder and teacher Vince Trombetti later that day separately contacted the male's family about the incident. Souder and Trombetti both later received letters of direction indicating that they had violated either the male student's right to privacy or right to due process in that they discussed the incident with his family and assumed that he was guilty before a hearing on the matter was held. DeGarmo also received a letter of direction for disclosing confidential information to other staff members.

{¶ 6} At the due process hearing for the students two days later, DeGarmo indicated she did not see sex or the male student's penis. Nally believed that what DeGarmo said at the hearing was inconsistent with what she had told him right after the incident. The students were allowed to return to school and no further discipline was taken against them.

{¶ 7} Worthington Schools believed that DeGarmo had lied, misrepresented, or provided false statements about her observations and further shared confidential information with staff members. Superintendent Melissa Conrath recommended that DeGarmo be terminated, and the Worthington School Board did so on December 13, 2012. The disciplinary action was modified on appeal to an unpaid suspension based on the inaccurate reporting and to a letter of direction for the improper sharing of confidential student information.

{¶ 8} DeGarmo filed a complaint alleging sexual discrimination, defamation per se, and false light invasion of privacy. Worthington Schools moved for summary judgment. The trial court found that Souder and Trombetti were not similarly situated, that DeGarmo did not overcome the qualified privilege that exists with regard to her claims for defamation and DeGarmo did not establish a false light invasion of privacy claim. As a result, summary judgment was granted on all counts. DeGarmo then initiated this appeal.

{¶ 9} Civ.R. 56(C) states that summary judgment shall be rendered forthwith if:

> [T]he pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [Summary Judgment Standard of Review]

{¶ 10} Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 629 (1992), citing *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 65-66 (1978). Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59 (1992). De novo review is well established as the standard of review for summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 11} DeGarmo's first assignment of error asserts the trial court erred in finding that there was no prima facie case for gender discrimination. The second assignment of error asserts that the trial court failed to consider the facts in a light most favorable to DeGarmo. DeGarmo seeks to prove gender discrimination through indirect evidence that Souder and Trombetti were similarly situated and treated more favorably.

{¶ 12} The Supreme Court of Ohio has stated that "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112." *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 196 (1981). Ohio has adopted the analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05 (1973), as the analysis for judicial inquiry into complaints alleging disparate treatment.

{¶ 13} In the absence of direct evidence of discrimination, a plaintiff may raise an inference of discriminatory intent by establishing that: (1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position held; and (4) comparable, nonprotected persons were treated more favorably. *Clark v. Dublin*, 10th Dist. No. 01AP-458 (Mar. 28, 2002), following *McDonnell Douglas*. To establish that a comparable nonprotected person was treated more favorably, the plaintiff "must show that the 'comparable' [was] similarly-situated in all respects." (Emphasis deleted.) *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992). The respects in which the comparable persons must be similarly-situated depend on the factual context in which the case arose. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1992). Thus, the plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered similarly-situated; rather, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in all of the relevant aspects. *Id.* at 352, quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir.1994). " '[T]he individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or

mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.' " *Ercegovich* at 352, quoting *Mitchell* at 583.

{¶ 14} We agree with the trial court that Souder and Trombetti were not similarly situated to DeGarmo. Souder and Trombetti did not engage in all the same conduct as DeGarmo. There is no evidence that Souder misrepresented or inaccurately reported what happened and Trombetti had no part in the incident. Viewing the evidence most favorably for DeGarmo we see that in her own deposition she states she said the word "penis" multiple times in the initial debriefing immediately after the incident. This inconsistency in reporting what she saw significantly differentiates her conduct from that of Souder and Trombetti. DeGarmo is not similarly situated with Souder or Trombetti and she has failed to prove her prima facie case for gender discrimination.

{¶ 15} The first and second assignments of error are overruled.

{¶ 16} The third assignment of error states that the trial court erred when it determined that DeGarmo had not overcome the qualified privilege that exists with regard to the claims for false light defamation. DeGarmo claims a false light invasion of privacy and a defamation claim.

{¶ 17} To establish a defamation claim, a plaintiff must show that the defendant made a false statement, that the false statement was defamatory, that the false defamatory statement was published, the plaintiff was injured and the defendant acted with the required degree of fault. *Roe ex rel. Roe v. Heap*, 10th Dist. No. 03AP-586, 2004-Ohio-2504, ¶ 21.

{¶ 18} One of the defenses to a defamation claim is one of qualified privilege, in which the interest that the defendant is seeking to vindicate is conditioned upon publication in a reasonable manner and for a proper purpose. *Hahn v. Kotten*, 43 Ohio St.2d 237, 243 (1975). A qualified privilege may be defeated only by clear and convincing evidence of actual malice on the part of the defendant. *Jacobs v. Frank*, 60 Ohio St.3d 111, 114-15 (1991). Actual malice is defined as "acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id*. at 116. "Reckless disregard" is demonstrated by presenting "sufficient evidence to permit a finding that the defendant had serious doubts as to the truth of [its] publication." *A & B-Abell Elevator*

Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 73 Ohio St.3d 1, 12-13 (1995).

{¶ 19} In 2007, the Supreme Court of Ohio recognized the false light invasion of privacy claim. *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, syllabus. One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Welling* at ¶ 61.

{¶ 20} In this case, DeGarmo must prove that Worthington Schools and the other defendants acted in reckless disregard as to falsity of the publicized matter in order to overcome the defenses of qualified privilege and to bring a claim of false light invasion of privacy claim. We find there is insufficient evidence that any defendant made defamatory statements with reckless disregard as to their falsity, or had serious doubts about the truth of the publication. The defendants believed DeGarmo either inaccurately reported or misrepresented what she had seen in the parking lot. Simply viewing the evidence in favor of DeGarmo that everyone simple misinterpreted her statements does not prove that any defendant had serious doubts whether DeGarmo actually said she saw the male student's penis or sex occurring. DeGarmo has failed to overcome the defenses of qualified privilege on the defamation claim and failed to establish a claim for false light invasion of privacy.

{¶ 21} The third assignment of error is overruled.

{¶ 22} Having overruled all the assignments of error, the decision of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.