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NO. CAAP-15-0000308

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MYRLEEN K. KALOI, Plaintiff-Appellant, v.
COUNTY OF HAWAII, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 14-1-0293)

MEMORANDUM OPINION

(By: Nakamura, C.J., Foley and Fujise, JJ.)

Plaintiff-Appellant Myrleen K. Kaloi (**Kaloi**) appeals from the (1) January 28, 2015 "Order Granting Defendant County of Hawaii's Motion to Dismiss Filed December 1, 2014"; (2) March 6, 2015 "Final Judgment"; and (3) March 6, 2015 "Notice of Entry of Judgment/Order" all entered in the Circuit Court of the Third Circuit¹ (**circuit court**).

On appeal,² Kaloi contends the circuit court erred in

¹ The Honorable Glenn S. Hara presided.

² Kaloi's opening brief fails to comply with Hawaii Rules of Appellate Procedure (HRAP) Rule 28(b)(4), which provides, in pertinent part:

Rule 28. BRIEFS.

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(b) **Opening brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

.

(continued...)

dismissing her second amended complaint under Hawai'i Rules of Civil Procedure Rule 12(b)(6) and in granting summary judgment in favor of Defendant-Appellee County of Hawai'i (**County**) because there was evidence of pretext sufficient to create a genuine issue of material fact.

I. BACKGROUND³

Kaloi began working for the County in the Mass Transit Agency around August 2009. Gloria Kalamau (**Kalamau**) was hired by the County in May 2010 through the Older American Community Service Employment Program, and worked in close proximity to Kaloi. Kaloi and Kalamau had difficulty working with each other, and both believed the other was hostile and a bully.

On April 14, 2011, Kalamau and Kaloi engaged in a physical altercation. The record leaves the details of the altercation unclear, but as best we can surmise, Kaloi had attempted to lock up the office when Kalamau refused to leave. Kalamau eventually left the building. Kaloi and Kalamau then physically fought. Kaloi's daughter, who was present at the scene, called the police. Following the altercation, Kalamau did

²(...continued)

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . .

. . . .

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

(Emphasis added.) Kaloi's counsel is warned that future violations of HRAP may result in sanctions.

³ We note that the record is sparse because there was no discovery conducted. Counsel for Kaloi did not object to the circuit court treating the County's motion to dismiss as a motion for summary judgment and does not raise this issue on appeal. Because there is little evidence in the record beyond that contained in the pleadings, the background facts are based in part on allegations contained in the pleadings.

not return to work, and consequently, her employment with the Mass Transit Agency was terminated.

On July 11, 2011, Kaloi filed a claim for workers' compensation benefits based on the injuries she sustained in the altercation with Kalamau. Her claim was denied on January 20, 2012 by the Department of Labor and Industrial Relations (DLIR) on the basis that Kaloi's injuries did not arise in the course of her employment. Kalamau also submitted a workers' compensation claim for injuries arising out of the April 14, 2011 incident, which were deemed compensable.

On March 27, 2013, Kalamau filed a civil lawsuit against the County and named Kaloi as a defendant.

In a letter dated October 28, 2013, Kaloi's insurance company requested the County provide for Kaloi's defense in the lawsuit filed by Kalamau. The County responded to Kaloi's insurance company by stating, "The County has no obligation to provide a defense or indemnification to Ms. Kaloi since she was acting outside of the course and scope of her employment at the time of the assault." In a letter dated November 12, 2013, Kaloi's insurance company urged the County to reconsider, stating, "We believe that the decision [by the DLIR] for Kalamau and Kaloi contradict each other. If one is found to be compensable under worker's compensation [(WC)], then clearly the other would also fall under WC." The County replied that the decisions were not incompatible because under Hawaii Revised Statutes (HRS) § 386-3 (2015 Repl.),⁴ Kaloi was ineligible for workers' compensation because she was found to have been the aggressor in the altercation. Additionally, the County stated, "the [DLIR] already found Ms. Kaloi was outside of the course and scope of employment and this decision is binding. As a result,

⁴ HRS § 386-3 provides, in relevant part:

§386-3 Injuries covered. . . .

(b) No compensation shall be allowed for an injury incurred by an employee by the employee's willful intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self-defense, or by the employee's intoxication.

[the County] has no obligation to provide a defense or indemnification to Ms. Kaloi since she was acting outside of the course and scope of her employment at the time of the assault."

Kaloi filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on April 30, 2014 alleging that she had been discriminated against on the basis of her age, which she noted in the charge was fifty-four years, and that the County had retaliated against her. The EEOC closed investigation on Kaloi's charge on May 7, 2014. The Hawaii Civil Rights Commission issued Kaloi a right to sue letter on June 26, 2014, noting that Kaloi had filed a complaint with the EEOC and that the complaint had been dismissed.

Kaloi filed her complaint against the County on August 4, 2014, seeking damages for age discrimination, hostile work environment, and negligent infliction of emotional distress.

On September 2, 2014, the County submitted a motion to dismiss. Attached to the County's motion were exhibits that had not been included in Kaloi's complaint. Kaloi submitted her opposition to the County's motion to dismiss on October 3, 2014. Kaloi also attached exhibits to her opposition that were not attached to the complaint.

At the hearing on the motion to dismiss held January 9, 2015, the circuit court asked the parties whether they had any objections to the court treating the motion to dismiss as a motion for summary judgment because both parties had relied on evidence outside of the pleadings. Neither party objected.

The circuit court granted the County's motion to dismiss on January 28, 2015. The circuit court entered its final judgment on March 6, 2015.

Kaloi filed her notice of appeal on April 2, 2015.

II. STANDARD OF REVIEW

Motion for Summary Judgment⁵

"We review a circuit court's award of summary judgment

⁵ The circuit court treated the County's motion to dismiss as a motion for summary judgment, so we review the circuit court's actions under the summary judgment standard.

de novo under the same standard applied by the circuit court." Adams v. CDM Media USA, Inc., 135 Hawai'i 1, 12, 346 P.3d 70, 81 (2015) (quoting Shoppe v. Gucci Am., Inc., 94 Hawai'i 368, 376, 14 P.3d 1049, 1057 (2000)).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party.

Adams, 135 Hawai'i at 12, 346 P.3d at 81 (citations, internal quotation marks, and brackets omitted) (quoting Shoppe, 94 Hawai'i at 376, 14 P.3d at 1057).

III. DISCUSSION

Kaloi and the County dispute whether Kaloi established a prima facie case of unlawful discrimination on the basis of Kaloi's age sufficient to shift the burden of production to the County to articulate legitimate, nondiscriminatory reasons for the alleged adverse employment actions. They also disagree on whether the County articulated legitimate non-discriminatory reasons for the alleged adverse employment actions and whether Kaloi presented sufficient evidence of pretext to create a genuine issue of material fact. Kaloi alleges the County intentionally treated her differently than it treated Kalamau, an older worker, a theory of discrimination known as "individual disparate treatment." See Shoppe, 94 Hawai'i at 377-78, 14 P.3d at 1058-59 ("Generally, an individual alleging employment discrimination under the [Age Discrimination in Employment Act (ADEA)]⁶ may pursue one or more of three available theories of discrimination . . . [including] intentional discrimination against an individual who belongs to a protected class (also .

⁶ The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (2012).

known as individual 'disparate treatment' discrimination).").⁷

HRS § 378-2(a)(1)(A) (2015 Repl.) states, "It shall be an unlawful discriminatory practice . . . [b]ecause of . . . age . . . [f]or any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment[.]" Where a plaintiff does not have direct evidence of discrimination, the "plaintiff can prove age discrimination 'by adducing circumstantial evidence of discrimination.'" Adams, 135 Hawai'i at 13, 346 P.3d at 82 (quoting Shoppe, 94 Hawai'i at 378, 14 P.3d at 1059). "When analyzing a claim of age discrimination relying on circumstantial evidence, [the Hawai'i Supreme Court] has set forth a three-step analysis, modifying the test adopted in McDonnell Douglas Corp. v. Green, [411 U.S. 792 (1973)]." Adams, 135 Hawai'i at 13, 346 P.3d at 82 (citing Shoppe, 94 Hawai'i at 378-79, 14 P.3d at 1059-60).

First, the plaintiff must establish a prima facie case of discrimination by demonstrating, by a preponderance of the evidence, the following four elements: (1) that plaintiff is a member of a protected class; (2) that plaintiff is qualified for the position for which plaintiff has applied; (3) that plaintiff has suffered some adverse employment action; and (4) that the position still exists.

Adams, 135 Hawai'i at 13, 346 P.3d at 82 (ellipses omitted) (quoting Shoppe, 94 Hawai'i at 378, 14 P.3d at 1059).

Unlike a plaintiff in a failure to hire case like Adams or an employment termination case like Shoppe, who is required to establish that the position he or she applied for still exists, where a plaintiff alleges that he or she has suffered an adverse employment action but continued to be employed by the employer, the plaintiff may satisfy the fourth element of the prima facie case of discrimination by demonstrating that a similarly situated

⁷ The other two theories of discrimination under the federal ADEA are: "(1) intentional discrimination against a protected class to which the plaintiff belongs (also known as 'pattern-or-practice' discrimination); and (2) unintentional discrimination based on a neutral employment policy that has a disparate impact on a protected class to which the plaintiff belongs (also known as 'disparate impact' discrimination)." Shoppe, 94 Hawai'i at 377, 14 P.3d at 1058 (footnotes omitted).

employee⁸ outside of his or her protected class was treated more favorably.⁹ See Cornwell v. Electra Cent. Credit Union, 439 F.3d 1018, 1028 (9th Cir. 2006) (articulating that the fourth element of a prima facie case of discrimination under Title VII requires plaintiff to prove "that the plaintiff's employer treated the plaintiff differently than a similarly situated employee who does not belong to the same protected class as plaintiff"); see e.g., You v. Longs Drugs Stores California, LLC, 937 F. Supp. 2d 1237, 1252 (D. Haw. 2013) (holding that a woman plaintiff alleging disparate treatment on the basis of sex failed to identify any men who were treated more favorably); but cf. Furukawa, 85 Hawai'i at 15, 936 P.2d at 651 ("Although proof regarding similarly situated employees outside the protected class may be one way of raising an inference of intentional discrimination, it is not the only way." (quoting Heard v. Lockheed Missiles & Space Co., Inc., 52 Cal. Rptr. 2d 620, 632 (Cal. Ct. App. 1996))).

Second, "once the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." Adams, 135 Hawai'i at 13, 346 P.3d at 82 (brackets omitted) (citing Shoppe, 94 Hawai'i at 378, 14 P.3d at 1059).

Third, "if the employer rebuts the prima facie case, the burden reverts to the plaintiff to demonstrate that the

⁸ "Generally, similarly situated employees are those who are subject to the same policies and subordinate to the same decision-maker as the plaintiff. . . . We hold that [a plaintiff] must prove that all of the relevant aspects of [her or] his employment situation were similar to those employees with whom [she or] he seeks to compare [her or] his treatment." Furukawa v. Honolulu Zoological Soc'y, 85 Hawai'i 7, 14, 936 P.3d 643, 650 (1997).

⁹ Federal law on the prima facie case of age discrimination under the ADEA is inapplicable and unpersuasive in our interpretation of age discrimination under HRS § 378-2 because elements of a prima facie case under the ADEA are tailored to employees over forty years of age. See Diaz v. Eagle Produce Ltd. P'ship, 521 F.3d 1201 (9th Cir. 2008) ("Each plaintiff can establish a prima facie case of disparate treatment by demonstrating that he [or she] was (1) at least forty years old, (2) performing his [or her] job satisfactorily, (3) discharged, and (4) either replaced by substantially younger employees with equal or inferior qualifications or discharged under circumstances otherwise 'giving rise to an inference of age discrimination.'" (quoting Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000))).

defendant's proffered reasons were 'pretextual.'" Adams, 135 Hawai'i at 14, 346 P.3d at 83 (citing Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060).

A. The County's Legitimate, Nondiscriminatory Reason for Its Challenged Actions

We need not decide whether Kaloi established a prima facie case of discrimination. This is because assuming arguendo that Kaloi established a prima facie case, we conclude that the County articulated legitimate non-discriminatory reasons for the alleged adverse employment actions, and that Kaloi failed to present sufficient evidence that the proffered reasons were pretextual to create a genuine issue of material fact.

"In applying the second step of the analysis, 'the employer's explanation must be in the form of admissible evidence and must clearly set forth reasons that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the challenged employment action.'" Adams, 135 Hawai'i at 15, 346 P.3d at 84 (brackets omitted) (quoting Shoppe, 94 Hawai'i at 378, 14 P.3d at 1059). "[I]f the employer's articulated reason is not legitimate (or is discriminatory) or if the articulated reason is not in the form of admissible evidence, then the burden of production has not been met." Adams, 135 Hawai'i at 15, 346 P.3d at 84. "The employer's burden to articulate a legitimate, nondiscriminatory reason is not a burden to prove the truth of the legitimate, nondiscriminatory reason. That is, the requirement in the second step is that the 'explanation' articulated be legitimate, not that the employer prove that the reason was true or correct." Id. at 23, 346 P.3d at 92 (internal citation omitted).

Kaloi contends that she suffered two adverse employment actions. First, Kaloi argues that she was denied workers' compensation benefits arising from the altercation between her and Kalamau. Second, Kaloi argues that the County refused to provide counsel for her in contravention of its explicit policy to provide employees with legal counsel. The policy in effect at the time Kaloi asked the County to provide a defense required the

County to "provide legal counsel for an Employee upon request when . . . [t]he Employee is sued for actions taken in the course of employment and within the scope of the Employee's duties and responsibilities."

The County asserts that the undisputed facts demonstrate that it was the DLIR that determined that Kaloi's claim for workers' compensation benefits was non-compensable. It was also the DLIR that determined that Kalamau's claim was compensable. Therefore, the County was not responsible for those decisions.

The County also asserts that it denied Kaloi legal counsel because Kaloi "was not acting in the course and scope of employment at the time of the fight[.]" The County's position is supported by letters dated November 4, 2013 and November 15, 2013 in which the County explained its decision, stating, "[T]he [DLIR] already found Ms. Kaloi was outside of the course and scope of employment and this decision is binding. As a result, [the County] has no obligation to provide a defense or indemnification to Ms. Kaloi since she was acting outside of the course and scope of her employment at the time of the assault."

For the purposes of summary judgment, the County has met its burden to produce evidence of legitimate, nondiscriminatory reasons for the denial of Kaloi's claim for workers' compensation benefits and for failing to provide legal counsel to Kaloi under its policy. The DLIR denied Kaloi's claim for workers' compensation benefits. In addition, under the County's policy, employees are provided legal representation only if the employee's actions from which a lawsuit arises or is related to were within the scope of the employee's duties or responsibilities. As such, the burden shifted to Kaloi "to demonstrate that [the County's] proffered reasons were 'pretextual.'" Adams, 135 Hawai'i at 14, 346 P.3d at 83 (citing Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060).

B. Whether the County's Proffered Reasons were Pretextual

"A plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely

motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060 (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). "At all times, the burden of persuasion remains on the plaintiff." Shoppe, 94 Hawai'i at 379, 14 P.3d at 1060 (quoting Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n, 89 Hawai'i 269, 279 n.10, 971 P.2d 1104, 1114 n.10 (1999)).

Kaloi contends the County's stated justifications for the denial of her claim for workers' compensation benefits and failing to provide Kaloi with legal representation were pretextual. With respect to workers' compensation benefits, Kaloi argues that she should have received workers' compensation benefits because Kalamau was awarded benefits arising out of the same incident. However, it was the DLIR that determined that Kalamau's claim was compensable and that Kaloi's claim was not. Accordingly, Kaloi failed to present sufficient evidence of pretext to prevent summary judgment regarding the denial of her workers' compensation claim.

With respect to legal representation, Kaloi argues on appeal,

In making the decision not to provide [Kaloi] with legal representation, the [County's] representative, Ms. Martin, intentionally ignored:

- (1) The fight was, at best, a mutual affray.
- (2) The older worker, Ms. Kalamau, had been terminated because of her participation in the affray.
- (3) The older worker had been charged and prosecuted for assault against [Kaloi] and her daughter.
- (4) [Kaloi] received no discipline arising from the affray.
- (5) The apparent contradiction in terms of allowing the older worker, Ms. Kalamau, workers' compensation benefits and denying [Kaloi] similar benefits arising from the affray.
- (6) The violation of the applicable collective bargaining agreement.
- (7) Any violation of [HRS § 89-13(a)(8)], arising from the denial of legal representation.
- (8) The statutory mandate of [HRS § 89-19], using

false legal analysis under [HRS § 386-3] to override a collectively bargained privilege of employment.

(Citations to the record omitted.)¹⁰ Additionally, Kaloi argues, "[t]he only difference between the two women involved in the mutual affray, in denying [Kaloi] the 'privileges of employment' including workers' compensation and providing legal counsel to her in a personal injury lawsuit, was that [Kaloi] was younger in age."

Even viewing all of the evidence and inferences in a light most favorable to Kaloi, none of the facts Kaloi points to are sufficient to raise doubt as to the credibility of the County's proffered explanation for not providing Kaloi with legal representation. Cf. Simmons v. Aqua Hotels and Resorts, Inc., 130 Hawai'i 325, 331, 310 P.3d 1026, 1032 (App. 2013) ("Plaintiff pointed to specific facts sufficient to raise doubts as to the credibility of Defendants' proffered explanations."). Kaloi also fails to point to any facts or provide evidence that would indicate the County unlawfully relied on or referred to Kaloi's age in deciding not to provide her with legal representation in Kalamau's lawsuit. Kaloi suggests that Kalamau, an older worker, was treated more favorably, but Kalamau was never provided legal representation, and so Kaloi's comparison to Kalamau's treatment is inapplicable to whether Kaloi was treated unfairly because of her age.

Kaloi has failed to demonstrate a single basis on which a reasonable fact-finder could conclude that the County's alleged adverse employment actions were motivated by Kaloi's age. Because Kaloi could not establish any genuine issue of material fact as to whether the County's proffered reasons for the denial of her claim for workers' compensation benefits and failing to provide her with legal representation were pretextual, the County was entitled to summary judgment as a matter of law. See Shoppe,

¹⁰ Although Kaloi argues in her brief that Kalamau "had been terminated because of her participation in the affray," she alleged in her second amended complaint that "Following the date of the assault, Kalamau did not return to work, and consequently, was terminated by MASS TRANSIT." In her civil lawsuit, Kalamau alleged that she was acquitted of the charges of assault against Kaloi and her daughter.

94 Hawai'i at 382, 14 P.3d at 1063. The circuit court did not err in its decision to grant summary judgment in favor of the County.

IV. CONCLUSION

Therefore, the (1) January 28, 2015 "Order Granting Defendant County of Hawai'i's Motion to Dismiss Filed December 1, 2014"; (2) March 6, 2015 "Final Judgment"; and (3) March 6, 2015 "Notice of Entry of Judgment/Order" all entered in the Circuit Court of the Third Circuit are affirmed.

DATED: Honolulu, Hawai'i, June 8, 2016.

On the briefs:

Ted H.S. Hong
for Plaintiff-Appellant.

Laureen L. Martin
Deputy Corporation Counsel
Section Chief,
County of Hawai'i
for Defendant-Appellee.



Chief Judge



Associate Judge



Associate Judge