

STATE OF MICHIGAN
COURT OF APPEALS

MAUREEN A. NULTY,

Plaintiff-Appellant,

v

ERNST & YOUNG, LLP, LEE HARKELROAD
and ALPHONSE LUCARELLI,

Defendants-Appellees.

UNPUBLISHED

March 22, 2002

No. 225558

Wayne Circuit Court

LC No. 98-805401-CL

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition of her claims for gender discrimination and constructive discharge, pursuant to MCR 2.116(C)(7) and (10). We affirm.

Plaintiff worked as a tax accountant, first for Arthur Young beginning in 1981, and then for Ernst & Young after Arthur Young merged with Ernst & Whinney in 1989. Plaintiff alleges that she was on track to becoming a partner in the firm. In the spring of both 1992 and 1993, plaintiff approached her supervising partners to inquire about applying for partnership. She was told both times that the firm was not financially able to bear another partner in the Detroit tax department office. In the spring of 1994, plaintiff, with the approval of her supervising partner, submitted an application for partnership. Defendant Lee Harkelroad informed plaintiff that she did not have the support of the majority of the partners and her application was not submitted for formal consideration. Three male employees were allegedly promoted to partnership status in 1994. In March 1995, plaintiff informed defendant Harkelroad that she had other employment opportunities she was considering and asked him if she would ever be considered for partnership. At that time, Ernst & Young was not in the process of evaluating partner candidates for fiscal year 1995. Plaintiff alleges that Harkelroad informed her that there was no reason to believe that she would be able to garner enough partner support in the future. Plaintiff resigned from the firm shortly thereafter, in March 1995, and took employment with another accounting firm, which paid plaintiff \$10,000 per year more than she was making when she left Ernst & Young.

In February 1998, plaintiff commenced this action, alleging that she was constructively discharged from her employment because of gender discrimination. The trial court granted defendants' motion for summary disposition, dismissing plaintiff's claims.

We review a trial court's decision on summary disposition de novo. *Spiak v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). The party faced with a motion for summary disposition under MCR 2.116(C)(10), when responding to the motion, is required to present evidentiary proofs showing that there is a genuine issue of material fact for trial. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

I. Gender Discrimination

Plaintiff first argues that she introduced direct evidence of gender discrimination and, therefore, the trial court erred in applying the burden-shifting test from *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to determine whether she established a prima facie case of discrimination. We disagree.

Intentional discrimination may be established either through direct or indirect evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Because most discrimination cases are based on circumstantial or indirect evidence of discrimination, this Court has applied the *McDonnell Douglas* presumptive test in such cases. *Harrison, supra* at 606-607. A prima facie case under *McDonnell Douglas* raises an inference of discrimination. *Harrison, supra* at 607.

A prima facie case under *McDonnell Douglas* only requires that the plaintiff produce enough evidence to create a rebuttable presumption of discrimination. This need not be enough evidence for the case to be heard by the jury. *Harrison, supra* at 608. Once the plaintiff meets this burden, the court must determine if the defendant has articulated a legitimate, nondiscriminatory reason for its action. *Id.* If such an articulation is offered, then the court is required to determine if the plaintiff has proven by a preponderance of the evidence that the reason offered by the defendant was a mere pretext for discrimination. *Id.*

In cases where there is direct evidence of discrimination, the burden-shifting approach from *McDonnell Douglas* is not appropriate. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). Direct evidence of discrimination is evidence that need not be used to infer discrimination, e.g., use of racial slurs by a decision maker, because if that evidence is believed, it requires the conclusion that discrimination was in the least a motivating factor in the employment decision made. *Harrison, supra* at 610. When a plaintiff relies upon direct evidence of discrimination, the plaintiff always has the burden of persuading the factfinder that the employer acted with an illegal discriminatory intent. *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 713 (1999).

Whatever the nature of the challenged employment action, the plaintiff must establish direct proof that the discriminatory animus was casually related to the decisionmaker's action. [*Harrison, supra* at 613.] Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. *Id.* [*Graham, supra.*]

In this case, the record reveals that plaintiff relied below almost exclusively on the burden-shifting test from *McDonnell Douglas* in opposing defendants' motion for summary disposition. Nevertheless, a small portion of plaintiff's trial court brief did refer to direct evidence of discrimination in support of her claim. The alleged direct evidence of discrimination consists of a statement made by defendant Harkelroad to plaintiff indicating that plaintiff would not be considered for partnership because "there was just something" about her. We conclude that this alleged statement is too vague and innocuous to be considered direct evidence of discriminatory intent. The statement, even if believed, does not create an inference that plaintiff's gender was a motivating factor in the decision not to consider plaintiff for partnership. Cf. *DeBrow, supra* at 538, *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998), and *Harrison, supra* at 610.¹ Thus, because plaintiff's case was dependent upon indirect evidence of discrimination, the trial court properly applied the burden-shifting approach from *McDonnell Douglas*.

Plaintiff further argues that the trial court erred in determining that she failed to establish a prima facie case of gender discrimination. Although three males were offered partnerships in 1994, plaintiff focused on the promotion of one male, G. Michael Licastro, as support for her discrimination claim.

In *Hazle v Ford Motor Co*, 464 Mich 456, 467; 628 NW2d 515 (2001), the Supreme Court explained that, under the *McDonnell Douglas* test, a plaintiff must produce support for each of the following elements by admissible evidence:

- (1) she belongs to a protected class,
- (2) she suffered an adverse employment action,
- (3) she was qualified for the position, and
- (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.

The Court clarified that a plaintiff in a discrimination case need not prove that she was at least as qualified for the position as the successful candidate. *Id.* at 468. The Court explained:

[T]he ultimate factual inquiry in any discrimination case is whether unlawful discrimination was a motivating factor in the employer's decision. We think it beyond question that, although relative qualifications certainly may be relevant in a discrimination case, particularly, as explained below, if a defendant

¹ We further note that plaintiff's claim of direct evidence of discrimination is contrary to her own deposition testimony:

Q. Did any of the partners at Ernst & Young at any point in time ever make in your presence a derogatory comment about females or about you based upon your gender?

A. No.

relies on them to rebut the presumption of discrimination created by the plaintiff's prima facie case, the fact that a plaintiff was "less qualified" than the successful applicant would not necessarily preclude a jury from finding that unlawful discrimination was nevertheless a motivating factor in the employer's decision. Therefore, we hold that a plaintiff is not required to provide evidence that he is at least as qualified as the successful candidate in order to establish a prima facie case under *McDonnell Douglas*. [*Id.* at 470.]

In this case, we are not persuaded that plaintiff presented evidence to show that she was qualified for partnership. Plaintiff presented evidence suggesting that her supervising partner, and some other partners, supported her application for partnership. However, Ernst & Young required that an employee have unanimous partner support within their department to be promoted to partner. The evidence establishes that plaintiff's timeliness of service and responsiveness to clients and partners were not acceptable to all the partners. Moreover, partners felt it necessary for plaintiff to expand her outside business relationships.

Even if plaintiff could demonstrate that she was qualified for promotion to partnership, she has not presented evidence that defendants' actions were based on her gender. *Hazle, supra* at 470-471. An inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates. *Hazle, supra* at 471. The mere fact that Licastro was promoted to partner and plaintiff was not promoted does not raise an inference of unlawful discrimination with respect to plaintiff. *Id.* at 467, 471-472. The evidence suggests that Licastro was well qualified for the promotion. Plaintiff has not presented evidence suggesting defendants' decisions regarding the promotions was motivated by her gender. Plaintiff claims that she was told she did not make partner in 1994 because of a lack of responsiveness to partners and clients. In 1995, the partners indicated improvement on the issue of responsiveness, but cited other concerns, including plaintiff's lack of community positioning and lack of upper level contacts within the client base. Plaintiff alleges the apparent change in requirements between 1994 and 1995 amounts to gender discrimination. However, there is no evidence that the requirements had anything to do with plaintiff's gender. Moreover, while partners cited lack of responsiveness as the main factor precluding partnership in 1994, plaintiff's 1993 performance review makes clear that plaintiff had prior notice of her need to expand her outside business relationships. Under these circumstances, plaintiff failed to establish a prima facie case of discrimination and defendants were entitled to summary disposition of the gender discrimination claim.²

² Furthermore, even if plaintiff presented sufficient evidence to establish a prima facie case, she failed to rebut defendants' nondiscriminatory reasons for not promoting plaintiff. Defendants introduced evidence below that plaintiff was not as profitable as other candidates and had shown in the past she was not sufficiently responsive to clients. Plaintiff advances several arguments as support for her position that defendants' proffered reasons were either not valid or a pretext for discrimination. However, after reviewing the record and plaintiff's arguments, we conclude that plaintiff failed to show that her gender was a motivating factor in defendants' employment (continued...)

II. Constructive Discharge

Plaintiff also challenges the trial court's ruling that, because she could not establish a claim for discrimination, her claim for constructive discharge must fail. We find no error.

"[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v Parada Federal Credit Union*, 457 Mich 318, 325-326; 577 NW2d 881 (1998), quoting *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996). In this case, plaintiff alleged that she was constructively discharged due to the discrimination she experienced in the workplace, primarily because she was not promoted to partner. In this context, because plaintiff is unable to prevail on her claim for discrimination, her constructive discharge claim must fail as well. The court properly granted summary disposition of this claim.³

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter

(...continued)

decisions. Thus, plaintiff has not shown that defendants' legitimate nondiscriminatory reasons for its actions were mere pretext for discrimination.

³ Given that plaintiff's claims fail under MCR 2.116(C)(10), we need not address whether summary disposition was proper based on the statute of limitations under MCR 2.116(C)(7).