

STATE OF MICHIGAN
COURT OF APPEALS

GABRIEL QUIROS, JR.,

Plaintiff-Appellee,

V

KALITTA FLYING SERVICE, INC., a/k/a
KITTY HAWK CHARTERS, INC.,

Defendant-Appellant.

UNPUBLISHED

June 3, 2003

No. 229229

Washtenaw Circuit Court

LC No. 96-008024-CL

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

Wilder, J., (*dissenting*)

I respectfully dissent.

In my view, the case before us is a classic mixed-motive case. As the majority concluded, the evidence in this case demonstrates the existence of discriminatory animus toward plaintiff in the workplace. Plaintiff was told that in order to be promoted he needed to “act white” by changing his body movement and eliminating his accent. Plaintiff observed pilots and supervisors for defendant mimicking his speech and mannerisms and was told that similar conduct occurred behind his back. Both plaintiff and his wife were told by one of the defendant’s Chief Pilots, John Bhim-Rao, that Louis Berry Biruakis, defendant’s director of operations, was a racist. Plaintiff contended at trial that this discriminatory environment manifested itself and culminated in the denial of training opportunities, the denial of a promotion to the Lear Jet captain position, and, ultimately, his constructive discharge.

Defendant asserts, on the other hand, that the fact that plaintiff did not complain of discrimination to his supervisors or other decisionmakers before quitting shows that the working conditions were not intolerable, that plaintiff was a valued employee who received every opportunity for training and promotion within the company, and that despite being a valued employee of the company, plaintiff simply lacked the qualifications necessary to permit his promotion to the Lear Jet captain position. Thus, the evidence before the jury was that plaintiff, a qualified pilot who was purportedly deemed “valued” by his employer, reached an impenetrable ceiling beyond which he was unable to progress. Plaintiff asked the jury to believe that his progress was impeded for discriminatory reasons, while defendant claimed that there were legitimate, nondiscriminatory reasons for plaintiff’s failure to progress. The jury believed plaintiff.

The majority concludes (1) that plaintiff failed to present direct evidence of discrimination, defined by this Court as evidence that, if believed, “requires the conclusion that unlawful discrimination was at least a motivating factor” in the adverse employment action, *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 670 (1997); and (2) that plaintiff also failed to establish a prima facie case of discrimination because, lacking the required FAA type rating, plaintiff was not qualified to become a Lear Jet captain. I disagree with these conclusions.

First, the evidence established that as Chief Pilot, Bhim-Rao was “the last guy in the chain” in regard to training and promotions and that plaintiff could not be promoted without the necessary training from Bhim-Rao. Plaintiff also presented evidence that Bhim-Rao never provided the training plaintiff was supposed to receive, but trained other pilots instead. This evidence, together with the evidence that Bhim-Rao told plaintiff that the decisionmakers in the company were racists, and that plaintiff should “act white” if he wanted to be promoted, is “direct proof that [defendant’s] discriminatory animus was causally related” to defendant’s adverse action against plaintiff. *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 515 (1999). I would find that plaintiff has presented evidence establishing the necessary causal link that, if believed, “requires the conclusion that unlawful discrimination was at least a motivating factor” in Bhim-Rao’s refusal to train plaintiff.¹ *Harrison, supra* at 610.

Second, even if there is insufficient direct evidence of discrimination, I would find that when viewed in the light most favorable to plaintiff, the evidence is sufficient to establish a prima facie case of discrimination. Despite the fact that plaintiff lacked the necessary FAA type rating for becoming a Lear Jet captain, the inquiry as to whether he was qualified to become a Lear Jet captain should not stop there. Plaintiff asserted that his failure to obtain the necessary rating was due both to defendant’s failure to provide him the necessary training and the intolerable working conditions that forced him to leave the company. As our Supreme Court has stated in regard to the establishment of a prima facie case, “the facts will necessarily vary in discrimination cases. Thus, the elements of the *McDonald Douglas* prima facie case should be tailored to fit the factual situation at hand.” *Hazle v Ford Motor Co*, 464 Mich 456, 463 n 6; 628 NW2d 515 (2001).

Here, the evidence established that plaintiff was otherwise qualified as a pilot, and that plaintiff’s qualification for the Lear Jet position, i.e. plaintiff’s advancement, was directly dependent upon the very training that plaintiff did not receive. There was also evidence in the record to establish that plaintiff did not receive the necessary training for advancement because of the discriminatory animus of defendant. On this unique set of facts, I would find that plaintiff has established a prima facie case of discrimination and that the case was properly submitted to

¹ Thus, I would conclude that irrespective of the fact that the training procedures did not “require” that plaintiff receive all of his training or pretest flights from Bhim Rao, Biraukis’ testimony about the importance of Bhim Rao’s involvement in the training and promotion “chain” creates an issue of fact, to be resolved by the jury and not this Court, about the extent and quality of the training and promotion opportunities actually provided to plaintiff.

the jury for decision. To conclude otherwise, in my judgment, results in consequences clearly unintended by Title VII and the ELCRA: an employer can withhold from its employees, in a discriminatory manner, the very training opportunities necessary to qualify for promotion, yet avoid liability for discriminatory failure to promote on the basis that the plaintiff was not qualified for promotion.

Although not addressed by the majority, I would also reject defendant's claim that the trial court lacked jurisdiction to consider plaintiff's asserted defense that he was constructively discharged, because the exhibits necessary to resolve this issue were not a part of the record below, and our review is limited to the record developed by the trial court. *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). Additionally, I would reject defendant's contention that judgment notwithstanding the verdict was warranted as to the jury's finding that plaintiff was constructively discharged, because there was sufficient evidence presented on this theory to support the jury's verdict. *Attard v Citizens Insurance Co*, 237 Mich App 311, 320; 602 NW2d 633 (1999).

The record evidence supports the finding of the jury that plaintiff was subjected to discrimination in the workplace. For the reasons articulated above, I cannot join in the majority opinion.

/s/ Kurtis T. Wilder