

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY A. RAZMUS,

Plaintiff-Appellant,

v

MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED

October 25, 2005

No. 256082

Ingham Circuit Court

LC No. 03-000145-NO

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff, Shirley J. Razmus, appeals as of right from a grant of summary disposition entered in favor of defendant, Michigan State Police (MSP). On appeal, plaintiff argues that the court erred in granting summary disposition in favor of defendant because she presented direct evidence establishing defendant's policy to consider race in determining promotions, a prima facie case of reverse discrimination, and also, a causal relationship between being denied interviews for further promotions and her pending litigation resulting in a valid claim for retaliation. Because contrary to plaintiff's claims, she did not present sufficient evidence establishing material questions of fact concerning any of her issues on appeal, we affirm.

Plaintiff, a Caucasian female, began her career as a trooper for defendant in 1977. Defendant promoted plaintiff to sergeant in 1985, to lieutenant in 1988, and to first lieutenant in 1989. During her employment, plaintiff earned a bachelor's degree in 1993, and a master's degree in 2001. From the time when plaintiff was promoted to first lieutenant in 1989, she applied for about ten promotions to inspector and received none. Defendant awarded seventy percent of promotions plaintiff applied for to Caucasians. Plaintiff claims she was denied three of the ten inspector positions because defendant illegally considered race in promotion decisions. The three inspector positions specifically at issue in this case are Daniel Payne's promotion to inspector in defendant's third district in February 2000, Morris Browns's promotion to inspector in defendant's second district in April 2000, and Cheryl Strayhorn's promotion to inspector in defendant's human resources division in May 2000.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because she presented direct evidence of race discrimination and established a prima facie case of unlawful reverse discrimination. This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transp*, 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 Co 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), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The Civil Rights Act (CRA), MCL 37.2101 *et seq.* prohibits employers from discriminating on the basis of prohibited considerations including race. MCL 37.2202(1). For a successful employment discrimination claim a plaintiff must produce some evidence of bias. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). If the plaintiff presents direct evidence of bias, then he will proceed “in the same manner as a plaintiff would prove any other civil case.” *Id.* at 462, citing *DeBrow, supra* at 537-539; and *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986). Direct evidence is defined as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003) (citations omitted). Absent direct evidence of discrimination, a plaintiff alleging reverse discrimination is held to the same standard as a plaintiff in any other claim of discrimination. *Lind v City of Battle Creek*, 470 Mich 230, 232-234; 681 NW2d 334 (2004). Thus, where a plaintiff relies on indirect (or circumstantial) evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133.

Under *McDonnell Douglas*, a plaintiff must establish a prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Sniecinski, supra* at 134. Once a plaintiff has established a prima facie case, the burden shifts to the employer to state a legitimate nondiscriminatory reason for the adverse employment action. If the employer articulates legitimate non-discriminatory reasons for the adverse employment actions, the burden shifts back to the plaintiff to show that the employer’s reasons are merely a pretext for discrimination. *Id.*; *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999), citing *McDonnell Douglas, supra*, 411 US 792.

In the instant matter, the trial court dismissed plaintiff’s claims after finding that plaintiff had presented no direct evidence of discrimination and had not presented circumstantial evidence sufficient to survive the *McDonnell Douglas* test regarding any of the three challenged promotions. Plaintiff argued below and now again on appeal that she provided direct evidence of discrimination in the form of statements allegedly made by former head of the MSP, Colonel Michael Dean Robinson, Major Marie Waalkes, Captain Tadarial Sturdivant, as well as an affirmative action policy statement contained in defendant’s promotion process manual.

Plaintiff first relies on statements made by Robinson indicating that defendant considers race and gender when filling vacancies within its ranks. Plaintiff highlights the following

statements, that race or gender are “factor[s] to be considered each and every time there’s a promotion.” And that “[w]e also have a position in the agency that I think we should be reflective of the society which we serve, and that includes all ranks within the agency.” The record displays that Robinson made these statements in deposition testimony on January 13, 1995 on the record in *Herendeen v Michigan State Police*, 39 F Supp 2d 899, 906-907 (WD Mich 1999). In *Herendeen*, the federal district court did find that these comments were direct evidence of discriminatory animus in the context of additional evidence indicating that test scores were adjusted in 1997 to “pass more minorities.” *Id.*, 906-907, 911.

These statements preceded any of the promotions plaintiff challenges by over five years. And, during that time, Robinson testified in another case, *Cremonte v Michigan State Police*, 232 Mich App 240; 591 NW2d 261 (1998), that it was the “express policy of the MSP not to take race, national origin, or gender into consideration” in the promotion process. Additionally, meeting minutes from a director’s meeting at defendant dated January 14, 1997 indicate that Robinson himself directed that “race and gender are not to be used as selection criteria” in promotions at defendant. After Robinson’s deposition testimony in *Cremonte* and his January 1997 directive that neither race nor gender were to be used in promotions, defendant altered the procedure by which promotions and hiring decisions were granted. In October 1998, defendant adopted a targeted selection promotional policy, which precludes consideration of race, national origin, or gender for purposes of making a promotion, hiring decision, or recommendation.

The trial court found that no question of fact existed regarding Robinson’s reversal of the policy of using race or gender as a factor in promotional decisions post-*Cremonte* because Robinson was the head of the MSP at the time and was empowered to make institutional policy changes that were in fact followed from the top down within defendant’s structure. Defendant’s institution of a completely new promotion procedure not considering race or gender as a factor in any way, the TSP, together with a documented straightforward directive from the head of the MSP to officials within defendant to no longer use race or gender in the promotion process clearly support the trial court’s finding. Further, plaintiff’s own deposition testimony displays that she never knew of a policy to use race or gender as selection criteria in the promotion process during the course of her employment as a manager at defendant, or during the course of defendant’s employment of Robinson. And, plaintiff even testified that on the occasions she served as an interview panel member for promotions, she was never directed to, nor did she ever, consider race or gender as selection criteria. Plaintiff’s own testimony supports the trial court’s conclusion that defendant’s policy of using race or gender as factors in the promotion process was in fact reversed on an institution-wide basis prior to any of the promotions at issue. Thus, contrary to plaintiff’s allegations, the record displays that since at least October 1998, it has been defendant’s express policy not to take race into consideration in making promotional or hiring decisions and therefore does not create a question of fact.

Plaintiff also relies on a statement allegedly made by Robinson in the context of the Strayhorn promotion indicating that “it’s time we had a black female at this level.” In her deposition testimony, plaintiff claims that Inspector Diane Dewitt told her she heard from Major Marie Waalkes that Robinson made the statement. Hence plaintiff does not claim that she directly heard the comment from Robinson. The record displays that Robinson denied making the comment, Waalkes denied hearing, or hearing of, Robinson making the comment. And Waalkes further denied making or repeating the statement to DeWitt. DeWitt does not recall

hearing the statement from Waalkes, does not recall telling plaintiff about the statement, and does not recall if she had a conversation with plaintiff about her chances for receiving a promotion. The record also reflects that Captain Richard Darling, hiring manager and panel member in the Strayhorn promotion, never heard of the remark at issue. After considering all the evidence, the trial court found plaintiff's testimony proffering Robinson's statement as direct evidence of discriminatory animus inadmissible hearsay.

Plaintiff offers the statement: "it's time we had a black female at this level" to prove that Robinson issued an order that an African-American female be chosen for the open Inspector position. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. As the trial court observed, because of the alleged declarants' denials, pursuant to *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 927-928 (CA 6, 1999), for Robinson's statement to be admissible through plaintiff's own testimony, both Dewitt's and Waalke's statements must be admissible. Because plaintiff offered the statements for the truth of the matter asserted and no other reason, they are inadmissible hearsay.

Alternatively, plaintiff argues that DeWitt's statement is not hearsay because it is an admission of a party opponent concerning a matter within the scope of the agency or employment made during the existence of a relationship. A party admission is not hearsay. See MRE 801(d)(2)(A). To constitute a party admission against defendant, DeWitt must have been an agent or servant of defendant, and the statement must have concerned a matter within the scope of her agency or employment during the existence of her agency relationship. MRE 801(d)(2)(D). DeWitt testified that she has never supervised plaintiff and also had no involvement in Strayhorn's promotion. At the time of Strayhorn's promotion, DeWitt no longer worked in defendant's human resources division. Because plaintiff cannot show that DeWitt's alleged statement concerned a matter within the scope of her agency or employment, it remains inadmissible hearsay.

Next, plaintiff argues that the TSP manual instructs defendant to proffer consideration of "affirmative action goals" "when candidates have equally acceptable profiles." In addition, plaintiff points out that affirmative action goals were present in defendant's Equal Opportunity Plan (EOP) applying to the period January 1, 1999 through December 31, 2000. Plaintiff frames her issue as follows, given the fact that the interview panelists have denied considering affirmative action goals during the interview process, an issue of fact is created regarding whether defendant deviated from its own standard operating procedure of considering race in all promotions.

The trial court found that "the existence of an affirmative action plan, without evidence of its discriminatory application, is not direct evidence of discriminatory animus." The record shows that the targeted selection training guide does not authorize defendant to consider race or gender during the promotional decision-making process. But the guide does state that in the instance candidates competing for a promotion have equally acceptable profiles the employer might want to consider several other factors, including affirmative action goals, salary requirements, and relocation requirements.

As the trial court pointed out, plaintiff merely relies on the existence of the language at issue in defendant's TSP manual and defendant's EOP, but does not provide any evidence that panel members actually reached a level of analysis wherein the language became an issue or was at all considered during the challenged promotions. Further, there is no evidence in this case that the TSP interview panelists that interviewed plaintiff determined that she, or any other candidate, had an "equally acceptable profile" following the candidate interviews. And, there is no evidence that any "affirmative action goals" were ever considered.

To the contrary, defendant provided testimonial evidence through both affidavits and depositions from TSP panel members in all three challenged promotions, that race and gender were never considered in the promotion process. Like the trial court, we also find it impressive that plaintiff herself testified that as a member of TSP panels, she never considered race or gender as a factor in the promotional process. Because plaintiff has provided absolutely no evidence that the language in the TSP manual or EOP were utilized by panel members in a discriminatory manner in any of the three challenged promotions, plaintiff has not presented a question of fact for the jury.

Plaintiff also alleged below that she provided direct evidence of discriminatory animus though a statement she alleges Sturdivant made that he was going to make the second district "look like it should" through the promotion process. Plaintiff does not assert that she heard Sturdivant make the comment. Plaintiff alleges that she read about the remark in legal proceedings and then provided an affidavit from Trooper Paul Royal stating that a third party told him that he overheard Sturdivant make the statement to another person some time in Spring 2002. Sturdivant denies making the statement. The trial court found the statement inadmissible as hearsay and because it was not relevant as a "stray remark."

Like Robinson's statement, because plaintiff offered Sturdivant's statement for the truth of the matter asserted and no other reason, it is likewise inadmissible hearsay evidence. Further, the trial court properly found the remark, an irrelevant "stray remark." Statements that are made outside the immediate adverse action context, generally referred to as "stray remarks," and which the plaintiff alleges to be direct evidence, must be examined for relevancy using the following four factors: "(1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias?" *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001).

Under the *Krohn* factors, clearly Sturdivant's alleged statement is not relevant as a "stray remark." Although the record reflects that Sturdivant was a member of the TSP panel that promoted Brown, and thus a decisionmaker in the promotion process, plaintiff alleges that he made the comment approximately two years after the date of Brown's promotion in April 2000. And, plaintiff has presented no evidence that the disputed remark was part of a pattern of biased comments and has not shown that the comment was clearly reflective of a discriminatory bias. Because the statement is inadmissible hearsay and because it is not relevant as a stray remark, it is not evidence of discriminatory animus and does not present a question of fact.

Since plaintiff has not presented any direct evidence of discrimination, she must proceed using the burden-shifting approach set forth in *McDonnell Douglas*. *Sniecinski, supra* at 133. In this case, to establish a prima facie case under the *McDonnell Douglas* analysis, plaintiff is required to show that: “(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.” *Hazle, supra* at 467, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); and *McDonnell Douglas, supra* at 802.

The fourth element is the only issue on appeal. A plaintiff cannot satisfy the fourth prong of the *McDonnell Douglas* test “merely by showing that [s]he was qualified for the position and that a nonminority candidate was chosen instead.” *Hazle, supra* at 470; see also *Matras, supra* at 684. This is because, “[a]s a matter of law, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates.” *Hazle, supra* at 471.

Regarding the Payne promotion, the record evidence shows that Payne was highly qualified for the promotion. Although plaintiff claims she was more qualified than Payne, she was ranked tenth out of eleven candidates in the TSP process. And, as the trial court pointed out, plaintiff has not claimed to be more qualified than the nine other candidates. The five-member panel responsible for Payne’s February 2000 promotion has affirmed that neither race nor gender were used as factors in its decision. The panel stated that Payne was promoted because he outperformed the other candidates during his interview by demonstrating superior leadership, and was unanimously deemed the most qualified candidate by the interview panel.

Regarding the Strayhorn promotion, plaintiff claims that she was more qualified than Strayhorn based on years of total service and supervisory service. However, the interview panel responsible for the May 2000 promotion of Strayhorn testified that she was the most qualified candidate based on her relevant experience in the particular areas of Equal Employment Opportunity, recruiting and selection, as well as her education and her interview performance.

Regarding the Brown promotion, plaintiff claims that she was more qualified than Brown based on education and years of service as a first lieutenant. The record reveals that plaintiff was more educated than Brown and did have more experience than Brown as a first lieutenant. However, the TSP grid analysis reveals that Brown was the best fit for the position whereas plaintiff finished sixth of nine. Brown’s interview panel testified that Brown interviewed the best and was the most qualified candidate out of the pool of applicants. The interview panel members also testified that they never considered race or gender during the interview process.

Plaintiff has provided no evidence that race was a factor in any of the interview panels’ decisions to select Payne, Strayhorn, or Brown for their individual promotions. Plaintiff has not shown in any of the three challenged promotions that “the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.” *Hazle, supra* at 467, quoting *Lytle, supra* at 172-173 and *McDonnell Douglas, supra* at 802. Because plaintiff has not met the fourth element of the *McDonnell Douglas* test, she has not proven a prima facie case of discrimination and defendant is not required to produce evidence of nondiscriminatory reasons for its actions. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). For these reasons, we conclude that the trial court did not err in granting defendant’s motion for

summary disposition because plaintiff failed to present direct evidence of race discrimination and failed to establish a prima facie case of discrimination.

Plaintiff also argues that the trial court erred when it dismissed her retaliation claim for failure to establish a prima facie case of retaliation. MCL 37.2701 prohibits an employer from “retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act.” *Feick v Monroe County*, 229 Mich App 335, 344; 582 NW2d 207 (1998). MCL 37.2701 provides specifically, in pertinent part:

Two or more persons shall not conspire to, or a person shall not: (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie claim of retaliation, the plaintiff must establish the following:

(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Defendant only challenged the causation element of plaintiff’s retaliation claim. To establish causation, the plaintiff must show that his participation in the protected activity was a “significant factor” in the employer’s adverse employment action, not just that there was a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

Our review of the record reveals that plaintiff failed to demonstrate that her filing of a complaint in this action was a significant factor in defendant’s decision not to interview her for the promotion. Both promotion openings plaintiff points to were for positions at the rank of captain. Initially defendant invited both first lieutenants (two tiers below captain) and inspectors (one tier below captain) to apply for the openings. However, the record evidence shows that during the interview process for both positions, all first lieutenant candidates including plaintiff were excluded from the interview process due to the response by inspector level candidates. Plaintiff has provided no evidence that the across-the-board decision to exclude first lieutenant applicants was based on some other criteria than the competitive qualifications inherent to those already performing at the inspector level. Because plaintiff failed to offer evidence to establish a material factual issue concerning whether defendant’s reason for disqualifying her from interviewing for the captain positions were in any way connected to plaintiff’s filing and

pursuing a cause of action for reverse discrimination, the trial court properly dismissed plaintiff's retaliation claim.

Affirmed.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Pat M. Donofrio