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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC  
AND GREAT GENERAL INTEREST**

This appeal raises three issues of great public and general interest<sup>1</sup>: (1) whether comments and expressed opinions by non-decisionmaking employees constitute “direct evidence” of employment discrimination under Ohio Rev. Code Chapter 4112; (2) whether comments and expressed opinions by non-decisionmaking employees can rise to the level of pretext evidence of employment discrimination under Ohio Rev. Code Chapter 4112; and (3) whether the submitted resignation by an employee, coupled with their continuing in employment until a mutually negotiated date, can rise to the level of a redressable “constructive discharge?”

How an employer becomes tarred with “direct evidence” in the employment discrimination setting is an issue of great importance to all Ohio employers. “Direct evidence is evidence that proves the existence of fact without requiring any inferences.” *Owens v. Wellmont, Inc.* (6<sup>th</sup> Cir. 2009), 107 Fair Empl. Prac. Cas. (BNA) 318, 321 (quoting, *Rowan v. Lockheed Martin Energy Sys., Inc.* (6<sup>th</sup> Cir. 2004), 360 F. 3d 455, 458). “Direct evidence of discrimination is evidence that proves discrimination has occurred without requiring further inferences.” *McFee v. Nursing Care Mngt. of America* (2010), 2010-Ohio-2744, ¶34. Once direct evidence of employment discrimination is determined to be present, the evidentiary burden of proof shifts to the employer to prove that a prohibited employee characteristic was not a motivating factor in the challenged adverse employment decision. *Mauzy v. Kelly Srvcs., Inc.* (1996), 75 Ohio St. 3d 578, 585 (citing, *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 109 S. Ct. 1775). In most employment discrimination disputes, the defending employer does not have a burden of proof, but only a

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<sup>1</sup> “Novel questions of law or procedure”, and issues implicating conflicts between courts of appeals, even though no appellate court has certified a conflict, unquestionably rise to the standard of “cases of public or great general interest”. *Noble v. Colwell* (1989) 44 Ohio St. 3d 92, 94 (novel questions of law or procedure); *Flury v. The Central Pub. House* (1928), 118 Ohio St. 154, 159 (appellate court conflict).

burden of stating the reasons why a particular adverse employment action occurred. *Barker v. Scovill, Inc.* (1983), 6 Ohio St. 3d 146, 148. So, “direct evidence” is a “more advantageous standard of liability” to employee-plaintiffs. *Taylor v. Virginia Univ.* (4<sup>th</sup> Cir. 1999), 193 F. 3d 219, 232 (*en banc*).

Twice, the United States Supreme Court has attempted to define the contours of what is “direct evidence” of discrimination. Both occasions produced highly fractured opinions. *Price Waterhouse* was a plurality ruling in which two Supreme Court Justices merely concurred in the judgment. In light of the divided *Price Waterhouse* ruling, this Court has observed that “...it is impossible to gauge a majority position on this [direct evidence] issue.” *Mauzy*, 75 Ohio St. 3d at n.3. More recently, *Gross v. FBL Fin. Svcs., Inc.* (2009), 129 S. Ct. 2343, led to a five to four ruling that “direct evidence” could never arise in a federal age discrimination dispute because of the federal statute’s controlling text.<sup>2</sup> At the Court of Appeals, the Appellee readily conceded: “The exact definition of what constitutes direct evidence, however, has been very illusive” (Pl. App. Br., p. 13).

Historically, this Court has followed the lead of its federal brethren when defining Ohio’s discrimination concepts, because Chapter 4112 was patterned after its federal counterpart.<sup>3</sup> The federal Sixth Circuit has succinctly held: “Comments made by individuals who are not involved in the decision-making process regarding the plaintiff’s employment do not constitute direct evidence

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<sup>2</sup> In *Gross*, the United States Supreme Court held that in light of the “because of” language in the federal Age Discrimination in Employment statute, 29 U.S.C. §§621-634, that direct evidence – and hence the shifting of burdens of proof – does not exist in the federal age discrimination context. *Gross*, 129 S. Ct. at 2350-51. The “because of” text of Ohio’s anti-discrimination statute mirrors that of the federal age discrimination statute, to wit: “It shall be an unlawful discriminatory practice...for any employer, *because of* the...sex...of any person, to discharge without cause...that person”. Ohio Rev. Code §4112.02(A) (emphasis added).

<sup>3</sup> *McFee*, 2010-Ohio-2744, ¶ 14; *Williams v. City of Akron* (2005), 107 Ohio St. 3d 203, 208-09; *Greer-Berger v. Temesi* (2007), 2007-Ohio-6442, ¶ 12; *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St. 3d 607, 609; *Barker*, 6 Ohio St. 3d at 147-148.

of discrimination.” *Carter v. Univ. of Toledo* (6<sup>th</sup> Cir. 2003), 349 F. 3d 269, 273 (citing, *Hopson v. Daimler-Chrysler Corp.* (6<sup>th</sup> Cir. 2002), 306 F. 3d 427, 433). The decision of the Fifth District Court of Appeals set aside the settled Sixth Circuit federal precedent, and instead held that the gratuitous opinions by non decision-making employees could serve to produce Chapter 4112 “direct evidence.” *Egli v. Congress Lake Club* (Stark App. 2009), 2010-Ohio-2444, ¶ 35. The decision of the Fifth District Court of Appeals, therefore, hopelessly conflicts with federal discrimination precedent, leaving Ohio’s employers and courts with uncertainty.

The status and evidentiary value of statements and opinions by non decision-makers is equally of public and great general interest to Ohio’s employers within the context of a circumstantial discrimination case under the *McDonnell-Douglas Corp. v. Green* (1973), 411 U.S. 792, paradigm. This Court has accepted discretionary jurisdiction over several employment disputes that have served to define the burdens that a discrimination plaintiff must shoulder in order to raise a *prima facie* inference of having suffered employment discrimination. *Williams v. City of Akron* (2005), 107 Ohio St. 3d 203, 205-206; *Mauzy*, 75 Ohio St. 3d at 588-89; *Barker*, 6 Ohio St. 3d at 148. No guiding parameters have yet been established by this Court, however, over how a Chapter 4112 plaintiff establishes the equally important pretext so as to have her case heard and decided by a jury. Once again, federal decisions by the Court of Appeals for the Sixth Circuit are settled in holding: “Unless the statements or conduct of non-decisionmakers can be imputed to the ultimate decisionmaker, such statements or conduct cannot suffice to satisfy the plaintiff’s burden of demonstrating [discriminatory] animus.” *Ruiz v. Ohio Dept. of Rehabilitation and Corrections* (N.D. Ohio 2010), 2010 U.S. Dist LEXIS 52798 \*33-34 (citing, *Noble v. Brinker Int’l, Inc.* (6<sup>th</sup> Cir. 2004), 391 F. 3d 715, 724). The favorable but gratuitous opinions of a discrimination plaintiff’s co-workers have been properly labeled in the federal sector as “close to irrelevant.” *Hawkins v. Pepsi-Co, Inc.* (4<sup>th</sup> Cir. 2000), 203 F. 3d 274, 280. “Generally, only the employer’s

perception of whether the employee met expectations is relevant.” *Huang v. Gutierrez* (S.D. Md. 2010), 2010 U.S. Dist. LEXIS 885, \*15. Once again, the Fifth District Court of Appeals saw fit to part company with Ohio’s federal judiciary on this important point of law. *Egli*, 2010-Ohio-2444, ¶¶ 50-51.

Finally, the question of whether an employee who tenders a voluntary resignation, and then negotiates with her employer to remain in employment for a fixed period of time can construct the legal fiction of “constructive discharge” for purposes of suing and recovering from their employer is an issue of great importance to Ohio’s employers. “If a plaintiff fails to establish a *prima facie* case of discrimination, a court may then dismiss the case.” *Williams*, 107 Ohio St. 3d at 209. The requirement that a discrimination plaintiff be “discharged” is one of several *prima facie* elements that, in turn, lead to a legal presumption that the employee was, in fact, discriminated against. *Byrnes v. LCI Comm. Holdings* (1996), 77 Ohio St. 3d 125, 128. “The burden on [a] plaintiff in establishing a constructive discharge is ‘substantial.’” *Broxterman v. Falley’s, Inc.* (D. Kan. 2008), 104 Fair Empl. Prac. Cas. (BNA) 1049 (citing, *EEOC v. PVNF, LLC* (10<sup>th</sup> Cir. 2007), 487 F. 3d 790, 804). “In general, employee resignations are presumed to be voluntary.” *Leheny v. City of Pittsburgh* (3<sup>rd</sup> Cir. 1999), 183 F. 3d 220, 227. Where an employee resigns, and then negotiates to stay on with their employer for a stated period of time, the suggestion that the worker has suffered “intolerable conditions” so as to manufacture the legal fiction of constructive discharge simply cannot arise, as a matter of law. *Johnson v. Wal-Mart Stores, Inc.* (M. D. Ala. 1997), 987 F. Supp. 1376, 1394; *Hoffman v. Winco Holdings, Inc.* (D. Ore. 2008), 2008 U.S. Dist. LEXIS 101672, \*\*15-16; *Shelar v. Ameripride Srvcs., Inc.* (D. Kan. 2006), 2006 U.S. Dist. LEXIS 45904, \*28.

## **I. STATEMENT OF THE CASE AND FACTS**

### **A. Background**

“Congress Lake is a private corporation governed by a board of eight voting Directors” (Appx. 18). There is also a President and Secretary, but the President only votes to break ties, and the Secretary has no voting power at all (*Id.* at 2). In the fall of 2007, the full Board of Directors of Congress Lake consisted of President Tom Lombardi, Vice-President Dr. Dominic Bagnoli, M.D., Treasurer John Finnucan, Secretary Craig Pelini, and Directors Frank Provo, David Scaglione, Rob Stradley, Tom Tschantz, Tom Wichert, and Scott Smart (*Id.*).

“Faith Egli was hired as an assistant golf professional by Congress Lake and promoted in 2002 to the position of head golf professional, a notable action by Congress Lake to the extent that females are underrepresented in the profession in this locale” (Appx. 18). Upon being promoted to Head Golf Professional in 2002, Ms. Egli (“Egli”) reported to General Manager Joe DeWitt (Appx. 2). A golf committee chaired by club member Bob Hendrickson oversaw the club’s various golf programs” (Appx. 2). Mr. DeWitt was not a member of the Club’s Board of Directors, and had no voting rights (Appx. 2). Similarly, Hendrickson’s position as Chair of the Golf Committee did not imbue him with the authority or right to make personnel decisions, or even issue discipline; these were board powers (Appx. 10). One of Ms. Egli’s subordinates was Assistant Golf Professional Donald Burke (Appx. 14). Mr. Frederick Crewse was one of several hundred Club members (Appx. 3, 14).

### **B. Egli’s Performance Deficiencies and Resignation**

“Dr. Bagnoli... as a member of the board of directors in 2005... was approached by various club members with complaints concerning Ms. Egli’s appearance, management of club golf tournaments, accessibility to members, management of subordinates, and new member orientation” (Appx. 3). Several Club members prepared and submitted letters of dissatisfaction to

the Board (*Id.*). “The Board then instructed the general manager, Mr. DeWitt, to discuss these concerns with Ms. Egli” (Appx. 3). DeWitt and Hendrickson personally disagreed with the 2005 Board of Directors’ decision to counsel Ms. Egli over her performance failures (Appx. 3, 14). DeWitt was of the opinion that the performance complaints of Egli detailed by the 2005 Board of Directors “lacked substance,” and Hendrickson was more blunt, subjectively opining that the complaints were as the result of “sex bias” (Appx. 3, 4). DeWitt voluntarily resigned his general manager’s position in July of 2007 (Appx. 4). “Board members noted some improvement, but registered continued concern in other areas” over Egli’s performance (Appx. 19). “The matter of Egli’s performance became an issue for the Board once again in 2007, again on the initiative of [Doctor] Bagnoli” (Appx. 19). “After two meetings regarding her employment, the Board voted to request Egli’s resignation and delegated the task of meeting with [Egli] to Board president Tom Lombardi and secretary Craig Pelini” (Appx. 19). “Of the seven voting board members present, five were in favor of the motion; one, Mr. Provo voted against it; and one, Mr. Smart, abstained” (*Id.*). “Mr. Smart later attempted to alter his vote to a ‘no’” (*Id.*). An eighth Director with voting authority, Mr. Finnucan, “did not attend the meeting” (*Id.*). “The club offered to pay [Egli] her salary through December 31, 2007, and to continue to sell her merchandise at the pro shop through the same date, and to purchase the remaining inventory thereafter” were she to resign (Appx. 4-5). After negotiating two additional months’ severance, “Ms. Egli resigned in emails addressed to Lombardi and the board on or about October 5, 2007” (Appx. 5):

Thomas Lombardi

From: Faith Egli [faithegli@yahoo.com]  
Sent: Friday, October 05, 2007 8:48 AM  
To: Thomas Lombardi  
Subject: resignation letter  
Attachments: 2248919955-resignation letter.doc

Mr. Lombardi,

I personally would like to thank you for all of your support during the years. You have my utmost respect and I thank you.

I truly feel that I did the best anyone could given the hand that I was given. It was a difficult year filling in mid season without a caddie master, and not being given the ability to hire one, or promote the man I thought that could help the department. I always gave 100 percent as did my staff, to give the best possible service. I am saddened that this was not enough.

I have attached the requested resignation letter, and appreciate being given my salary thru February.

Sincerely,  
Faith

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Congress Lake Board of Directors,

I would like to notify you of my resignation as your Head Golf Professional effective December 31, 2007 with the agreed upon terms. I have enjoyed my years at Congress Lake Club serving the members and guests while working with a great staff. These years will be always thought about fondly and I appreciate the opportunity and experiences.

Truly Yours,  
Faith Egli, PGA, LPGA

“Ms. Egli thereafter attempted to rescind her resignation through her attorney, which attempt Congress Lake refused” (Appx. 5). Consequently, on or about October 20, 2007, Egli was ordered off the club’s premises; and on or about November 20, 2007, was asked to remove her inventory from the club’s pro shop” (*Id.*). As agreed through her submitted voluntary resignation, Egli “was paid through the end of the year” (*Id.*). “Egli’s departure from Congress Lake caused some dissention among membership, both voting and nonvoting” (Appx. 19).

“A man, Bill Welch, was eventually hired to replace Ms. Egli” (Appx. 5).

### C. Egli’s Lawsuit

“On or about August 11, 2008, Ms. Egli filed her complaint with the trial court, alleging violations of Rev. Code 4112.02(A), prohibiting employment discrimination based on sex, and Rev. Code 4112.99” (Appx. 5). “Motion, practice and discovery ensued (*Id.*). To hurdle summary

judgment, Egli argued to the trial court that she possessed “direct evidence” of discrimination because voting Director Dr. Bagnoli, and non-voting Secretary Craig Pelini, had allegedly stated back in 2002 when Egli was promoted “...they did not want a woman as head golf professional” (Appx. 9). Egli argued that Director Tschantz also had previously stated that he “...did not want a woman as head golf professional” (Appx. 9). A non-voting Congress Lake member, Mr. Frederick Crewse, presented unspecific “deposition testimony that he frequently overheard locker room conversation among several members...regarding Egli’s gender” (Appx. 23).

Ms. Egli also obtained affidavits from non-voting club member Robert Hendrickson, and non-member, non-voter employee Donald Burke (Appx. 14). Hendrickson avered “that the allegations regarding her unfitness were pretextual,” and also testified that Mr. DeWitt felt the same (Appx. 14). The non-voting, non-member employee Donald Burke avered that he “...directly disputes the contentions that [Ms. Egli] mishandled the club’s golf programs or her subordinates” (*Id.*).

#### **D. Common Pleas Proceedings**

On August 18, 2009, the Honorable Lynn C. Slaby granted Congress Lake’s summary judgment motion (Appx. 26).<sup>4</sup> The trial court rejected the notion that Egli had submitted “direct evidence” of discrimination:

A threshold question, then, is whether Egli’s claim is properly analyzed as one of direct or indirect discrimination.

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To the extent that Egli relies on the incidents and comments described above to create a genuine issue of material fact regarding direct evidence of discrimination – and to prove her claim by that means – she has failed to do so. Each of the examples to which she

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<sup>4</sup> This civil action was originally assigned to the Honorable Charles E. Brown, Jr. Amidst the Ohio R. Civ. P. 56 exercise, Judge Brown identified a possible conflict of interest, and Judge Slaby was thereafter appointed by this Court to hear the matter on a visiting assignment.

points requires a chain of inferences to reach the possible conclusion that she was terminated from her employment because of sex. This is not the quality of evidence to which the courts point as direct evidence of discrimination, and if Egli's claim is to survive summary judgment, it must do so under the burden shifting analysis applicable to claims of discrimination proved by indirect evidence. (Appx. 23-25).

Turning to the circumstantial, indirect method of demonstrating employment discrimination,<sup>5</sup> the trial court ruled that although Egli had presented a genuine issue as to whether she had been constructively discharged,<sup>6</sup> the requisite pretext burden had not been satisfied:

Egli's response to Congress Lake's Motion for Summary Judgment maintains that the Board's articulated reason for the termination of her employment is pretext because its falsity is demonstrated by her own assessment of her performance, and disagreement among her subordinates, among some of those at Congress Lake with whom she worked, and among members of Congress Lake at large. It is undisputed that, at the direction of the Board, DeWitt met with Egli to discuss the concerns raised by Bagnoli and, it appears, shared by others. It is also undisputed that Egli enjoyed a measure of popularity among a segment of Congress Lake's membership, and that former Manager DeWitt and committee chairman Hendrickson disagreed with the Board's assessment of Egli's performance. Even viewing these facts in the light most favorable to Egli, they fail to demonstrate pretext. Disagreement among these various observers of a situation – whose direct involvement in the decisions regarding Egli's employment varied by degree – does not rise to the level of establishing that the Board's justification for its actions was false. See, *Weller v. Titanium Metals Corp.* (S.D. Ohio, 2005), 361 F. Supp. 712, 722, citing, *Peters v. Lincoln Elec. Co.* (C.A. 6 2002), 285 F.3d 456, 474. (Appx. 26-27).

#### **E. Appellate Court Proceedings**

The Fifth Appellate District reversed the trial court, and held that Egli had presented "direct evidence" of discrimination:

In this case, only two of the board members cited by Ms. Egli as being improperly motivated – Dr. Bagnoli, and Mr. Tschantz –

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<sup>5</sup> *McDonnell-Douglas Corp. v. Green* (1973), 411 U.S. 792.

<sup>6</sup> Appx. 26.

possessed votes (and voted to request her resignation). Mr. Pelini, as secretary, did not. The vote against her was five to one, with an abstention by Mr. Smart, or five to two, if his later attempt to change his vote to favor Ms. Egli is considered valid. Thus, to conclude that any improper motivation on the parts of the board members cited by Ms. Egli provided the decisive margin against her, or tainted the votes of the other board members, requires evidence that these three board members exercised such influence over their fellows. Ms. Egli points to the deposition testimony of Dr. Bagnoli, as well as an email he sent to club members when he learned he was to be voted off of the board, in which he claimed he did, in fact, exercise such influence. Combining this with the evidence she presented from Mr. Crewes and Mr. Hendrickson regarding sex bias against her, leads to the conclusion that Ms. Egli presented direct evidence that unlawful bias played at least some part in her termination. Cf. *Klaus*, supra, at 725. (Appx. 10).

The appellate panel noted: “In general, employee resignations are presumed to be voluntary” (Appx. 12). The appellate court also observed: “The mere fact that an employee is forced to choose between resignation and termination does not alone establish that a subsequent choice to resign is involuntary...” (*Id.*). The appellate court, nevertheless, ruled:

In this case, the club’s president, Mr. Lombardi, deposed that, if Ms. Egli had not resigned once he and Mr. Pelini requested her to do so, then he had authority to terminate her, and would have done so. He further deposed that she understood this. Consequently, we must conclude that Ms. Egli presented sufficient evidence of constructive discharge for summary judgment purposes. She was not required “to struggle with the inevitable simply to attain the ‘discharge’ label.” *Mauzy* at 589. And thus, like the trial court, we conclude that Ms. Egli set forth a prima facie case of employment discrimination via indirect evidence. (Appx. 13).

Finally, the Fifth Appellate District ruled, serving upon Egli’s so-called “direct evidence,” that Egli had demonstrated pretext via the testimony of non-decisionmakers:

First, there is the testimony of club member Frederick Crewes that Dr. Bagnoli and Mr. Tschantz – two of the board members voting to demand Ms. Egli’s resignation – were consistently hostile to her employment of the basis of sex. This testimony is different in kind than that merely showing an atmosphere of discrimination, as in *Risch*. Rather, as noted previously, it tends toward direct evidence

that these two board members were, at least in part, improperly motivated.

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The testimony of Mr. Hendrickson, and Mr. Burke, though, is the type of evidence found by the *Risch* and *Peirick* courts to be sufficient to establish pretext in summary judgment proceedings under the *McDonnell Douglas* test. Mr. Hendrickson was not a decisionmaker. However, as head of the club's golf committee, he worked closely with Ms. Egli, and the board, on many of the issues that Congress Lake cites as supporting her termination. He testified that the reasons advanced by the board were untrue, and were pretextual. He reported that the general manger, Mr. DeWitt, believed the same. Mr. Burke, Ms. Egli's assistant, testified via affidavit that the criticisms of her handling of the club's golf programs and her subordinates, were untrue. Given the position these men occupied at Congress Lake, their testimony buttresses the other evidence previously cited that Ms. Egli was terminated, not for the reasons advance by the club, but due to her sex. (Appx. 15-16).

## II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

### Proposition of Law No. 1.

#### **Comments and Opinions of Non-Decisionmakers Cannot Establish "Direct Evidence" of Employment Discrimination Under Rev. Code 4112.02.**

Club member Frederick Crewse, and former Golf Committee Chair Bob Hendrickson both submitted affidavits on behalf of Ms. Egli during the summary judgment briefing. Mr. Crewse recounted how voting members Dr. Bagnoli and Tom Tschantz "openly opposed Ms. Egli's promotion [in 2002] on the basis of her sex" (Appx. 3). Hendrickson avered that he disagreed with the 2005 Board of Directors' decision to progressively counsel Ms. Egli and that, in his opinion, Egli's performance as Head Golf Professional "...was better than it had ever been while I was a member of the Club."

The purported sex discriminatory comments attributed to Bagnoli and Tschantz, in and of themselves, could not possibly have established the requisite "direct evidence" of discrimination, because the established law is clear that individual biases of a minority block of decisionmakers

will not serve to impermissibly stain an otherwise valid, uncoerced majority vote. *Kendall v. Urban League of Flint* (E.D. Mich. 2009), 612 F. Supp. 2d 871, 881; *Scarborough v. Morgan Cty. Bd. of Educ.* (6<sup>th</sup> Cir. 2006), 470 F. 3d 250, 262-63; *LaVerdure v. Kelly Cty. of Montgomery* (3<sup>rd</sup> Cir. 2003), 324 F. 3d 123, 125; *Jeffries v. Harlestown* (2<sup>nd</sup> Cir. 1995), 52 F. 3d 9, 14; *Kawokaa v. City of Arroyo Grande* (9<sup>th</sup> Cir. 1994), 17 F. 3d 1227, 1239. Using the testimony of Crewse and Hendrickson, however, the Appellant Panel ruled Egli had submitted “direct evidence” of discrimination (Appx. 10-11).

Simply put, Hendrickson’s personal opinion that Egli was cutting it, is “close to irrelevant” in the analysis of employment discrimination. *Hawkins*, 203 F. 3d at 280. “Comments made by individuals who are not involved in the decision-making process regarding plaintiff’s employment do not constitute direct evidence of discrimination.” *Carter*, 349 F. 3d at 273 (citing, *Hopson*, 306 F. 3d at 433). *Accord*, *Koski v. Standex Int.’l. Corp.* (7<sup>th</sup> Cir. 2002), 307 F. 3d 672, 678 (noting that the pertinent inquiry is whether the decisionmaker, as opposed to other managers or subordinates, evaluated the aggrieved employee based on discriminatory criteria); *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., *concurring*) (noting that “statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself [do not] suffice to satisfy the plaintiff’s burden” of proving discrimination). The trial court, therefore, correctly ruled that whatever else may be said of the Crewse and Hendrickson affidavits, “...requires a chain of inferences to reach the possible conclusion that [Egli] was terminated from her employment because of sex” (Appx. 25). The Appellate Panel’s contrary ruling (Appx. 10) should be rejected by this Court.

**Proposition of Law No. 2.**

**Comments and Opinions of Non-Decisionmakers Cannot Establish Pre-Text Under Rev. Code 4112.02.**

To be sure, appointed non-voting club member and Golf Committee Chair Hendrickson, and ex<sup>7</sup>-general manager DeWitt thought Egli to be an asset to Congress Lake. Both openly disagreed with the 2005 Board decision to discipline Egli and both disagree with the 2007 Board's decision to approach Egli about possibly resigning (Appx. 3). However, "unless the statements or conduct of non-decisionmakers can be imputed to the ultimate decisionmaker, such statements or conduct cannot suffice to satisfy the plaintiff's burden of demonstrating [discriminatory] animus." *Noble*, 391 F. 3d at 724. This is so even where purported bias abounds with respect to non-decision-making "managers." *Koski*, 307 F. 3d at 678; *Hill v. Lockheed Martin Logistics* (4<sup>th</sup> Cir. 2004), 354 F. 3d 277, 286 (*en banc*); *Klaus v. Hilb, Rogal & Hamilton Cty. Co. of Ohio* (S.D. Ohio 2006), 437 F. Supp. 2d 706, 726 ("even if he was a manager" "he had no involvement in the decision-making process with respect to [the] decision to terminate [plaintiff]"). "[A] statement by an intermediate level management official is not indicative of discrimination when the ultimate decision...is made by an upper level official." *McDonald v. Union Camp Corp.* (6<sup>th</sup> Cir. 1990), 898 F. 2d 1155, 1161. At the time Egli was asked to resign, neither DeWitt nor the other club members like Hendrickson were a part of Congress Lake's management. See, e.g., *Risch v. Royal Oak Police Dept.* (C.A. 6, 2009), 581 F.3d 383, 393, citing *Ercegovich*, 154 F.3d at 357. And their statements were not imputed to specific board members.

Against this backdrop, the Fifth District Appellate Panel relied only on opinion and speculation of non-decisionmakers to render a finding of pretext ("Application of the reasoning in *Risch* and *Peirick* leads to the conclusion that Ms. Egli presented sufficient evidence that the

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<sup>7</sup> That DeWitt voluntarily quit his job at the Club well before Egli was approached about resigning only further distances his gratuitous opinion from being arguably relevant.

reasons for termination advanced by Congress Lake were pretextual under *McDonnell Douglas*.”) (Appx. 15). In doing so, the Appellate Court not only strayed from but contradicted the tenants of *Risch* and *Ercegovich* that statements by a non-decisionmaker, standing alone, generally do not support an inference of discrimination to find pretext, and that to be probative, such statements should buttress other evidence of pretext.

Similarly, in *Peirick v. IUPUI Athletic Dept.* (7<sup>th</sup> Cir. 2007), 510 F.3d 681, 693, the court held that “the opinions of nondecisionmakers. . . cannot carry the day.”<sup>8</sup> However, the Fifth District admittedly but improperly allowed just that (Appx. 15). The Appellate Panel acted contrary to the very case law it purportedly based its pretext finding on. The court’s conclusion that non-decisionmaker opinion evidence is “sufficient evidence,” in and of itself to establish pretext, leaves the floodgates open for nonprobative third party opinion to challenge an employer’s personnel decision with which it merely disagrees.

### **Proposition of Law No. 3.**

**The Legal Fiction of “Constructive Discharge” Required Egli to Prove Her “Choice to be Terminated was Involuntary or Coerced.” *Mauzy v. Kelly Srvc., Inc.* (1996), 75 Ohio St. 3d 578, 588.**

Thus it was incumbent upon Egli to show “working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign” (*Id.*). Negotiating with one’s employer to remain employed is completely inimical to the suggestion of “constructive discharge.” *Johnson*, 987 F. Supp. at 1394; *Hoffman*, 2008 U.S. Dist. LEXIS 101672 at \*\*15-16; *Shelar*, 2006 U.S. Dist. LEXIS 45904 at \*28. Egli not only negotiated her resignation date, but

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<sup>8</sup> The Court’s reliance on any application of the *Peirick* facts is misplaced anyhow. Opinion evidence of non-decisionmakers was found probative in *Peirick* to contradict the employer’s characterization of how certain non-decisionmakers viewed the terminated employee, which the employer offered as a justification for its adverse employment action. Egli offered only non-probative opinion, speculation and conjecture of non-decisionmakers, that was even attributable to the decisionmakers.

subsequent to her resignation meeting with Board President Mr. Lombardi, negotiated two additional months' severance pay. (See, *infra*. p. 7)

The Appellate Panel's finding of constructive discharge based on *Mauzy* is a misapplication of that case. The employer's actions must lead a reasonable person to believe that termination is imminent (Appx. 13). The Fifth District found that because the Congress Lake representative, Mr. Lombardi, knew that he had authority to terminate Egli should she not resign, there was sufficient evidence of constructive discharge. There was no record evidence that Egli knew this, and what is relevant to a finding of constructive discharge is what Egli believed (Appx. 13). She was not given an ultimatum; it was a conversation, a request, and negotiation of a resignation date and severance pay. See *Lenz v. Dewey*, 64 F.3d 547, 552 (10<sup>th</sup> Cir 1995) (Appx. 12).

### **III. CONCLUSION**

For the foregoing reasons, it is clear that the Propositions of Law raised through Congress Lake's Appeal for Discretionary Jurisdiction raise issues of public and great general interest, and Congress Lake respectfully requests that this Court recognize and accept same.

Respectfully submitted,

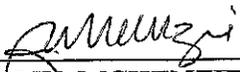
  
\_\_\_\_\_  
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COUNSEL FOR APPELLANT,  
CONGRESS LAKE COMPANY,  
d/b/a CONGRESS LAKE CLUB

**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum of Appellant, Congress Lake Club in Support of Discretionary Jurisdiction has been served upon the following person(s) by ordinary U.S. Mail, this 15<sup>th</sup> day of July, 2010:

Darrell N. Markijohn, Esq.  
Homer R. Richards, Esq.  
4100 Holiday Street N.W., Suite 101  
Canton, OH 44718-2532

  
\_\_\_\_\_  
JOHN W. MCKENZIE (0059266)

# **APPENDIX**

10 JUN - 1 PM 2:40  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

IN THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
STARK COUNTY, OHIO

FAITH EGLI, : OPINION  
Plaintiff-Appellant, : CASE NO. 2009CA00216  
- vs - : Judge Slaby  
CONGRESS LAKE CLUB, et al., :  
Defendant-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 2008-CV-03491.

Judgment: Reversed and remanded.

*Darrell N. Markijohn*, Darrell N. Markijohn, Esq., LLC, 4100 Holiday Street, N.W., Ste. 101, Canton, OH 44718-2532 and *Homer R. Richards*, Homer R. Richards Co., LPA, 4100 Holiday Street, N.W., Ste. 101, Canton, OH 44718-2532 (For Plaintiff-Appellant).

*John W. McKenzie* and *Thomas Evan Green*, 3480 West Market Street, Suite 300, Akron, OH 44333 (For Plaintiff-Appellee).

COLLEEN MARY O'TOOLE, J., Eleventh Appellate District, sitting by assignment.

{¶1} Faith Egli appeals from the grant of summary judgment by the Stark County Court of Common Pleas to the Congress Lake Golf Club in her sex discrimination case. We reverse and remand this matter for further proceedings.

{¶2} Ms. Egli has a formidable golfing background. A graduate of Michigan State University (where she was named a finalist for Athlete of the Decade for the 1980s), she is the winner of nine professional golf tournaments. She is a member of the PGA, successfully competing against male professionals in the Northern Ohio PGA. She is a member of the LPGA, once finishing eighth at its national championship.

A TRUE COPY TESTE:  
NANCY S. REINBOLD, CLERK  
By *T. Flickinger* Deputy  
Date *6/2/10*

{¶3} From 1988 through 1990, Ms. Egli was an assistant and head golf professional in Michigan. In 1991, she was hired as first assistant golf professional at Beachmont Country Club in Cleveland, Ohio. In March 1996, she became an assistant to Don Miller, the head golf professional at Congress Lake. In 2000, Mr. Miller was given the title "director of golf," and Ms. Egli that of "head golf professional." When Mr. Miller retired in 2002, Congress Lake conducted a nationwide search for his replacement, finally choosing Ms. Egli to exercise full power as head golf professional.

{¶4} Congress Lake Country Club is a corporation, governed by a board of eight voting directors. There is also a president and secretary. The president only votes to break ties between the directors. The secretary does not vote. The board generally meets once a month. The board at the time Ms. Egli resigned from Congress Lake in October 2007 consisted of President Tom Lombardi, Vice President Dr. Dominic Bagnoli, M.D., Treasurer John Finnucan, Secretary Craig Pelini, Frank Provo, David Scaglione, Rob Stradley, Tom Tschantz, Tom Wichert, and Scott Smart.

{¶5} Congress Lake has a general manager who reports to the board, and directs the club's operations. For most of the period during which Ms. Egli served as head golf professional, the general manager was Joe DeWitt. Ms. Egli reported directly to him.

{¶6} Congress Lake also has various committees overseeing particular aspects of its operation. These included the golf committee, which oversaw the club's various golf programs. The chairman of this committee from 2005 through 2007 was club member Bob Hendrickson. As head golf professional, Ms. Egli sat in on meetings of the

golf committee, which met about once a month during the golfing season. She worked closely with Mr. Hendrickson, who supported her strongly.

{¶7} According to Ms. Egli, at the time she assumed responsibilities as head golf professional in 2002, the then-club president, Bill Allen, along with the general manager, Mr. DeWitt, and the head of the personnel committee, met with her, and told her that she could only hire male assistants, due to sex bias against her by certain club members.

{¶8} Frederick Crewes, a Congress Lake member, deposed that there was a group of members who openly opposed Ms. Egli's promotion on the basis of her sex, including Dr. Bagnoli, and Mr. Tschantz – both members of the board of directors who voted to request her resignation in 2007. Mr. Crewes asserted that derogatory comments regarding Ms. Egli were consistently made by these club members.

{¶9} Dr. Bagnoli deposed that, as a member of the board of directors in 2005, he was approached by various club members with complaints concerning Ms. Egli's appearance, management of club golf tournaments, accessibility to members, management of subordinates and new member orientation.<sup>1</sup> Dr. Bagnoli obtained letters from dissatisfied club members, including one from Mr. Pelini, later club secretary at the time of Ms. Egli's resignation, and one signed collectively by various members, including Mr. Tschantz. The board then instructed the general manager, Mr. DeWitt, to discuss these concerns with Ms. Egli. According to both Ms. Egli and Mr. Hendrickson, head of the golf committee, Mr. Dewitt felt the various complaints lacked substance; Mr.

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1. Regarding her appearance, Ms. Egli was asked, and agreed, to wear long pants, rather than the shorts or skirts common in the LPGA.

Hendrickson attributed the complaints to sex bias. He further asserted that Mr. DeWitt indicated Ms. Egli would probably lose her position due to her sex.

{¶10} Various members of the board deposed asserted that complaints regarding Ms. Egli's handling of the various golf programs at Congress Lake, including tournaments and the junior golf program, continued to be lodged; and, that she continued to have difficulty with subordinates and relations with certain members. According to Ms. Egli, her direct supervisor, Mr. DeWitt, continued to support and praise her efforts until July 2007, when he left his position as general manager.

{¶11} September 18, 2007, Dr. Bagnoli moved the board of directors to replace Ms. Egli as head golf professional. The minutes of the meeting indicate that Mr. Scaglione seconded the motion, which failed five votes to four. Dr. Baglione deposed that no formal vote was taken, only a straw vote. Several board members deposed they wished to obtain legal counsel. Evidently, another meeting was held at which counsel was present.

{¶12} October 2, 2007, the board met again. A vote was taken to request Ms. Egli's resignation. Of the seven voting board members present, five were in favor of the motion; one, Mr. Provo, voted against it; and one, Mr. Smart, abstained. Mr. Smart later attempted to alter his vote to a "no." Mr. Finnucan, who did not attend the meeting, was opposed to the motion.

{¶13} October 4, 2007, Mr. Lombardi, the club's president, and Mr. Pelini, the secretary, met with Ms. Egli to inform her that the board requested her resignation. The club offered to pay her salary through December 31, 2007, and to continue to sell her merchandise at the pro shop through the same date, and to purchase the remaining

inventory thereafter. Certain emails were exchanged between Ms. Egli and Mr. Lombardi, in which it appears he agreed to have the board consider her request to get paid through the end of February 2008, so long as the board received her resignation previously. Ms. Egli resigned in emails addressed to Mr. Lombardi and the board on or about October 5, 2007.

{¶14} Ms. Egli thereafter attempted to rescind her resignation through her attorney, which attempt Congress Lake refused. On or about October 20, 2007, she was ordered off the club's premises; on or about November 20, 2007, she was given three days' notice to remove her inventory from the club's pro shop. She was paid through the end of the year.

{¶15} Considerable uproar ensued at Congress Lake. Some ninety-five members signed a petition critical of the board's treatment of Ms. Egli. Dissatisfied stockholders in the club forced a special meeting November 7, 2007, where the board, however, refused to answer any questions regarding Ms. Egli's employment.

{¶16} A man, Bill Welch, was eventually hired to replace Ms. Egli.

{¶17} On or about August 11, 2008, Ms. Egli filed her complaint with the trial court, alleging violations of R.C. 4112.02(A), prohibiting employment discrimination based on sex, and R.C. 4112.99. Congress Lake answered September 10, 2008. Motion practice and discovery ensued. Congress Lake filed for summary judgment, which Ms. Egli opposed. The trial judge recused himself due to a possible conflict of interest; the Supreme Court of Ohio appointed a visiting judge to hear the matter. August 18, 2009, the trial court granted Congress Lake's motion for summary judgment.

{¶18} August 21, 2009, Ms. Egli noticed this appeal, assigning a single error:

{¶19} “The Trial Court erred in granting Appellee’s Motion for Summary Judgment.”

{¶20} “Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.’ *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, \*\*\*. ‘In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion, which is adverse to the nonmoving party.’ *Id.* citing Civ.R. 56(C). Further, the standard in which we review the granting of a motion for summary judgment is *de novo*. *Id.* citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, \*\*\*.

{¶21} “Accordingly, ‘(s)ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’ *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. ‘Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.’ *Id.*, citing *Dresher* at 293.

{¶22} \*\*\*\*

{¶23} \*\*\*\*

{¶24} "Since summary judgment denies the party his or her 'day in court' it is not to be viewed lightly as docket control or as a 'little trial.' The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, \*\*\*

{¶25} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, \*\*\*, is too broad and fails to account for the burden Civ.R. 56 places upon a *moving* party. The court,

therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*. (Emphasis added.)

{¶26} “The Supreme Court in *Dresher* went on to hold that when *neither* the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, ‘and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’ *Id.* at 276. (Emphasis added.)” *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, at ¶¶36-37, 40-42. (Parallel citations omitted.)

{¶27} Under her assignment of error, Ms. Egli advances two issues:

{¶28} “[1.] Whether Appellant presented direct evidence of gender discrimination sufficient to preclude summary judgment as a matter of law.

{¶29} “[2.] Whether Appellant presented indirect evidence of gender discrimination sufficient to create genuine questions of material fact over whether Appellee’s reasons for discharge were pretextual.”

{¶30} R.C. 4112.02(A) prohibits sex discrimination in all matters related to employment. *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 2007-Ohio-6189, at ¶20. “Ohio courts apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to claims arising under R.C. Chapter 4112 to the extent that the terms of the statutes are consistent.” *Id.*, citing *Genaro v. Cent Transport, Inc.* (1999), 84 Ohio St.3d 293, 298, citing *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

{¶31} Sex discrimination in employment may be proved either by "direct" evidence, or by "indirect" evidence and application of the burden-shifting test set forth in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. *Klaus v. Kilb, Rogal & Hamilton Co. of Ohio* (S.D.Ohio 2006), 437 F.Supp.2d 706, 725-726; *Birch*, supra, at ¶21-23.

{¶32} "In employment discrimination claims, 'direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.' *Laderach v. U-Haul [of Northwestern Ohio]* (C.A.6, 2000), 207 F.3d [825.] \*\*\* 829. Direct evidence proves the existence of a fact without any inferences or presumptions. *Id.* To establish 'direct evidence' of discrimination through a supervisor's comments made in the workplace, the remarks must be 'clear, pertinent, and directly related to decision-making personnel or processes.' *Dobbs-Weinstein v. Vanderbilt University*, 1 F.Supp.2d 783, 798 (M.D. Tenn. 1998), *aff'd*, 185 F.3d 542 (6th Cir. 1999) (quoting *Wilson v. Wells Aluminum Corp.*, 1997 U.S. App. LEXIS 2331, No. 95-2003, \*\*\* (6th Cir. Feb. 7, 1997) (unpublished))." *Klaus*, supra, at 725.

{¶33} Under her first issue, Ms. Egli contends she introduced sufficient direct evidence of discrimination to survive summary judgment, in the form of evidence that Congress Lake board members Dr. Bagnoli, Mr. Tschantz, and Mr. Pelini stated they did not want a woman as head golf professional. The trial court found these alleged statements insufficient to create a genuine issue of material fact under a direct evidence analysis, since a "chain of inferences" was required "to reach the possible conclusion that [Ms. Egli] was terminated from her employment because of sex." We disagree.

{¶34} The Congress Lake board of directors holds the sole power to terminate. When a multi-member board makes employment decisions, the test for whether the decision was discriminatory is whether "improperly motivated members supply the deciding margin [in the vote]," *Scarborough v. Morgan Cty. Bd. of Educ.* (C.A.6, 2006), 470 F.3d 250, 262; or, "whether the votes against [the employee] were 'tainted (by) whatever retaliatory motives (other board members) may have had.'" *Kendall v. Urban League of Flint* (E.D.Mich. 2009), 612 F.Supp.2d 871, 881, quoting *Jeffries v. Harleston* (C.A.2, 1995), 52 F.3d 9, 14.

{¶35} In this case, only two of the board members cited by Ms. Egli as being improperly motivated – Dr. Bagnoli, and Mr. Tschantz – possessed votes (and voted to request her resignation). Mr. Pelini, as secretary, did not. The vote against her was five to one, with an abstention by Mr. Smart, or five to two, if his later attempt to change his vote to favor Ms. Egli is considered valid. Thus, to conclude that any improper motivation on the parts of the board members cited by Ms. Egli provided the decisive margin against her, or tainted the votes of the other board members, requires evidence that these three board members exercised such influence over their fellows. Ms. Egli points to the deposition testimony of Dr. Bagnoli, as well as an email he sent to club members when he learned he was to be voted off of the board, in which he claimed he did, in fact, exercise such influence. Combining this with the evidence she presented from Mr. Crewes and Mr. Hendrickson regarding sex bias against her, leads to the conclusion that Ms. Egli presented direct evidence that unlawful bias played at least some part in her termination. Cf. *Klaus*, supra, at 725.

{¶36} The first issue has merit.

{¶37} Under her second issue, Ms. Egli contends she presented sufficient evidence to withstand summary judgment regarding whether the reasons advanced by the board for requesting her resignation were pretextual. This issue relates to whether she made a prima facie case using an indirect evidence analysis of her employment discrimination claim. The trial court concluded she did so, but that she failed to show the complaints regarding her performance as head golf professional were mere pretext for requesting her resignation.

{¶38} Indirect evidence employment discrimination cases are analyzed under a burden-shifting test established by the United States Supreme Court in *McDonnell Douglas*, supra.

{¶39} "First, the plaintiff must establish a prima facie case of discrimination. See *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1159 (6th Cir. 1990). To do so, the plaintiff must show that: (1) she is a member of a protected class; (2) she was discharged from her employment; (3) she was qualified for the position; and (4) she was replaced by a person outside of the class. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992). \*\*\* Once the plaintiff establishes a *prima facie* case, an inference of discrimination arises. The burden of proof then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge. *Id.* [at 583.] Once established, the burden shifts back to the plaintiff to prove that the employer's articulated nondiscriminatory reason for its action was merely pretext for unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, \*\*\* (1981). To that end, the plaintiff must prove 'that the (employer's) asserted reasons have no basis in fact, that the reasons did not in fact motivate the discharge, or, if they

were factors in the (employer's) decision, that they were jointly insufficient to motivate the discharge.' *Burns v. City of Columbus*, 91 F.3d 836, 844 (6th Cir. 1996) (citations omitted)." *Klaus*, supra, at 725. (Emphasis sic.)

{¶40}

{¶41} Congress Lake argues that Ms. Egli cannot meet the second prong of the *McDonnell Douglas* test: i.e., that she was discharged. Congress Lake notes that she resigned. The Sixth Circuit has spoken to the issue of when a resignation may be considered involuntary, or a constructive discharge:

{¶42} "In general, employee resignations are presumed to be voluntary. *Leheny v. City of Pittsburgh*, 183 F.3d [220,] \*\*\* 227 [3d Cir. 1999]. An employee may rebut this presumption by producing evidence indicating that the resignation was involuntarily procured. *Id.* Whether an employee's resignation was involuntary depends upon whether an objectively reasonable person would, under the totality of the circumstances, feel compelled to resign if he were in the employee's position. *Yearous v. Niobrara County Mem. Hosp.*, 128 F.3d [1351,] \*\*\*1356. Relevant to this inquiry are '(1) whether the employee was given an alternative to resignation, (2) whether the employee understood the nature of the choice (she) was given, (3) whether the employee was given a reasonable time in which to choose, and (4) whether the employee could select the effective date of resignation.' *Lenz v. Dewey*, 64 F.3d 547, 552 (10th Cir. 1995). The mere fact that an employee is forced to choose between resignation and termination does not alone establish that a subsequent choice to resign is involuntary, provided that the employer had good cause to believe there were

grounds for termination.” *Rhoads v. Bd. of Edn. Of Mad River Local School Dist.* (C.A.6, July 8, 2004), 103 Fed.Appx. 888, 895.

{¶43} However, when conducting an analysis regarding whether an employee's resignation was involuntary, amounting to constructive discharge, we are bound by the cautionary statement made by the Supreme Court of Ohio in *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 589: “\*\*\*courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the ‘discharge’ label.”

{¶44} In this case, the club's president, Mr. Lombardi, deposed that, if Ms. Egli had not resigned once he and Mr. Pelini requested her to do so, then he had authority to terminate her, and would have done so. He further deposed that she understood this. Consequently, we must conclude that Ms. Egli presented sufficient evidence of constructive discharge for summary judgment purposes. She was not required “to struggle with the inevitable simply to attain the ‘discharge’ label.” *Mauzy* at 589. And thus, like the trial court, we conclude that Ms. Egli set forth a prima facie case of employment discrimination via indirect evidence.

{¶45} Of course, Congress Lake set forth legitimate, nondiscriminatory reasons for its actions: that Ms. Egli's handling of the club's golf programs, and of subordinates, was sub-par. Under the *McDonnell Douglas* test, the burden shifted back to Ms. Egli to establish that these reasons were pretextual. The trial court concluded that she presented no such evidence. We respectfully disagree.

{¶46} Ms. Egli presented the testimony of Mr. Crewes, that various of the board members had stated they wished to get rid of her due to her sex. She presented the testimony of Mr. Hendrickson that the allegations regarding her unfitness were pretextual; through Mr. Hendrickson, she presented evidence that Mr. DeWitt, the longtime general manager of Congress Lake, felt the same. Included in the record is the affidavit of Donald Burke, one of her assistant pros, in which he directly disputes the contentions that she mishandled the club's golf programs or her subordinates.<sup>2</sup> Congress Lake argues that evidence presented by those uninvolved in the process of deciding to terminate an employee may not be used to establish "pretext" when conducting the *McDonnell Douglas* burden shifting test, and thus, that only comments made by Congress Lake board members are significant herein. Formerly, this may have been a good statement of the law. Cf. *Klaus*, supra, at 725.

{¶47} However, the Sixth Circuit has recognized that comments by nondecisionmakers may be used to establish pretext under *McDonnell Douglas*, by showing a discriminatory atmosphere in the place of employment. *Risch v. Royal Oak Police Dept.* (C.A.6, 2009), 581 F.3d 383, 393-394. "Furthermore, 'evidence of a (\*\*\*) discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment.' \*\*\* (internal quotation marks omitted)." *Id.* at 393, quoting *Ercegovich v. Goodyear Tire & Rubber Co.* (C.A.6, 1998), 154 F.3d 344, 356.

{¶48} "In evaluating such statements, 'courts must carefully evaluate factors affecting the statement's probative value, such as the declarant's position in the

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2. Also included in the record is the affidavit of another assistant pro, Michael Dessecker, making the same assertions as Mr. Burke. We respectfully note the affidavit is unexecuted. Consequently, we have

(employer's) hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action, as well as whether the statement buttresses other evidence of pretext.' \*\*\* (internal quotation marks and citation omitted)." *Risch* at 393, quoting *Ercegovich* at 357.

{¶49} Further, the United States Court of Appeals for the Seventh Circuit, in considering the termination of a female athletic coach under the *McDonnell Douglas* test, specifically considered the testimony of student athletes and fellow coaches in finding pretextual the alleged nondiscriminatory reasons for termination presented by appellee athletic department, university, and university trustees. *Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dept.* (C.A.7, 2007), 510 F.3d 681, 691-694. Significantly, the Seventh Circuit commented: "Although the opinions of nondecisionmakers as to [appellant's] performance cannot carry the day, \*\*\*, their responses to the termination decision provide some indication of the type of conduct historically considered termination worthy." *Id.* at 693.

{¶50} Application of the reasoning in *Risch* and *Peirick* leads to the conclusion that Ms. Egli presented sufficient evidence that the reasons for termination advanced by Congress Lake were pretextual under *McDonnell Douglas*. First, there is the testimony of club member Frederick Crewes that Dr. Bagnoli and Mr. Tschantz – two of the board members voting to demand Ms. Egli's resignation – were consistently hostile to her employment on the basis of sex. This testimony is different in kind than that merely showing an atmosphere of discrimination, as in *Risch*. Rather, as noted previously, it tends toward direct evidence that these two board members were, at least in part, improperly motivated.

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not considered it.

{¶51} The testimony of Mr. Hendrickson, and Mr. Burke, though, is the type of evidence found by the *Risch* and *Peirick* courts to be sufficient to establish pretext in summary judgment proceedings under the *McDonnell Douglas* test. Mr. Hendrickson was not a decisionmaker. However, as head of the club's golf committee, he worked closely with Ms. Egli, and the board, on many of the issues the Congress Lake cites as supporting her termination. He testified that the reasons advanced by the board were untrue, and were pretextual. He reported that the general manager, Mr. DeWitt, believed the same. Mr. Burke, Ms. Egli's assistant, testified via affidavit that the criticisms of her handling of the club's golf programs and her subordinates, were untrue. Given the position these men occupied at Congress Lake, their testimony buttresses the other evidence previously cited that Ms. Egli was terminated, not for the reasons advanced by the club, but due to her sex.

{¶52} The second issue has merit.

{¶53} The judgment of the Stark County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion. It is the further order of this court that appellees are taxed costs herein assessed.

{¶54} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDALL, J.,  
Eleventh Appellate District,  
sitting by assignment,

TIMOTHY P. CANNON, J.,  
Eleventh Appellate District,  
sitting by assignment,

concur.

STATE OF OHIO )  
 )SS.  
COUNTY OF STARK )

IN THE COURT OF APPEALS  
FIFTH DISTRICT

FAITH EGLI,  
Plaintiff-Appellant,

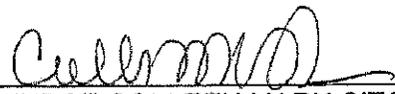
JUDGMENT ENTRY  
CASE NO. 2009CA00216

- vs -

CONGRESS LAKE CLUB, et al.,  
Defendant-Appellee.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Stark County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this opinion.

Is it the further order of this court that appellees are taxed costs herein assessed. The court finds there were reasonable grounds for this appeal.

  
\_\_\_\_\_  
JUDGE COLLEEN MARY O'TOOLE  
ELEVENTH APPELLATE DISTRICT  
sitting by assignment.

DIANE V. GRENDALL, J.,  
ELEVENTH APPELLATE DISTRICT  
sitting by assignment.

TIMOTHY P. CANNON, J.,  
ELEVENTH APPELLATE DISTRICT  
sitting by assignment.

10 JUN - 1 PM 2:40  
JAMES HENRICH  
CLERK OF COURT OF APPEALS  
STARK COUNTY OHIO

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

**FILED**  
AUG 18 2009  
NANCY S. REINHOLD  
STARK COUNTY OHIO  
CLERK OF COURTS

FAITH EGLI,

Plaintiff

v.

CONGRESS LAKE CLUB,

Defendant

CASE NO. 2008-CV-03491

JUDGE LYNN C. SLABY

ORDER

This matter is before the court on Defendant Congress Lake's Motion for Summary Judgment and Plaintiff Faith Egli's response thereto. For the reasons that follow, Congress Lake's Motion for Summary Judgment is granted and judgment is entered accordingly.

**Facts**

Congress Lake is a private corporation governed by a board of directors. Membership in the club is divided among those who are shareholders and those who are members only, without the right to vote on club business. The board of directors consists of eight individuals plus a president, who votes in the case of a tie, and a nonvoting secretary. Faith Egli was hired as an assistant golf professional by Congress Lake and promoted in 2002 to the position of head golf professional, a notable action by Congress Lake to the extent that females are underrepresented in the profession in this locale.

In 2005, Dominic Bagnoli, a member of the Board, raised concerns regarding Egli's performance. Other Board members shared his concerns, and the Board chose to ask then-General Manager Joe DeWitt to address the concerns personally with Egli, although DeWitt did not, it appears, share their concerns. Board members noted some improvement, but registered continued concern in other areas. The matter of Egli's performance became an issue for the Board once again in 2007, again on the initiative of Bagnoli. After two meetings regarding her employment, the Board voted to request Egli's resignation and delegated the task of meeting with her to Board president Tom Lombardi and secretary Craig Pelini. Egli tendered her resignation. Although she later attempted to retract it through counsel, Congress Lake did not permit the retraction.

Egli's departure from Congress Lake caused some dissention among the membership, both voting and nonvoting. Sufficient members signed a petition to call a special meeting for the purpose of discussing Egli's departure, at which Lombardi declined to discuss the Board's rationale for making personnel decisions. Egli brought this case alleging a single claim of sex discrimination in connection with the termination of her employment pursuant to R.C. 4112.02.

#### **Summary Judgment Standard**

The standard for considering a motion for summary judgment is well-established:

"Summary judgment will be granted only when there remains no genuine issue of material fact and, when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. The burden of showing that no genuine issue of material fact exists falls upon the party

who files for summary judgment.” (Citations omitted.) *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶10.

The moving party “bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.” *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party then has a reciprocal burden to set forth specific facts, by affidavit or as otherwise provided by Civ.R. 56(E), which demonstrate that there is a genuine issue for trial. *Byrd* at ¶10.

Summary judgment, however, is not precluded by any and all issues of fact, but only those which are both genuine and material. “‘Genuine’ issues of fact, for purposes of Civ.R. 56, are those which are ‘real, not abstract, frivolous, or merely colorable.’” *Craddock v. The Flood Co.*, 9th Dist. No. 23882, 2008-Ohio-112, at ¶18, quoting *Weber v. Antioch Univ.* (Mar. 8, 1995), 2d. Dist. No. 94-CA-83, at \*2. A disputed fact is material if it is an essential element of the claim as determined by the applicable substantive law. In other words, a material fact is one that might affect the outcome of the litigation. *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248; *Burkes v. Stidham* (1995), 107 Ohio App.3d 363, 371. The substantive law underlying Egli's claims, therefore, provides the framework for evaluating Congress Lake's motion for summary judgment, both with respect to whether there are genuine issues of material fact and whether Congress Lake is entitled to judgment as a matter of law.

**Ohio Revised Code Chapter 4112 and the  
Framework for Analysis of Sex Discrimination Claims**

R.C. 4112.02(A) prohibits discrimination because of sex "with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." To the extent that R.C. Chapter 4112 is consistent with federal law, Ohio courts apply federal case law interpreting Title VII of the Civil Rights Act of 1964 to claims arising under R.C. Chapter 4112. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St.3d 293,298, citing *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196.

A plaintiff alleging sex discrimination bears the burden of setting forth a prima facie case of discrimination by either direct or circumstantial evidence. *Chang v. Univ. of Toledo* (N.D. Ohio 2007), 480 F.Supp.2d 1009, 1013, citing *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 802. In every case, the plaintiff "must prove a causal link or nexus between evidence of a discriminatory statement or conduct and the prohibited act of discrimination." *Byrnes v. LCI Communication Holdings Co.* (1996), 77 Ohio St.3d 125, 130.

Direct evidence is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods.* (C.A.6, 1999), 176 F.3d 921, 926. An explicit statement of discriminatory intention is one such piece of direct evidence. See *Johnson v. Univ. of Cincinnati* (C.A.6, 2000), 215 F.3d 561, 577 fn.2. When such statements are at issue, the connection between the improper motive reflected in the remarks and the decision-making process is critical, and forms the basis for

distinguishing harmless or stray remarks from direct evidence of discrimination. *Birch v. Cuyahoga Cty. Probate Court*, 173 Ohio App.3d 696, 8th Dist. No. 88854, at ¶23.

A plaintiff who provides direct evidence of discrimination is not also required to satisfy the four-part test for establishing a prima facie case using indirect evidence. *Rowan v. Lockheed Martin Energy Sys., Inc.* (C.A.6, 2004), 360 F.3d 544, 548. “[A]n employee who has presented direct evidence of improper motive does not bear the burden of disproving other possible \*\*\* reasons for the adverse action. Rather, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive.” *Weigel v. Baptist Hosp. of E. Tennessee* (C.A.6, 2002), 302 F.3d 367, 382 (analyzing direct and indirect methods of proof in the context of retaliation claims), citing *Jacklyn*, 176 F.3d at 926.

In order to establish a prima facie case of sex discrimination using *indirect* evidence, a plaintiff must demonstrate (1) that she is a member of a protected class, (2) that she was qualified for the position in question, (3) that she suffered an adverse employment action despite her qualifications, and (4) that she was treated less favorably than a similarly situated individual outside the protected class. *Barnett v. Dept. of Veterans Affairs* (C.A.6, 1998), 153 F.3d 338, 341. If the plaintiff successfully establishes a prima facie case, the employer must articulate a legitimate, nondiscriminatory justification for the employment action. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 255. The plaintiff may then prove, by a preponderance of the evidence, that the justification articulated by the employer is a

pretext for discrimination. Id. At all times, however, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff" remains with the plaintiff. Id.

### III. Analysis

Congress Lake's Motion for Summary Judgment argued that Congress Lake was entitled to summary judgment based on analysis of Egli's claim under the *McDonnell Douglas* burden shifting analysis applied to cases of indirect evidence of discrimination. Egli's response argued proof of discrimination by both direct and indirect evidence. More specifically, she argued (1) that there are explicit statements of discriminatory intent in connection with her termination and (2) that Congress Lake's articulated nondiscriminatory justification for her termination – unsatisfactory work performance – is pretextual.

#### Direct Evidence

A threshold question, then, is whether Egli's claim is properly analyzed as one of direct or indirect discrimination. Egli points to four items as direct evidence of discrimination: (1) the recollection of Congress Lake member Fred Crewse that, near the time of Egli's promotion to the position of head golf professional in 2002, Dominic Bagnoli told him in a parking lot that he did not want a female hired for the position; (2) Crewse's deposition testimony that he frequently overheard locker room conversation among several members (some of whom later became Board members) regarding Egli's gender and the affidavit of assistant golf professional Don Burke identifying one similar

instance (although neither Crewse nor Burke could identify specific comments tainted with gender bias); (3) Egli's recollection that, shortly following her 2002 promotion, she was instructed to hire only male assistants; (4) a comment made by former manager DeWitt to Bob Hendrickson, chairman of the golf committee, to the effect that Egli would never be successful at Congress Lake "unless she grows a male appendage." In addition to the forgoing, Egli also characterizes the opinions and conclusions of Congress Lake members as direct evidence of discrimination.

The distinguishing feature of direct evidence is that it is probative of discriminatory motive without the need for inferences:

"'Direct evidence' in the context of discrimination claims 'does not refer to whether evidence is direct or circumstantial in the ordinary evidentiary sense in which we normally think of those terms. Instead, 'direct evidence' refers to a type of evidence which, if true, would require no inferential leap in order for a court to find discrimination.'" *Mitchell v. Lemmie*, 2d Dist. No. 21511, 2007-Ohio-5757, at ¶102, quoting *Bass v. Board of County Commrs., Orange County, Fla.* (C.A.11, 2001), 256 F.3d 1095, 1111.

In other words, such comments must be unequivocal – "clear, pertinent, and directly related to decision-making personnel or processes." *Klaus v. Hilb, Rogal & Hamilton Co. of Ohio* (S.D.Ohio 2006), 437 F.Supp.2d 706, 725, quoting *Dobbs-Weinstein v. Vanderbilt Univ.* (M.D.Tenn.1998), 1 F.Supp.2d 783, 798. Thus, statements of personal opinion, comments separated in time from the decision-making process, and the conclusions of nonparticipants regarding the motivations of decision-makers are not direct evidence of discriminatory animus in connection with an employment decision.

To the extent that Egli relies on the incidents and comments described above to create a genuine issue of material fact regarding direct evidence of discrimination – and

to prove her claim by that means – she has failed to do so. Each of the examples to which she points requires a chain of inferences to reach the possible conclusion that she was terminated from her employment because of sex. This is not the quality of evidence to which courts point as direct evidence of discrimination, and if Egli's claim is to survive summary judgment, it must do so under the burden shifting analysis applicable to claims of discrimination proved by indirect evidence.

#### Indirect Evidence

As set forth above, a plaintiff who seeks to prove a claim of sex discrimination by means of indirect evidence must establish a prima facie case of discrimination by showing (1) that she is a member of a protected class; (2) that she was qualified for the position in question; (3) that she suffered an adverse employment action despite her qualifications; and (4) that she was treated less favorably than a similarly situated individual outside the protected class. *Barnett*, 153 F.3d at 341. It is undisputed that Egli is a female, that she was qualified for her position, and that Congress Lake subsequently hired a male head golf professional. Congress Lake does, however, maintain that the undisputed evidence demonstrates that Egli did not suffer an adverse employment action but, instead, resigned her employment.

This court agrees that there is no genuine issue of material fact on this point, but disagrees with the conclusion reached by Congress Lake. In the context of establishing a prima facie case of discrimination, constructive discharge is a means of proving adverse employment action. See *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d 578, 588-

89. With respect to constructive discharge, "courts seek to determine whether the cumulative effect of the employer's actions would make a reasonable person believe that termination was imminent. They recognize that there is no sound reason to compel an employee to struggle with the inevitable simply to attain the 'discharge' label." *Id.* at 589. While it is undisputed that Egli tendered a resignation by electronic mail, it is equally undisputed that she did so after a meeting in which Lombardi and Pelini informed her that the Board of Congress Lake had decided to take its golf program in a different direction and offered her the opportunity to resign in lieu of termination. There is no genuine issue of material fact regarding the circumstances under which this meeting was held, yet this court concludes that to view it as other than constructive discharge would place employees in the unenviable quandary described in *Mauzy*. Accordingly, Egli has set forth a prima facie case of sex discrimination.

It is then incumbent upon Congress Lake to articulate a legitimate, nondiscriminatory reason for the adverse employment action against Egli. See *Burdine* at 255-56. It is undisputed that Congress Lake has done so by articulating that its action was motivated by concerns regarding Egli's performance that, despite intervention by DeWitt at the Board's direction, were not sufficiently remedied. Egli's prima facie case of discrimination has, therefore, been rebutted, and her burden of demonstrating that Congress Lake's articulated justification is pretext is sufficiently framed. See *id.*

Egli's response to Congress Lake's Motion for Summary Judgment maintains that the Board's articulated reason the termination of her employment is pretext because its

falsity is demonstrated by her own assessment of her performance, and disagreement among her subordinates, among some of those at Congress Lake with whom she worked, and among members of Congress Lake at large. It is undisputed that, at the direction of the Board, DeWitt met with Egli to discuss the concerns raised by Bagnoli and, it appears, shared by others. It is also undisputed that Egli enjoyed a measure of popularity among a segment of Congress Lake's membership, and that former manager DeWitt and committee chairman Hendrickson disagreed with the Board's assessment of Egli's job performance. Even viewing these facts in the light most favorable to Egli, they fail to demonstrate pretext. Disagreement among these various observers of the situation - whose direct involvement in the decisions regarding Egli's employment varied by degree - does not rise to the level of establishing that the Board's justification for its action was false. See *Weller v. Titanium Metals Corp.* (S.D.Ohio, 2005), 361 F.Supp. 712, 722, citing *Peters v. Lincoln Elec. Co.* (C.A.6 2002), 285 F.3d 456, 474.

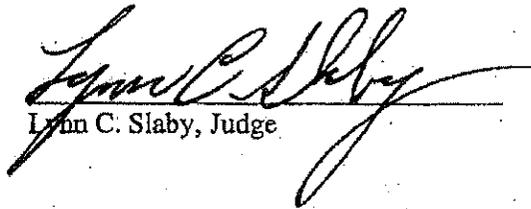
#### Conclusion

In the end, the "ultimate issue" in a sex discrimination case is whether the adverse employment action was taken because of the employee's gender. See *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501, 505. In this regard, Egli's claim must fail. Accordingly, Congress Lake's Motion for Summary Judgment is granted. All pending motions related to trial are rendered moot by this Order, and all other outstanding motions are denied.

Judgment is entered in favor of Congress Lake and against Egli on her claim of sex discrimination and, as there are no other claims outstanding, this matter is concluded and the case is closed.

The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).

It is so ordered.



Lynn C. Slaby, Judge