

ORIGINAL

IN THE SUPREME COURT OF OHIO

FAITH EGLI,)	CASE NO.: 2010-1245
)	
Appellee,)	
)	
vs.)	
)	On Appeal from the Stark County
CONGRESS LAKE CLUB, et al.,)	Court of Appeals Fifth Appellate
)	District Case No. 09CA00216
Appellant.)	

**APPELLEE FAITH EGLI'S MEMORANDUM IN RESPONSE
TO MEMORANDUM OF APPELLANT IN SUPPORT
OF DISCRETIONARY JURISDICTION**

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I. APPELLEE'S STATEMENT OF POSITION THAT THIS CASE DOES NOT RAISE ISSUES OF GREAT PUBLIC OR GENERAL INTEREST.

Appellee, Faith Egli (hereinafter "Egli"), is an accomplished professional golfer. Appellant, Congress Lake Club, Inc. (hereinafter "CLC"), employed Egli as its head golf pro from 2002 until her termination in 2007. Egli claims that CLC terminated her due to her gender, in violation of Ohio Revised Code §4112.02 and §4112.99. The issues in this case are no different than the issues in a typical gender discrimination case filed in state or federal court.

A unanimous opinion from Fifth District Court of Appeals determined there was sufficient evidence to overcome summary judgment. To do so, the Court applied case law and routine legal tests used by courts to determine whether summary judgment is appropriate. The Court specifically identified the evidence that supported a finding that CLC terminated Egli due to her gender and justified a trial.

Factually, this case is very simple. All of the members of CLC's Board of Directors are male. A group of them did not want Egli to be their head golf pro because she was a woman. This group, led by the 2007 Vice President of the Club, Dr. Dominic Bagnoli, in a concerted, calculated, and mean-spirited manner, engineered Egli's termination and replaced her with a man. The Court of Appeals acknowledged the following evidence:

1. When Egli was hired in 2002 as head golf pro at CLC, then Club President, Bill Allen, along with the General Manager, Joe DeWitt, and the head of the personnel committee, met with her and told her that she could only hire male assistants due to the sexual bias against her expressed by certain Club members. (Court of Appeals Opinion ¶7, hereinafter Ct. of App. ¶[____].)

2. In 2005, General Manager DeWitt, against his judgment, was ordered by Bagnoli and the Board of Directors to advise Egli that her appearance was unacceptable and ordered her to dress

like a man and wear long pants rather than the shorts and skirts common to LPGA golf professionals. (Ct. of App. ¶9.)

3. Bagnoli, Vice President of the Club and self-proclaimed orchestrator of Egli's termination, stated repeatedly to numerous witnesses that he did not want a female head golf professional and that he wanted to replace her with a man. Bagnoli repeatedly used off-color sexist language and crude expletives in his references to Egli. (Ct. of App. ¶8.)

4. Tom Schantz, a member of the Board of Directors who voted to terminate Egli, also stated repeatedly to numerous witnesses that he did not want a female head golf professional and that he wanted to replace Egli with a man. He also used off-color sexist language and crude expletives in his references to Egli. (Ct. of App. ¶8.)

5. Craig Pelini, Secretary of the Board of Directors, stated that he did not want a female head golf professional and that he wanted to replace Egli with a man. (Ct. of App. ¶33.)

6. Bob Hendrickson, Chairman of the Golf Committee and responsible for operation of the Club's golf program, worked with Egli every day and testified that all of the excuses that the Board of Directors gave for her termination (all golf related) were false. He also testified that the Board of Directors had discriminated against Egli because of her gender for years, and that he had made a conscious effort to protect her from this illegal activity. (Ct. of App. ¶6.)

7. The Club's General Manager, Joe DeWitt, who Egli reported directly to, stated that Egli would not survive as head golf pro due to her gender. He also supported and praised Egli's work as a golf professional. (Ct. of App. ¶5, 10.)

8. Assistant Golf Professional, Don Burke, Egli's first assistant, testified that members of the Board treated her poorly and with disrespect due to her gender. He also confirmed that Bagnoli, Tschantz and Pelini stated repeatedly that they did not want a female head golf professional

and wanted to replace her with a man. He also refuted all of the golf related excuses that the Board proffered in support of its decision to terminate Egli. (Ct. of App. ¶46.)

9. Assistant Golf Professional, Mike Dessecker, refuted all of the golf related excuses proffered by the Board in support of its decision to terminate Egli. (Ct. of App. ¶46.)

10. Some 95 Club members signed a petition stating the Board's decision to terminate Egli was ill-advised and would result in a lawsuit that it would lose. The members refuted all of the golf related excuses for Egli's discharge and stated that she was an outstanding golf professional. (Ct. of App. ¶15.)

11. Dissatisfied stockholders at the Club forced a special meeting of the Board of Directors where they demanded that the Board answer questions regarding its decision to terminate Egli and requested a special election to overturn the decision to terminate her. The Board refused to answer any questions and refused to give the stockholders an opportunity to vote to rescind its decision to terminate her. (Ct. of App. ¶15.)

The Court of Appeals identified all of this evidence and concluded there was enough to overturn CLC's motion for summary judgment. The sheer volume of the evidence, let alone its weight, sufficiently supports the Court of Appeal's decision to deny CLC's request for summary judgment.

In CLC's first two propositions of law CLC ignores most of this evidence, focuses on only a small portion of it, and then raises a hyper technical legal argument premised on a "decision maker" theory. CLC claims this raises a question of public interest. CLC, however, misstates the law. These same arguments were raised before the Court of Appeals and resoundingly rejected. In addition, if this Court accepted jurisdiction and agreed to hear CLC's argument that some of the evidence should be discarded, it would still be left with overwhelming evidence to support the Court

of Appeal's decision to allow this case to be tried to a jury. Therefore, while CLC argues this case raises issues of public interest, its legal argument, even if accepted, will not change the outcome of the Court of Appeal's decision.

II. ARGUMENTS CONTRA TO APPELLANT'S PROPOSITIONS OF LAW.

CLC has listed three propositions of law for consideration. The first two involve the comments and opinions of "non-decision makers." The third is premised on constructive discharge. Before addressing each of CLC's propositions of law, some general comments on CLC's "non-decision makers" theory are warranted.

CLC argues that the comments and opinions of non-decision makers can (1) never establish direct evidence of discrimination, and (2) cannot prove pretext. In effect, CLC argues that the only evidence in a discrimination case that can be considered are the comments and opinions of the very individuals accused to have violated the law. Appellant's statement of the law is misstated, and if accepted, would eviscerate the discrimination laws in Ohio. Very few victims of discrimination could survive summary judgment if they were required to extract self-accusatory admissions from the very people who committed the wrong.

Moreover, even if this Court adopted such a strict and unfair standard, this case would actually still survive because Egli has indeed presented evidence that the decision makers stated they had discriminatory motives. Bagnoli and Schantz both stated repeatedly that they wanted to get rid of Egli and replace her with a man. Bagnoli dominated the Board's vote on Egli's discharge, coerced the Board to change its mind after initially voting not to terminate her, and ultimately got his way. In testimony and e-mails, Bagnoli proudly admits that he influenced the Board to terminate Egli. He was the ultimate decision maker here, and he repeatedly stated that he wanted to replace

Egli with a male golf pro. This evidence meets even CLC's strict legal standard and supports the Court of Appeal's decision to deny CLC's motion for summary judgment.

CLC still argues that Egli failed to present direct evidence from a majority of the CLC Board. Yet, CLC's own cases cited in its briefs established an illegally motivated voting member can taint the entire Board. The Court of Appeals ruled that 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., 470 F.3d 250, 262 (6th Cir., 2006) 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, 612 F.Supp. 871, 881 (E.D. Mich., 2009), quoting Jefferies v. Harleston, 52 F.3d 9, 14 (2nd Cir., 1995). (See Ct. of Appeals ¶34.) The Court of Appeals then found that Bagnoli admitted in his deposition and in e-mails that he did in fact exercise such influence (Ct. of App. ¶35.)

A. Direct Evidence is Not Restricted to Decision Makers.

Even though there is enough direct evidence under CLC's definition, its argument regarding the direct evidence test in Ohio is still misstated. This Court ruled in Mauzy v. Kelley Srvc. Inc., 75 Ohio St. 3d 578 (1996) that a plaintiff "may establish a prima facie case of age discrimination *directly* by presenting evidence, *of any nature*, to show that an employer more likely than not was motivated by discriminatory intent." This Court stressed that the direct evidence test in discrimination cases "refers to a method of proof, not a type of evidence." Id at 587. CLC's entire legal argument mistakenly focuses on the type of evidence, characterized as opinions and statements of non-decision makers. It does not matter whether this evidence is characterized as direct evidence or circumstantial evidence. What does matter is that Egli chose the direct method of proving discrimination and presented an array of different types of evidence that established CLC's Board

was motivated by discriminatory intent. This methodology falls squarely under this Court's off-cited opinion in Mauzy, supra. See also Peters v. Rock-Tenn Co. (Delaware App. 2008) 2008-Ohio-6444 and Wright v. Southland Corp., 187 F.3d 1287 (11th Cir. 1999).

Under Mauzy's direct method of proof, any evidence that establishes the actor's motivation behind termination will be considered. Therefore, in addition to the admissions of decision makers, Bagnoli, Tschantz and Pelini, the testimony of Golf Chairman, Hendrickson, General Manager, DeWitt, and Assistant Professionals, Burke and Dessecker, and the petitions of 95 Club members and numerous shareholders all support a finding that CLC was motivated by discriminatory intent when it terminated Egli. The Court of Appeals, therefore, properly considered all of this evidence when it held that there was sufficient direct evidence of discriminatory intent to deny summary judgment.

B. Indirect Evidence is Not Restricted to Decision Makers.

Appellant's argument that the evidence from non-decision makers in a classic McDonald-Douglas indirect evidence analysis cannot establish pretext is without merit. McDonald-Douglas Corp. v. Green (1973) 411 US 792, 93 S.Ct. 1817. In a pretext case, an employee's burden is to simply show that the excuses given by the employer to support its adverse employment decision are false. This method of proof clearly includes the evidence of non-decision makers and anyone else that tends to show that the reasons proffered as supporting discharge are pretextual.

Again, the Court of Appeals resoundly rejected CLC's argument that the evidence from non-decision makers cannot be considered in a pretext case. The Court of Appeals relied on Risch v. Royal Oak Police Dept., 581 F.3d 383 (6th Cir., 2009), Peirick v. IUPUI Athletics Dept., 510 F.3d 681 (7th Cir., 2007), and Ercegovich v. Good Year Tire & Rubber Co., 154 F.3d 344 (6th Cir., 1998).

Despite CLC's argument to the contrary, the Court of Appeals did not stray from the clear opinions of these aforementioned cases. Indeed, in Risch, the Sixth Circuit Court of Appeals stated:

Although discriminatory statements by a nondecision-maker, standing alone, generally do not support an inference of discrimination, the *comments of a non-decisionmaker are not categorically excludable*. Circumstantial evidence establishing the existence of a discriminatory atmosphere at the defendant's workplace in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff. While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, *such evidence does tend to add "color" to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff*. (Emphasis added; Id.) Risch at 393-394.

The Court of Appeals also correctly cited Peirick wherein the Seventh Circuit commented:

Although the opinions of non-decisionmakers as to [appellant's] performance cannot carry the day, * * * their responses to the termination decision provides some indication of the type of conduct historically considered termination worthy. Id. at 693.

Therefore, the testimony of Club Manager DeWitt, Egli's immediate supervisor, Hendrickson, the Chairman of the Golf Committee, and the affidavits of her two assistant golf professionals that worked directly with her, are probative since they all refute the alleged reasons for Egli's termination. These four individuals were not the final decision makers, but they were all in the best position to evaluate Egli's golfing performance. They worked with her every day as her direct supervisor, golf chairman and assistant golf professionals. They believed that she did an outstanding job and that she was terminated by the Board because she was a woman.

C. CLC Forced Egli To Resign and Constructively Discharged Her.

Appellee properly submitted evidence of constructive discharge pursuant to Mauzy v. Kelly Srvcs., Inc., supra. CLC's argument regarding Egli's failure to prove constructive discharge is also simply wrong. CLC misstates the law, and falsifies the evidentiary record. As recognized by the Court of Appeals, CLC's President, Tom Lombardi, stated that the Board voted to terminate Egli's employment, advised her of that fact and offered her an opportunity to resign. Lombardi further testified that if Egli had refused to resign, that he had the authority to terminate her, that he would have done so and that Egli fully understood that if she had refused to resign, that he would have terminated her. (Ct. of App. ¶44.)

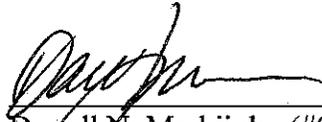
In their argument, CLC states that there was no record evidence that Egli knew that the ultimatum that Lombardi gave to her included the threat that she would be terminated if she did not resign. Based on the record that is not before this Court, the Court of Appeals properly found that Lombardi specifically testified that Egli understood the ultimatum. (Ct. of App. ¶44)

As a result, the application of this Court's decision in Mauzy was proper. This Court stated that "there is no sound reason to compel an employee to struggle with the inevitable simply to attain the discharge label." Mauzy at 589. Since this Court has already decided this very issue, this case does not raise an issue of public or great general interest.

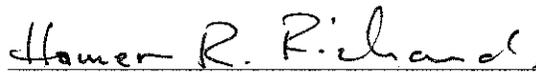
III. CONCLUSION.

For the foregoing reasons, Appellee submits that the Appellant has failed to present an issue of public or great general interest and requests that this Court deny Appellant's request that this Court accept this case under its discretionary jurisdiction.

Respectfully submitted,



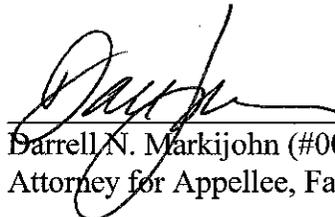
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PROOF OF SERVICE

A copy of Appellee Faith Egli's Memorandum in Response To Memorandum of Appellant in Support of Discretionary Jurisdiction was sent by ordinary U.S. mail, postage prepaid, to John W. McKenzie, Attorney for Appellant, at 3480 West Main Street, Suite 300, Akron, Ohio 44333, this 16th day of August, 2010.



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