

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>DENISE DUCHESNEAU,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Civil No. 97-326-P-H</i>
)	
<i>BILL DODGE OLDSMOBILE, INC.,</i>)	
)	
<i>Defendant</i>)	

**RECOMMENDED DECISION ON
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

After being interviewed for but not offered a job as a salesperson for a Brunswick, Maine automobile dealership, the plaintiff has filed suit against the dealership asserting claims of gender discrimination under federal and state law. The defendant seeks summary judgment in its favor. For the reasons that follow, I recommend that the summary judgment motion be denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of

evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

As Rule 56 makes clear, any affidavits submitted as part of the summary judgment record must be made on personal knowledge and must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). "Statements made upon information and belief, as opposed to personal knowledge, are not entitled to weight in the summary judgment balance." *Cadle Co.*, 116 F.3d at 961 (citations omitted). Invoking these principles, the defendant has moved to strike the two affidavits submitted by the plaintiff. The affidavits, one executed by the plaintiff herself and the other by her attorney, comprise with their exhibits the entire record offered by the plaintiff in opposition to the summary judgment motion.

The attorney's affidavit consists almost entirely of her account of testimony she heard at a factfinding hearing conducted by the Maine Human Rights Commission ("MHRC"). See Affidavit of Plaintiff's Attorney, Kim Matthews ("Matthews Aff.") (Docket No. 10). Specifically, the affidavit relates statements made at the hearing by witness Douglas Duvall, whom the affiant

identifies as “the sales manager at Bill Dodge Oldsmobile, Inc. in Brunswick.” *Id.* at ¶ 2. The defendant objects to this account of Duvall’s testimony as hearsay and thus not admissible in evidence within the meaning of Rule 56(e). Finding none of the hearsay exceptions set forth in the Federal Rules of Evidence to be applicable, I agree with the defendant that the court may not credit this account of Duvall’s hearing testimony. In particular, and as the defendant points out, the record does not establish that Duvall was employed by the defendant at the time of his testimony¹ and, thus, the court is unable to determine that his statements are admissible as admissions attributable to the defendant as a party-opponent. *See* Fed. R. Evid. 801(d)(2)(D) (court may credit as admission “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”). I do not credit any of Duvall’s hearing testimony as recounted in the Matthews Affidavit. The remainder of the Matthews Affidavit is properly before the court. *See* Matthews Aff. at ¶ 3 (describing certain discovery materials received from defendant).

The plaintiff’s affidavit is also properly before the court. I am unable to agree with the defendant that the jurat contained therein is insufficient, inasmuch as it recites that the plaintiff made oath that her affidavit was “made upon personal knowledge, except where stated to be upon information and belief.” Affidavit of Plaintiff Denise Duchesneau (“Duchesneau Aff.”) (Docket No. 9) at 2. Obviously, however, to the extent that any statements made by the plaintiff are based on something other than personal knowledge, they may not be credited and I have not done so in my evaluation of the summary judgment record. Given that each affidavit is at least partially cognizable,

¹ In fact, the defendant contends that Duvall was not in its employ at the time of the MHRC hearing. Whether this is so is not of record.

It is not appropriate to strike them from the record and the defendant's motion so requesting (Docket No. 14) is therefore denied.

II. Factual Scenario

In light of the foregoing, the summary judgment record reveals the following: In the fall of 1995, the defendant decided to hire three new salespeople. Affidavit of Douglas A. Duvall ("Duvall Aff.") (Docket No. 7) at ¶ 2. It placed an ad in a newspaper and scheduled a three-day "seminar" in an effort to recruit people interested in selling vehicles. *Id.* Six applicants attended the seminar, held in early November of 1995. *Id.* The plaintiff was the only woman among the six. *Duchesneau Aff.* at ¶ 2. On the second day of the seminar, general sales manager Douglas Duvall interviewed the six candidates. *Duvall Aff.* at ¶ 2. He decided thereafter to offer jobs to three of them. *Id.*

When she learned she was not among those offered jobs with the defendant, the plaintiff asked Duvall why she was not hired. *Duchesneau Aff.* at ¶ 5. At first, Duvall stated that the plaintiff was not qualified. *Id.* After the plaintiff reminded him that she had extensive experience in sales, although not at a car dealership, Duvall stated that "women don't do well" selling cars. *Id.* at ¶¶ 5, 7 and exhibit thereto (plaintiff's resumé, reciting extensive experience selling appliances at Sears Roebuck & Co.). Of the three men who were hired as salespeople, one stated in his employment application that he had approximately three years of experience in "telemarketing" with L.L. Bean. *See* exhibit to *Matthews Aff.* at [7]. This is the only sales experience disclosed by any of the three successful applicants in the materials they submitted to the defendant. *See generally* *Matthews Aff.* at ¶ 3 and exhibits thereto.

III. Discussion

The plaintiff's claims arise under Title VII, 42 U.S.C. §§ 2000e *et seq.*, and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551 *et seq.* Under Title VII, the burden-shifting paradigm set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), provides the framework for analysis — but only if the record lacks direct evidence of discrimination. *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 95 (1st Cir. 1996). "In cases involving direct evidence of discriminatory motive, the burden of persuasion shifts from the employee to the employer, who must then affirmatively prove that it would have made the same decision even if it had not taken the protected characteristic into account." *Id.* at 95-96 (citation omitted). "[D]irect evidence is evidence which, in and of itself, shows a discriminatory animus." *Id.* at 96 (citation omitted).

The plaintiff contends that there is direct evidence of discriminatory motive here in the form of Duvall's statement that women "don't do well" selling cars. I agree, noting that the defendant does not argue otherwise. Whereas "direct evidence does not include stray remarks in the workplace, particularly those made by nondecision-makers or statements made by decisionmakers unrelated to the decisional process itself," *id.* (citations omitted), here we have a comment that is anything but a stray remark. Rather, it is a statement suffused with discriminatory animus made by the decisionmaker himself in response to a direct inquiry from the plaintiff about the reason for his decision. Accordingly, the *McDonnell-Douglas* framework is inapplicable and, to obtain a favorable judgment on the Title VII claim, the defendant must "affirmatively prove that it would have made

the same decision even if it had not taken the protected characteristic into account.”² *Id.* at 96. The question of whether the defendant would have done so remains a disputed issue for trial. A factfinder could certainly credit Duvall’s assertions to that effect,³ but the court may not at the summary judgment stage.

In its reply memorandum, the defendant contends that it is entitled to summary judgment on the MHRA claim given the suggestion contained in the plaintiff’s opposition memorandum that hers is a “mixed-motive” type of discrimination case. *See* Plaintiff’s Memorandum of Law in Support of Her Objection to Defendant’s Motion for Summary Judgment (Docket No. 8) at 4. In support of that position, the defendant relies on this court’s recent decision in *Forrest v. Stinson Seafood Co.*, 1998 WL 24215 at *3 (D.Me. Jan. 5, 1998).

The defendant misconstrues this important case. The court determined in *Forrest* that, although courts have traditionally looked to Title VII caselaw for “guidance” in the interpretation of the MHRA, the two statutes have diverged to the extent that Congresses amended Title VII in 1991 but the Maine Legislature chose not to act. *Id.* at *2-*3. The 1991 amendment to Title VII did not create the federal cause of action for mixed-motive discrimination. The phrase “mixed-motive,”

² Were this a *McDonnell-Douglas*-type case, the plaintiff would have been obliged to come forward with a *prima facie* case of discrimination, triggering an obligation on the part of the defendant to show a legitimate, non-discriminatory reason for its decision. *Ayala-Gerena*, 95 F.3d at 95. Assuming the defendant did so, the burden would then shift back to the plaintiff to show that the defendant’s asserted reason or reasons were merely pretextual. *Id.*

³ According to Duvall, some of the qualities necessary for a good vehicle salesperson are “intangible,” whereas others include having a “[p]rofessional personal appearance,” “[e]xcellent communication skills” and the “[a]bility to sell a minimum quota according to dealership standards.” Duvall Aff. at ¶ 5. Duvall’s position is that the plaintiff lacked these qualifications, that prior sales experience was not one of the defendant’s hiring criteria, and that he therefore “gave little weight to the fact that Ms. Duchesneau had some prior sales experience in fields unrelated to motor vehicles.” *Id.* at ¶ 7.

as used in the Title VII context, distinguishes cases in which discriminatory animus was a motivating factor in the employment decision from “pretext” cases, in which the plaintiff’s case hinges on proving that the legitimate reason articulated by the defendant for its employment decision was, “in reality, a pretext” for illegal discrimination. *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995) (citations omitted). To move forward with a mixed-motive case, “sufficiently direct evidence of discrimination” is required. *Id.* None of this is a function of the 1991 Civil Rights Act. What Congress did in 1991 was to make mixed-motive cases more plaintiff-favorable. *Id.* at 1142. Under the 1991 amendments, “an employer can no longer avoid liability by proving that it would have made the same decision for nondiscriminatory reasons. Instead, liability now attaches whenever race [or other factors enumerated in Title VII] ‘was a motivating factor for any employment practice, even though other factors also motivated the practice.’” *Id.*, quoting 42 U.S.C. § 2000e-2(m); *see also Smith v. F.W. Morse & Co.*, 76 F.3d 413, 419 n.3 (1st Cir. 1996) (noting that 1991 amendment left framework for proving mixed-motive case “somewhat changed”).

Consistent with the foregoing, the court in *Forrest* was able to determine after trial that, because “inadequate experience” and “lack of skill” were at least among the factors contributing to the adverse employment decision at issue in that case, there was no liability under the MHRA even though the plaintiff’s gender was also a motivating factor. *Forrest*, 1998 WL 24215 at *1, *3. A similar determination by the factfinder in this case would be fatal to the MHRA claim. But I do not read the plaintiff’s reference to her claims as “mixed-motive” to be a factual concession that non-discriminatory reasons played a role in the employment decision. Rather, I understand her to be invoking the federal case law that allows her to avoid the *McDonnell-Douglass* burden-shifting framework because she is able to produce direct evidence of discrimination. *See Miller v. CIGNA*

Corp., 47 F.3d 586, 597 n.9 (3d Cir. 1995) (“mixed-motives” a “term of art” that can be “misleading” for precisely this reason); *Fuller*, 67 F.3d at 1143 n.3 (noting same potential confusion). Consistent with *Forrest*, the fact that the plaintiff bases her case on direct evidence obviously is not fatal to her MHRA claim. The defendant is not entitled to summary judgment on the state-law cause of action.

Finally, the defendant contends that, even assuming the existence of discrimination in violation of Title VII and the MHRA, summary judgment is appropriate to the extent the plaintiff seeks compensatory and punitive damages as authorized by 42 U.S.C. § 1981a.⁴ In response, the plaintiff relies on the following assertions from her affidavit:

I was very upset after Mr. Duvall’s comments about not hiring me because I am a woman. I returned to my employment at Sears. I immediately told one of my co-workers, Ms. Drake, why I was upset. I told her that I had been told that I was not qualified and that Mr. Duvall didn’t think women could sell cars. I also told several other people about Mr. Duvall’s comments including Bunny Dalhke, Julie Lakin and Eugene Elsic, within a very short time after Mr. Duvall made the comments.

Duchesneau Aff. at ¶ 6.

Among the injuries for which compensatory damages are explicitly available under Title VII are “emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life.” 42 U.S.C. § 1981a(b)(3). While I agree with the defendant that the circumstances set out in paragraph 6 of the Duchesneau Affidavit might lead a factfinder to dispense relief for such injuries sparingly, they still provide a colorable basis in fact for an award of compensatory damages.

Punitive damages are available if the plaintiff demonstrates that the defendant discriminated

⁴ As noted in *Forrest*, compensatory and punitive damages became available under Title VII by virtue of the 1991 Civil Rights Act and the Maine Legislature similarly amended the MHRA in 1997. *Forrest*, 1998 WL 24215 at *2. The defendant’s position on damages cites only federal law and does not distinguish between the Title VII and MHRA claims.

against her “with malice or with reckless indifference to [her] federally protected rights.” 41 U.S.C. § 1981a(b)(1). Proof of intentional discrimination and actual injury or loss is not enough; the plaintiff “must meet an even higher standard” involving “malice or reckless or callous indifference” to the plaintiff’s rights *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 507 (1st Cir. 1996) (quoting legislative history of section 1981a). The precise contours of that higher standard have not yet been defined by the First Circuit, although this court has previously suggested that a punitive damages award under Title VII requires a showing of “intent to harm” or “serious disregard for the consequences” of the actions in question. *Braverman v. Penobscot Shoe Co.*, 859 F.Supp. 596, 604 (D.Me. 1994) (citation omitted). I agree with the defendant that the plaintiff is not automatically entitled to punitive damages by offering proof of intentional discrimination. However, in my view, a reasonable factfinder could infer that Duvall was recklessly indifferent to her right not to suffer discrimination because of her gender. The defendant is not entitled to summary judgment on the punitive damages claim.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 30th day of April, 1998.

David M. Cohen
United States Magistrate Judge