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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1164**

Yolanda Majors,
Appellant,

vs.

Regents of the University of Minnesota,
Respondent.

**Filed April 23, 2018
Reversed and remanded
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CV-16-3632

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appellant)

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Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Hooten, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the district court’s order granting respondent’s motion for
summary judgment and dismissing her employment-discrimination claim under the
Minnesota Human Rights Act (MHRA). Appellant argues the district court erred by

concluding that genuine issues of material fact exist concerning her disparate-treatment claim but that, as a matter of law, her damages claim is too speculative because she cannot prove that respondent would have ultimately hired her as a tenured professor. We reverse and remand.

FACTS

In the spring of 2010, appellant Dr. Yolanda Majors, an African-American woman, was a tenured professor at the University of Illinois at Chicago. While attending an academic conference, Dr. Majors met Joe Kelly, a representative from respondent University of Minnesota (the University), and they discussed her interest in joining the University's faculty. Kelly conveyed Dr. Majors's interest in the University to Ryan Warren, the CFO and COO of the College of Education and Human Development (CEHD). Warren asked Dr. Majors for her curriculum vitae (CV) and other materials and subsequently passed them on to Dr. Jean Quam, Dean of CEHD. But Warren also advised Dr. Majors that CEHD had no open faculty positions as of late May 2010.

Even though the University had no open positions, Dean Quam became interested in meeting with Dr. Majors. At an informal meeting in July 2010, Dean Quam told Dr. Majors that she wanted to "keep the door open." Dr. Majors moved to Minnesota in September 2010 as a result of her spouse's corporate job promotion. She continued to pursue employment with the University while also remaining a tenured faculty member at the University of Illinois. In late January 2011, Dr. Cynthia Lewis, a professor in the curriculum and instruction (C & I) department, emailed Dr. Majors to advise her that she was "in conversations with the dean and with the literacy program area now about hiring

[her].” Dr. Lewis also emailed Dean Quam, stating that the literacy department wanted to hire Majors as an “opportunity hire”—a position typically reserved for a minority candidate to fill a specific need within a department or program.¹ The tenure-review process is the same for all candidates, including opportunity hires. Under that process, other faculty members advocate for the candidate to the department chair; the department chair creates a written document explaining the need for the hire; and the department faculty votes on whether to advance the candidate. If advanced, the candidate speaks to the broader college faculty. If approved by the college’s faculty, the candidate’s credentials go to the dean of the college, who must also ensure that funding for the position is available. If approved by the dean, the credentials require approval by the provost. If approved by the provost, tenure must be voted on by the board of regents.

Dean Quam responded to Dr. Lewis by stating that she was interested in hiring Dr. Majors but did not have a position unless the ongoing effort to hire a new department chair created a vacancy because of promotion within the department. The person later hired for the position came through a national search and not from within the department.

Over the next few months, the faculty held various meetings to discuss the possibility of hiring Dr. Majors, including in early April 2011 when Dean Quam, Dr. Lewis, and three other faculty members discussed the possibility of hiring Dr. Majors as a tenured professor. Dean Quam expressed enthusiasm about the idea but said that she needed to gather more information and would need to secure funding for the position. Dean

¹ A person hired as an opportunity hire does not go through the competitive selection process used to fill traditional tenure-track vacancies.

Quam and Dr. Majors met in late April 2011. According to Dr. Majors, Dean Quam was reluctant to present her for a faculty tenure vote because she had just hired Dr. Nina Asher, another woman of color, for the position of department chair and it was late in the academic year to generate faculty support. In her interrogatory answers, Dr. Majors stated:

During [their] meeting, Dean Quam spoke enthusiastically about her desire to hire [Dr. Majors] but stated that the timing was not right to do so, as she had just hired another woman of color, Dr. Nina Asher, as the Chair of the Department of C&I. Dean Quam stated that she feared push back from the faculty for her decision to hire Dr. Asher and that because of this she was reluctant to present [Dr. Majors] to the faculty due to the fact that Dr. Majors was also a woman of color. Dean Quam explained that holding [Dr. Majors] back was an effort to “protect” her and that in the following term both Dr. Asher and Dean Quam would present [Dr. Majors]’s hire to the department. Dean Quam further explained that before she presented [Dr. Majors] to the faculty it was important that Dr. Asher, a woman of color, have a chance to establish herself with the faculty first.

Dean Quam advised Dr. Majors that she did not want Dr. Majors’s position “to get caught up in the politics” of the C & I department chair vote. Dean Quam therefore proposed postponing Dr. Majors’s tenure vote for one year and offered Dr. Majors a non-tenured visiting-professor position for the 2011-2012 academic year. The appointment would expire in May 2012, but the position could be renewed for an additional year. Dr. Majors accepted the offer, believing that she was offered the visiting-professor position so that the University could retain her while Dean Quam determined how to hire her as a tenured professor.

Before Dr. Majors started working in her temporary position, Dr. Asher reviewed Dr. Majors’s CV and noticed that Dr. Majors had a few years’ gap in her publications that

occurred when she took on a more administrative role at the University of Illinois. In the spring of 2012, Dean Quam, Dr. Asher, and other faculty members met with Dr. Majors to communicate the fact that she would need to publish more in order to be considered for a tenured position. Dr. Majors worked toward increasing her publication numbers, completed her first year, and accepted the University's offer of an additional one-year appointment as a visiting professor.

Dr. Majors received positive feedback from various CEHD faculty members. And Dr. Asher prepared a C & I department report to submit to Dean Quam that included hiring and faculty updates, which stated that the department "look[ed] forward to the possibility of being able to bring Dr. Majors on board as a tenured Associate Professor in the future." But in June 2013, Dean Quam informed Dr. Majors that she was no longer being considered for a tenured position as an associate professor. Dean Quam testified that she chose not to hire Dr. Majors because her research and publication profile did not meet the department's strict standards. Following Dr. Majors's second one-year appointment, the University hired Dr. Majors in an academic administrative position for a nine-month appointment. The University subsequently hired her for two years in another administrative position.

Dr. Majors filed a complaint in district court, alleging that the University discriminated against her based on her race and sex in violation of the MHRA. *See* Minn. Stat. § 363A.08, subd. 2 (2016). Dr. Majors sought damages for loss of income, emotional distress, and other damages in an amount in excess of \$50,000. The University moved the district court for summary judgment. The district court granted the University's motion,

reasoning that, although there are genuine issues of material fact concerning Dr. Majors's MHRA claim, the damages claim is too speculative because Dr. Majors cannot prove that the University ultimately would have hired her as a tenured associate professor. This appeal follows.

D E C I S I O N

Dr. Majors argues that the district court erred in determining that she cannot recover damages under the MHRA unless she can prove that she ultimately would have been hired as a tenured associate professor. “We review a grant of summary judgment de novo to determine whether there is any genuine issue of material fact and whether the district court erred in applying the law.” *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 21 (Minn. 2012). We view the evidence in the light most favorable to the nonmoving party. *Id.*

Under the MHRA, an employer may not discriminate against an employee with respect to hiring or tenure based on his or her race or sex. Minn. Stat. § 363A.08, subd. 2. Dr. Majors alleges a violation under a disparate-treatment theory, which requires that she prove that her race or sex actually motivated the employer's decision. *Friend v. Gopher Co.*, 771 N.W.2d 33, 37 (Minn. App. 2009). Dr. Majors can prove a disparate-treatment violation by showing that her race or sex played a “substantial causative factor” in the decision. *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 514 (Minn. 2017). She need not prove that the employer acted with animus. *Id.* at 517. To survive summary judgment, Dr. Majors must support her claim with either (1) direct evidence of discrimination or (2) sufficient circumstantial evidence in accordance with the three-part framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817

(1973). *Friend*, 771 N.W.2d at 37-38. A plaintiff may prove a claim under the direct-evidence framework with either direct or circumstantial evidence, or a combination of the two. *Id.* at 40.

Direct Evidence of Discrimination

“In contrast to the process of elimination that takes place under *McDonnell Douglas*, direct-evidence cases are adjudicated based on the strength of affirmative evidence of discriminatory motive.” *Id.* at 38. In order for Dr. Majors to prevail under the direct-evidence alternative, the evidence must demonstrate that her race or sex “actually motivated” the University’s decision not to advance her forward for a faculty-vote. See *LaPoint*, 892 N.W.2d at 513. Dr. Majors need not prove that the University would have advanced her absent unlawful discrimination, and “proof by the [University] that it would have made the same decision absent a discriminatory motive is no defense.” *Id.*

In analyzing Dr. Majors’s claim, the district court first determined that Dr. Majors “put forth sufficient evidence under the direct evidence framework to create genuine issues of material fact that her candidacy for a tenured position was not put forward” because she was held to a higher standard as an African-American woman. But the district court ultimately granted the University’s summary-judgment motion because it concluded that Dr. Majors was seeking a determination that she should have been awarded a tenured position as an associate professor and requesting monetary damages for having been deprived of that position.

Similarly, the University now argues on appeal that the district court correctly concluded that Dr. Majors cannot provide direct evidence of discrimination because she

cannot demonstrate that the University would have ultimately hired her as a tenured professor, and therefore she cannot prove damages. To support this argument, the University relies on *Yan v. Bd. of Regents of Univ. of Wis. Sys.*, No. 05-C-16-C, 2005 WL 2206768 (W.D. Wis. Sept. 12, 2005), to assert that we should characterize this claim as a denial-of-tenure case and conclude, as the district court did, that Dr. Majors's tenured position was merely a promise that did not materialize.

The district court's reasoning and the University's argument that Dr. Majors must prove that she would have ultimately been hired as a tenured professor to be protected by the MHRA is not supported by the MHRA's plain language or the caselaw interpreting the statute. The MHRA protects employees from discrimination that occurs in the ultimate hiring decision under Minn. Stat. § 363A.08, subd. 2(1), and in decisions "*with respect to hiring [or] tenure*" under Minn. Stat. § 363A.08, subd. 2(3) (emphasis added). Dr. Majors did not allege only a failure-to-hire claim. In her complaint, Dr. Majors cited to the entirety of Minn. Stat. § 363A.08, subd. 2, which encompasses discrimination claims with respect to hiring or tenure. And in Dr. Majors's memorandum of law opposing the University's summary-judgment motion, she argued that she was never "put . . . forward for consideration by the faculty" and "was never considered for nor hired into a tenured Associate Professor position" because the University applied a heightened standard to her as a woman of color. Dr. Majors also asserted that the University "believe[s] that women of color are held to a higher standard than others in applying for *and* receiving appointments in Associate Professor positions at universities" and that it denied Dr. Majors the "opportunity to be considered for hire" based on her status as an African-American

woman. Based on Dr. Majors's submissions to the district court, we conclude that Dr. Majors asserted her claim as both a failure-to-hire claim and as a decision-with-respect-to-hiring-or-tenure claim. Because the University's decision not to advance a candidate for tenure is a decision with respect to hiring, Dr. Majors is entitled to relief under Minn. Stat. § 363A.08, subd. 2(3), if she can demonstrate that the University discriminated against her based on her race or sex.

Caselaw interpreting the MHRA also demonstrates that an employee is protected under the statute even if she cannot prove that she ultimately would have been hired. In *LaPoint*, the supreme court concluded that the MHRA protects an employee from discriminatory employment decisions if the employee can prove that the protected characteristic "actually motivated" the employer's decision. 892 N.W.2d at 514. But the employee "need not prove that [the employer] would have hired her absent unlawful discrimination in order to establish liability." *Id.* at 513. Although Dr. Majors's ability to achieve tenure may have never materialized, she may nevertheless recover under the MHRA if she can prove that her race or sex actually motivated the University's decision not to advance her candidacy for a faculty vote.

Accordingly, we must consider whether Dr. Majors provided direct evidence that her race or sex actually motivated the University's decision. Dr. Majors provided the following evidence: (1) Dean Quam informed her that she was reluctant to recommend her for a faculty vote because she was concerned that Dr. Majors needed to present a stronger case as an African-American woman; (2) Dean Quam expressed concern that she would receive push back from faculty because Dr. Majors was African-American and Dr. Asher,

the recently hired C & I department chair, was also African-American; (3) Dr. Asher discussed Dr. Majors's status as an African-American woman with regard to the strength of her resume; and (4) another faculty member discussed with Dr. Majors that, based on national literature, African-American women need to put forth the strongest application possible because they are scrutinized more than non-minority candidates.

The University argues that Dr. Majors cannot rely on this evidence because, at most, it is properly characterized as stray remarks. Stray remarks, which are statements made by individuals who are not involved in employment decisions, cannot serve as direct evidence of discrimination. *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997). Assuming *arguendo* that Dean Quam and Dr. Asher did suggest that Dr. Majors was subjected to a higher standard because she was an African-American woman, the University argues that Dean Quam and Dr. Asher are not the sole decision-makers because individuals on multiple levels ultimately vote on the University's hiring and tenure decisions. We reject this argument because, as the dean of the college and the department chair, Dean Quam and Dr. Asher played direct roles in deciding whether to advance Dr. Majors to the next step in the tenure process. When viewing the evidence in the light most favorable to Dr. Majors, we agree with the district court that Dr. Majors has "put forth sufficient evidence under the direct evidence framework to create genuine issues of material fact that her candidacy for a tenured position was not put forward because, as an African American woman, she was held to a higher standard."

Available Relief

Because Dr. Majors presented evidence to create a genuine issue of material fact that the University unlawfully discriminated, we must next consider whether the district court correctly concluded that Dr. Majors is seeking damages that are not commensurate with her claim. The amount of damages is generally a question of fact for the jury, *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 789 (Minn. 1989), but a plaintiff cannot recover damages that are “speculative, remote, or conjectural.” *Poppler v. Wright Hennepin Co-op Elec. Ass’n*, 834 N.W.2d 527, 546 (Minn. App. 2013) (quotation omitted).

Minn. Stat. § 363A.33, subd. 6 (2016), states, “If the court or jury finds that the respondent has engaged in an unfair discriminatory practice, it shall issue an order or verdict directing appropriate relief as provided by section 363A.29, subdivisions 3 to 6.” Minn. Stat. § 363A.29, subd. 4 (2016), provides that if the district court determines that an employer engaged in an unfair employment practice under Minn. Stat. § 383A.08 (2016),

[the district court] shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the [district court] may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney’s fees, in addition to punitive damages.

See also Wenigar v. Johnson, 712 N.W.2d 190, 211 (Minn. App. 2006) (concluding that a district court properly awarded damages under the MHRA when it awarded damages for emotional distress resulting from discrimination). The district court must also order an employer to pay a civil penalty to the state. Minn. Stat. § 363A.29, subd. 4. “The purpose

of the civil damage remedy under the Minnesota Human Rights Act is to return an aggrieved party to the same position that would have been attained had there been no discrimination.” *Graffius v. Control Data Corp.*, 447 N.W.2d 215, 217 (Minn. App. 1989).

The district court concluded that Dr. Majors is seeking damages that are too speculative because she cannot prove that she would have ultimately been granted tenure and therefore cannot prove that she is entitled to past and future income. The district court also noted that Dr. Majors is not seeking a declaration that her rights had been violated.

We disagree with the district court’s determination with respect to damages for two reasons. First, as we have discussed, Dr. Majors did not limit her claim to a denial-of-tenure or failure-to-hire claim and does not need to show that she would have been hired but for the University’s discriminatory act to recover under the MHRA. *See LaPoint*, 892 N.W.2d at 514. Second, the MHRA’s damages provisions do not limit an employee’s recovery to either compensatory damages or a declaratory judgment, as the district court suggests. Instead, if the jury finds that the University engaged in an unlawful employment practice under the MHRA, the district court must award actual and compensatory damages that are not too speculative and order the University to pay a civil fee to the state. Minn. Stat. § 363A.29, subd. 4. The district court may also award damages for mental anguish or suffering, reasonable attorney fees, and punitive damages. *Id.* Because genuine issues of material fact exist as to Dr. Majors’s discrimination claim, we conclude that the district court erred in granting the University’s motion for summary judgment.

Reversed and remanded.