

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

OLA KIRK

FILED

APPELLANT

VS.

OCT 31 2014

DOCKET NO. 13-054

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

EMPLOYEE APPEALS BOARD

RESPONDENT

ORDER

There came on for hearing on March 7, 2014, and August 21, 2014, Ola Kirk's (hereafter "Kirk") appeal to the Mississippi Employee Appeals Board. The genesis of Kirk's appeal is her allegation that she was denied a promotion to the position of DPS - Region Supv Driver Serv (Lt.). Kirk's appeal alleged that she was denied the promotion because of her race, sex and age. At the conclusion of the hearing on August 21, 2014, counsel for Kirk stipulated that based on the evidence Kirk would not pursue her claim of discrimination based on race or age. Thus, the only issue before the Mississippi Employee Appeals Board is whether Kirk's failure to be promoted to the position of DPS - Region Supv Driver Serv (Lt.) was a result of sexual discrimination.

FINDINGS OF FACT

1. Kirk has been an employee of the Mississippi Department of Public Safety (hereafter "MDPS") since December 18, 1987.
2. Anthony Cunningham (hereafter "Cunningham") has been an employee of the MDPS since April 24, 1987.
3. Kirk is a black female, over forty years of age, and is currently a Master Sergeant with the MDPS and she has been in that position for the last eleven (11) years.
4. Cunningham is a black male, over forty years of age.

5. Prior to submitting her application for the Lieutenant position, Kirk had sought promotion with the MDPS since being promoted to Master Sergeant in 2002, but had been unsuccessful in her efforts.

6. Kirk has supervised as many as fifteen (15) employees, and one sworn officer, since her promotion to Master Sergeant in 2002.

7. Cunningham has supervised eleven (11) or twelve (12) Driver License Examiners and one (1) sworn officer (MVI).

8. Kirk supervises the day to day operations of the Driver Services Division in District II.

9. Kirk served on the MDPS "Recruiting Team for 2006" and she participated in the MDPS video distributed to the public by the MDPS and the Mississippi Highway Safety Patrol.

10. Kirk, as did Cunningham and all of the other applicants for the Lieutenant position, met all the qualifications and the minimum requirements to test for the in-house promotion with the MDPS.

11. Kirk received one work related commendation.

12. Cunningham received five work related commendations.

13. On or about April 15, 2013, Lieutenant Anthony Wright announced his retirement effective at the end of May, 2013.

14. The posted position was for the Lieutenant position of Driver Services Bureau Central Region.

15. Cunningham made application for the Lieutenant position for the Driver Services Bureau Central Region.

16. At the time Cunningham made application for the Lieutenant position, he was a Master Sergeant with the MDPS.

17. Kirk, Cunningham, and other Master Sergeants, served as an Acting Lieutenant before and after the retirement of Lieutenant Wright.

18. Kirk was serving as Acting Lieutenant at the time of the MDPS' interview/testing process for the vacant Lieutenant position in July, 2013.

19. Kirk and the other candidates for the Lieutenant position were interviewed by the three (3) appointed interviewers for the MDPS, Major Chris Gillard, Captain Prentiss Parker and Lieutenant Jay Kelly.

20. The applicants that were interviewed were all Master Sergeants with the MDPS. Those persons were: Charles Coleman, Anthony Cunningham, Richard Davenport, James Gunter, Ola Kirk, and James Walker.

21. Kirk was the only female to file an application for the Lieutenant promotion. Kirk was the only female interviewed for the Lieutenant position.

22. No evidence was introduced at Kirk's appeal hearing that any of Kirk's supervisors had ever made a derogatory remark about Kirk's sex, race or age at any time during her years of employment with the MDPS.

23. There were six (6) interview questions. All candidates were asked the same questions by the interview panel. All six (6) questions were oral questions and all six (6) candidates provided oral responses to the questions.

24. There were no females on the interview panel.

25. There were no female Driver Services Supervisors in Driver Services who could have been an interviewer on the interview panel.

26. The panel members took notes of the interview of each of the six candidates and tallied the scoring (after any adjustment of any scoring) and each candidate was given a final score.

27. At the conclusion of an applicant answering the oral questions, the panel members compared scoring of the candidates before the final score was made as to each candidate interviewed. It was determined before the interview began that no interviewer's final score would be more than one (1) point different than other interviewer's score.

28. The scoring was on a scale of 1 -5.

29. No key to the questions was prepared by any of the members of the interview panel.

30. Kirk's final overall score on the oral interview was 64.

31. Cunningham's final overall score on the oral interview was 73.

32. The panel's scoring of the candidates ranged from 73 to 43.

33. Cunningham and Kirk were the top scoring candidates of those interviewed by the panel.

34. Cunningham, as the highest scorer, received the promotion to Lieutenant.

35. Cunningham was promoted to the Lieutenant position because he scored higher than Kirk.

36. Once a person qualified to sit for the oral interview, the candidate's interview score was the sole determining factor as to who should receive the promotion to Lieutenant.

37. The Mississippi Highway Patrol, at all materials times, had two promotional mechanisms in effect. They were General Order 22/01 and General Order 22/02.

38. General Order 22/01 controls tested positions in both the Enforcement Division of MHP (Enforcement Troopers) and the Mississippi Bureau of Investigation.

39. Candidates for merit promotion testing under General Order 22/01 must be sworn MHP Officers. Sworn officers are those officers who have successfully completed MHP Patrol School.

40. General Order 22/02 is designated for promotion of Speciality Positions, as well as for other positions not specifically named for promotion by another General Order.

41. Promotions in Driver Services are controlled by General Order 22/02. The promotion to Lieutenant for which Kirk applied is controlled by General Order 22/02.

42. Driver Services' promotional practices fall outside the scope of General Order 22/01.

43. Kirk, at her appeal hearing, did not state that either Parker, Gillard, or Kelly, the interviewers on the interview panel, were sexist.

44. General Order 22/01 pertains to merit promotion within sworn ranks for MHP and MBI.

45. Kirk was told by the panel that on one question she scored better than any other candidate.

46. Kirk admitted, at her appeal hearing, that at the conclusion of the oral interview, that she had concerns as to how well she had performed on question 4. Kirk scored an overall "7" on questions 2 and 4. A "7" was Kirk's lowest score.

47. At the time Cunningham was promoted to the Lieutenant position, there were seven (7) female sworn Mississippi Highway Patrol Officers. All seven of those female officers were in managerial positions.

48. Kirk was not more clearly qualified for the Lieutenant position than Cunningham.

49. Kirk was not denied the promotion to the Lieutenant position because of her sex.

50. At no point did the MDPS discriminate against Kirk on the basis of sex, race, or age or any other ground in the selection process for the Lieutenant position.

CONCLUSIONS OF LAW

This case is controlled by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and cases by the United States Fifth Circuit Court of Appeals. The United States Supreme Court in *McDonnell Douglas* set forth a framework to be employed when a person alleges they suffered a Title VII claim of employment discrimination and can prove their claim by direct evidence. Where only circumstantial evidence may be available, as in Kirk's case, the *McDonnell Douglas* burden-shifting framework is modified. *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408, 409 (5th Cir. 2007). Under the modified framework, a Plaintiff must first create a presumption of discrimination by making out a prima facie case of discrimination. *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003); *Mitchell v. City of Tupelo*, No. 1:13CV00049- SA-DAS, 2014 WL 4540924 (N.D. Miss. Sept 11, 2014).

To establish a prima facie case, Kirk must show the following:

(1) [s]he belongs to a protected class; (2) [s]he applied for and was qualified for a position for which applicants were being sought; (3) [s]he was rejected; and (4) a person outside of [her] protected class was hired for the position.

Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc., 482 F.3d 408, 412 (5th Cir. 2007).

Did Kirk establish each of the four elements of a sexual discrimination prima facie case? The answer is “yes.” This is so because (1) Kirk is a female; (2) she applied for and was qualified for the position [Lieutenant position] for which applicants were being sought; [3] Kirk was rejected; and [4] a person outside of [Kirk’s] protected class [a male] was promoted to the [Lieutenant] position.

Because Kirk established a prima facie case of sexual discrimination, the burden of production shifted to the MDPS to offer a non-discriminatory reason for Kirk’s failure to be promoted to the sought Lieutenant position. *Mitchell v. City of Tupelo*, No. 1:13CV00049-SA-DAS, 2014 WL 4540924 (N.D. Miss. Sept 11, 2014). The MDPS’ production burden is satisfied once it produces evidence which “taken as true, would permit the conclusion that there was a non-discriminatory reason for the adverse action sustained by [Kirk].” *Price v. Fed. Exp. Corp.*, 283 F.3d 715, 723 (5th Cir. 2002). The MDPS contends that Kirk was not promoted to Lieutenant position because she did not score as high on the oral interview test as a male, Anthony Cunningham, scored.

The MDPS’ reason for Kirk not receiving the Lieutenant promotion is a non-discriminatory reason for Kirk’s adverse employment result. Accordingly, under the *McDonnell Douglas/Burrell* modified framework, the burden of persuasion shifted back to Kirk to prove by a preponderance of the evidence that the MDPS’ stated reason for not selecting Kirk for the Lieutenant position was a pretext. “Pretext” means a lie or not true. In addition, Kirk must also prove that not only was the MDPS’ stated reason for not selecting her untrue, but that the MDPS intentionally denied her the Lieutenant promotion because she was a female. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Kirk, at her appeal hearing, testified to a number of facts which she contends established that she was more qualified than Cunningham. For example, Kirk testified that she had been employed with the MDPS since 1987; that in the past she had supervised fifteen (15) employees; that she supervised the day to day operations of the Driver Services Division in District II and that Kirk served on the agency "2006 Recruiting Team" and that Kirk participated in the agency video distributed by the Mississippi Highway Patrol.¹

The MDPS does not dispute that Kirk, throughout her tenure of employment with the MDPS, has been an excellent employee. However, the MDPS contends that all persons who applied to test for the open Lieutenant position were required to meet certain minimum requirements to be eligible to test for that position and because of those requirements all of the applicants for the Lieutenant position had significant experience and qualifications.

This tribunal, having reviewed all exhibits introduced into evidence and having considered the testimony of all witnesses, finds as a fact that Kirk did not meet her burden of proof that she was clearly more qualified for the Lieutenant position than Cunningham. This is so because Cunningham also had significant qualifications and experience.

For example, Cunningham, like Kirk, served as the Acting Regional Lieutenant in the Central Region for two weeks shortly after Lieutenant Wright retired. Cunningham, like Kirk, had completed four years of college and received a Bachelor of Science degree. Cunningham, like Kirk, had supervised Driver License Examiners. Cunningham had

¹No attempt is made to list, in this Order, all of Kirk's or Anthony Cunningham's qualifications as both of them have significant qualifications. In addition to the oral testimony concerning Kirk's and Cunningham's qualifications and experience, *see* exhibits 11, 12, 24 and 25.

received five commendations. Kirk had received one. Cunningham, like Kirk, had been employed with the MDPS since 1987. In comparing the qualifications of both Kirk and Cunningham, while they were different in some respects – as expected – a comparison does not show, as Kirk contends, that Kirk was clearly more qualified than Cunningham. Kirk’s qualifications do not “leap from the record and cry out to all who would listen that [she] was vastly – or even clearly – more qualified for the [Lieutenant] job.” *Moss v. BMC Software, Inc.*, 610 F.3d 917 (5th Cir. 2010). To prevail on her theory that she was more qualified and should have received the Lieutenant promotion, Kirk’s qualifications must be of such “weight and significance that no reasonable person, in the exercise of impartial judgment,” could have chosen Cunningham over Kirk for the Lieutenant promotion. *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999). (Emphasis added).

In regard to Kirk’s allegation that the oral test was discriminatory because the scoring results of the panel were subjective, the Fifth Circuit Court of Appeals held in *Alvarado v. Texas Rangers*, 492 F.3d 605, 616 (5th Cir. 2007) that “[A]n employer’s subjective reasons for not selecting a candidate . . . may serve as a legitimate nondiscriminatory reason for the candidate’s non-selection.” *See also, Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004) (recognizing that the *McDonnell Douglas* framework “does not mean that an employer may not rely on subjective reasons for its personnel decisions.”) While Kirk, Cunningham, and the other candidates were scored subjectively on the oral interview by the three interviewers, this does not satisfy Kirk’s pretext burden and overcome MDPS’ stated non-discriminatory reason for selecting Cunningham instead of Kirk.

Kirk did not develop sufficient probative proof to meet her burden of proof that the MDPS discriminated against females generally or against her specifically. Kirk admitted during cross-examination that there were seven (7) sworn female Mississippi Highway Patrol Officers and that all seven were in managerial positions, including Kirk, a Master Sergeant. Further, Kirk at the appeal hearing, was asked by the attorney for the MDPS if she thought any of the three interviewers on the interview panel – Parker, Gillard, and Kelly – were sexist and she said she did not. Kirk did state she believed she had been discriminated against because of her sex, but to label Parker, Gillard and Kelly “sexist” would be “hard words.”

While Kirk clearly believes that she was denied the Lieutenant position because of her sex “[a] subjective belief of discrimination, however genuine, [cannot] be the basis of judicial relief.” *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96 (5th Cir. 1991) and *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 152 (5th Cir. 1995), cert. denied, 516 U.S. 1047, 116 S.Ct. 709, 133 L.Ed.2d 664 (1996).

The ultimate question in every employment discrimination case is whether the Plaintiff was the victim of intentional discrimination. *Price* at 720. Kirk failed to produce sufficient evidence to meet her burden of proof that the MDPS’ proffered reason for selecting Cunningham over Kirk for the Lieutenant promotion was untrue. Likewise, Kirk also failed to meet her burden of proof she was intentionally denied the Lieutenant promotion because of her sex. For these reasons, this tribunal finds for the MDPS and Kirk’s appeal to the Mississippi Employee Appeals Board is dismissed, with prejudice.

SO ORDERED, THIS THE 30 DAY OF OCTOBER, 2014.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By: Michael N. Watts
MICHAEL N. WATTS
Presiding Hearing Officer