

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

PETER T. CLINTON

FILED

APPELLANT

FEB 05 2015

VS.

DOCKET NO. 14-032

EMPLOYEE APPEALS BOARD

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

RESPONDENT

ORDER

On July 23, 2014, Peter T. Clinton ("Clinton") filed a grievance with the Mississippi Employee Appeals Board ("MEAB") alleging that he should have been promoted from the Enforcement Captain's promotion list to Captain in the Mississippi Bureau of Investigation ("MBI"). Clinton's Statement of Relief requested the following:

- (a) a promotion to the rank of Captain (MBI, Northern Region)
- (b) a reasonable monetary compensation for said discrimination and emotional distress
- (c) test scores and detailed calculations for the 2013 promotional examinations
- (d) an amendment to go 22/01 that outlines the length of time a candidate will remain on the merit promotion list (see grievance form).

The MEAB does not have authority to grant monetary compensation for discrimination or emotional distress, or to order an amendment to [GO] 22/01 that outlines the length of time a candidate will remain on the merit promotion list. For that reason, those portions of Clinton's appeal are dismissed. The MEAB can provide Clinton certain relief if he has been denied a promotion to a recognized position if discrimination was a cause in whole, or in part, of Clinton not being promoted, or if Clinton established he should have been promoted absent discriminatory reasons.

Although Clinton's complaints of sex and race discrimination are predicated on a broad number of alleged facts, Clinton's primary basis for his discrimination claims is based on the

undisputed fact that a white female, Lori Smith, was promoted from the position of Master Sergeant Enforcement to the position of MBI Lieutenant (Lt.), Troop C. This occurred even though Smith had never worked at MBI before her promotion, did not test for the MBI Lieutenant position and in Clinton's view was not qualified to hold the position of MBI Lieutenant.

Smith tested for MHP Captain Enforcement in April 2013. Clinton also took the Captain Enforcement test in April 2013, at the time Smith took the test. In total, there were sixteen (16) MHP officers who tested for MHP Captain Enforcement and who were placed on the MHP Captain Enforcement list in 2013. Following the Captain Enforcement test in April 2013, Smith was ranked number seven (7) on the list with a score of 88.80. Clinton was ranked number eleven (11) on the list with a reported score of 85.23.¹

Clinton also was listed on the MBI Lieutenant promotion list, along with seven other officers. Smith did not test for a MBI Lieutenant position, or any position with MBI. Smith was not listed with Clinton and the other seven (7) officers identified on the MBI Lieutenant promotion list. Clinton, in May, 2013, was promoted to Lieutenant with MBI and was stationed with MBI Troop E.

Lori Smith was transferred from the Captain Enforcement promotion list to MBI Lieutenant Troop C in June, 2013. Smith was transferred from the Captain Enforcement List to the MBI Lieutenant List because all the officers on the MBI Lieutenant List and Captain Enforcement List were exhausted. Although Clinton argues that the MHP Captain Enforcement List was not

¹Questions arose during Clinton's appeal concerning his correct score on the Captain Enforcement test. For reasons set forth *infra*, Clinton may be entitled to an award of back pay because of miscalculation of his Captain Enforcement test score and his failure to be promoted to Captain in Enforcement.

exhausted at the time Smith was selected as the person to be assigned to the MBI Lieutenant position, this tribunal having considered the testimony of all witnesses, having gauged and considered each witnesses' demeanor and credibility and having considered all exhibits in evidence, finds as a fact that Lori Smith was assigned to the MBI Lieutenant position only after all other officers listed on both the MBI Lieutenant list either refused to be assigned to MBI, Troop C or because all officers before her on the MBI Lieutenant promotion list and Captain Enforcement promotion list were exhausted and Smith was the next candidate "up" on the list. This tribunal further finds as a fact that Smith was not assigned to the MBI Lieutenant position because of her sex or because of her race.

This factual finding, however, does not mean this tribunal finds that the appointment of Smith to the Lieutenant position at MBI was authorized under General Order 22/01 and/or General Order 22/02, or any applicable Mississippi statutes.

General Order 22/01 states the following:

22.01.01 – Purpose

This general order establishes the process for promotion of sworn personnel by the Department of Public Safety/Mississippi Highway Safety Patrol.

General Order 22.01.02 Policy

....

General Order No. 22/02

Subject: Specialized Position

I. Purpose

II. Policy

III. Specialized Position

- A. Director of Driver Services
- B. Director of Air Operations
- C. Director of Internal Affairs
- D. Director of Executive Security for Governor, Lieutenant Governor and Speaker of House
- E. Director of SWAT

MDPS also contends that MCA §§ 45-1-2, 45-1-3 and following sections provided the Commissioner of Public Safety and/or his designee the discretion to make appointments under the facts of this case because the MBI Lieutenant list and Captain Enforcement list had been exhausted.

This tribunal has reviewed General Orders 22/01, 22/02 and §§ 45-1-2, 45-1-3 and other pertinent portions of Mississippi Code Annotated. This tribunal does not read those Orders or Miss. Code Ann. § 45-1-1, *et. seq.* to authorize the Commissioner of the MDPS, or his designee, to permanently appoint, on a discretionary basis, an employee, such as Lori Smith, to the non-specialized merit position of MBI Lieutenant. While General Order 22/02 provides the MDPS Commissioner and his designee discretion to make appointments to a specialized position identified in General Order 22/02, the MBI Lieutenant position is not within General Order 22/02. General Order 22/02 by its wording applies only to the specialized position delineated in it. The Lieutenant position of the MBI is not identified as one of the specialized positions listed in General Order 22/02.

General Order 22.01.02 provides:

It is the policy of the Department of Public Safety/Mississippi Highway Safety Patrol to certify for promotion only those candidates meeting the qualifications prescribed in this policy and to use uniform procedures to ensure equal opportunity for promotion to all eligible candidates. All vacant positions shall be filled on a merit basis from among the most qualified available members. (Emphasis added)

The MBI Lieutenant position is a merit position. Smith did not apply to test for the MBI Lieutenant position and Smith never tested for the MBI Lieutenant position. Because the MBI Lieutenant position was a merit position and Smith did not test for that position, she was not properly appointed to the MBI Lieutenant position under section 22.01.02 of General Order 22/01, effective 02/15/13.²

However, this tribunal's determination that neither General Orders 22/01 or 22/02 or the stated statutes authorized the appointment of Smith to the MBI Lieutenant position does not necessarily provide a factual or legal basis to support Clinton's claims of discrimination.

Clinton's discrimination claims are controlled by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and cases from 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 cannot prove their claim by direct evidence. Where only circumstantial evidence may be available, as in Clinton'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 such as Clinton 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).

²Smith could have been placed as a MBI Lt. on an interim basis, or other Sergeants within MBI could have been placed on the MBI Lt. position on an interim basis.

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

(1) he belongs to a protected class; (2) he applied for and was qualified for a position for which applicants were being sought; (3) he was rejected; and (4) a person outside of [his] 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 Clinton establish each of the four requirements of a prima facie discrimination case?

The answer is “no.”

Clinton, a black male, was within a protected class. However, Clinton cannot meet his burden of proof that he was “qualified for a position for which applicants were being sought.” This is so because the MDPS was not, during 2013 or prior to September 2014, seeking applicants for the position of Captain with the MBI. In addition, Clinton was not “rejected” for a MBI Captain position nor was a person outside of Clinton’s protected class – black or male – selected instead of Clinton and promoted to Captain MBI. For these reasons, Clinton cannot establish all of the four requirements of prima facie discrimination.

Even if Clinton had met his burden of proof and established a prima facie case of racial or sex discrimination, MDPS set forth a non-pretextual, non-discriminatory reason for Clinton’s failure to be promoted in 2013 to Captain MBI. At the time Clinton was promoted to MBI Lieutenant position, the MDPS did not believe that there was a Captain’s “slot” to be filled. Colonel Berry, a black male, testified that the Captain position within MBI had been eliminated by a previous administration and replaced with the position of Major. For this reason, according to Colonel Berry no Captain position was available for Clinton or anyone else to be promoted in 2013 and in 2013 no

test was given to anyone for a MBI Captain position. Other witnesses corroborated Berry's testimony.

While Clinton contends that the PIN for the MBI Captain position was not abolished prior to 2013 as contended by the MDPS, Clinton had the burden of proof on that issue. *See, Mississippi State Personnel Board Policy and Procedures Manual*, effective date 7/1/2014, Chapter 10, Section 20(B). Also, *see Richmond v. Mississippi Department of Human Services*, 745 So. 2d 254 (Miss. 1999). In *Richmond* the court stated:

The statute and administrative regulations clearly place the burden of persuasion on the aggrieved employee to demonstrate that the reasons given are not true. Rule 17, Administrative Rules of the Mississippi Employee Appeals Board; Miss. Code Ann. § 25-9-127 (1972). ... This is not mere semantics. Under our scheme, in a nutshell, ties go to the appointing authority. That is, unless the employee carries the burden of persuasion that the alleged conduct did not occur, the employee has no right to have the employment decision overturned. *Mississippi Employment Security Commission v. Collins*, 629 So. 2d 576, 580 (Miss. 1993); Miss. Code Ann. § 25-9-127.

At the appeal hearing, Clinton in his cross-examination of witnesses, including Colonel Berry, raised certain questions as to whether the PIN for MBI Captain position had been eliminated at some point under a previous administration. Although Clinton's cross-examination of Berry and others was probing and raised questions about whether the Mississippi State Personnel Board had actually eliminated the PIN for the Captain position, Clinton's questioning of Berry and others on that issue did not elicit testimony to prove by a preponderance of the evidence that the MBI Captain PIN had not been eliminated as testified to by Berry. Clinton could have subpoenaed records from the Mississippi State Personnel Board to disprove that the MBI Captain position was not eliminated. However, Clinton did not do so, or subpoena any witness to support his contention that the MBI

Captain position was not eliminated. Even if Clinton had met his burden of proof that the MBI Captain position was not eliminated, as Berry testified, that does not mean Berry did not believe the position was eliminated. In fact, the objective evidence confirmed that Colonel Berry did not believe a MBI Captain position existed in 2013. This was established not only by Berry's and other's testimony, but by a May 2, 2013, letter from Colonel Berry (as Director of MHSP and Assistant Commissioner, MDPS) to Deanne Mosley, Director of the Mississippi State Personnel Board.

In Berry's May 2, 2013, letter to Mosley, he stated the need to the Mississippi State Personnel Board for three MBI Captain positions and he requested an "upward reallocation" of three Captains for MBI. (See Exhibit 12). Berry's May 2, 2013, letter to Mosley, and Berry's and the other witnesses' testimony, establish that Berry had a good faith belief and understanding that there were no Captain positions or "slots" with MBI in May 2013. Berry's May 2, 2013, letter to Mosley and other witnesses' testimony provided a non-pretextual reason for MDPS to not test for the Captain MBI position in 2013 and provided a non-pretextual reason for Clinton not to be promoted to Captain from the Captain Enforcement List, notwithstanding Lori Smith's assignment to MBI Lieutenant position without having tested for that position.

In summary, while the MDPS was in error in assigning Lori Smith to the Lieutenant position of MBI, this tribunal rejects Clinton's contention that such is sufficient to prove discrimination for him not also being appointed to a non-existent MBI Captain position. The law addressing discrimination does not make an employer, whether private or a state entity such as MDPS, liable because the employer made errors or mistakes. The party alleging discrimination must prove, by a preponderance of the evidence, an intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993). Here, Clinton failed to meet his burden of proof that MDPS,

through Colonel Berry, a black male, engaged in conduct whose purpose was to intentionally discriminate against Clinton. Accordingly, this tribunal finds in favor of the MDPS on Clinton's claim of sex and race discrimination. Clinton's appeal on those claims is dismissed, with prejudice.

Even though Clinton's discrimination claims are dismissed, Clinton may be entitled to back pay, but not because he was a recipient of sex or race discrimination. As noted in footnote 1, questions arose during Clinton's appeal concerning errors with his test score for the position of Enforcement Captain. Exhibit 7 reflected Clinton's test score for MHP Enforcement Captain was 85.23. Exhibit 20 reflected that Clinton's MHP Captain final test score was 87.5. Although there was conflicting evidence at the appeal hearing concerning the discrepancies between Clinton's reported 85.23 score and his 87.5 score, this tribunal finds as a fact that Clinton's correct score for his Captain Enforcement test was 87.5 – not 85.23.

Although it is not totally clear to this tribunal, it appears Walter Duncan, a black male may have been promoted to Enforcement Captain ahead of Clinton on May 30, 2014. If this occurred, this was error. Duncan should not have been promoted to the Captain Enforcement position on May 30, 2014, over Clinton because Duncan's Enforcement Captain test score was 86.32 which was lower than Clinton's Captain Enforcement score of 87.5. For this reason, if Duncan was promoted to Captain in the Enforcement Division over Clinton, Clinton is entitled to back pay as an Enforcement Captain from May 30, 2014, until December 1, 2014, the date Clinton was appointed to MBI Captain. If this occurred, MDPS is ordered to pay Clinton back pay from May 30, 2014, to November 30, 2014, and to restore Clinton to all his rights and benefits including not only back pay, but all of his retirement benefits, provided the integrity of such benefits remain uncompromised in accordance with all applicable law, policies, rules, and regulations. If Duncan, or some person with

a lower test score than Clinton was not appointed to Captain Enforcement over Clinton, then Clinton is not entitled to back pay and other corresponding benefits.

SO ORDERED, THIS THE 4 DAY OF FEBRUARY, 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS
Presiding Hearing Officer