

FULL BOARD OF THE MISSISSIPPI EMPLOYEE APPEALS BOARD

OLA C. KIRK	FILED	APPELLANT
VS.	APR 06 2015	NO.13-054
MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY	EMPLOYEE APPEALS BOARD	RESPONDENT

ORDER OF EAB BOARD, EN BANC

Appellant, Ola C. Kirk, filed an appeal with the Employee Appeals Board, *en banc*. Kirk appealed the Order entered by Hearing Officer Michael N. Watts on March 6, 2015. The EAB, *en banc*, has reviewed the briefs of the parties and the record in this matter. The EAB, *en banc*, affirms the decision of Hearing Officer Watts and affirms the Hearing Officer's finding that Kirk's failure to be promoted was not due to sexual discrimination. The reasons for the EAB, *en banc*, opinion are set forth below.

FACTS

Kirk was employed as a Master Sergeant with the Mississippi Department of Public Safety (MDPS). On June 7, 2013, MDPS sent out a notice for the open position of DPS-Region Supervisor, Lieutenant Driver Services Bureau Central Region (hereinafter "lieutenant"). Kirk applied for the position, which would have been a promotion, and was interviewed for the position on July 17, 2013. Kirk was not chosen for the position of Lieutenant. The man chosen for the position of Lieutenant, Anthony

Cunningham, is a black male over 40 years of age. On July 24, 2014, Kirk filed a Grievance with MDPS alleging that she had not been chosen for the position of lieutenant due to her race, age and gender. Kirk did not receive any relief as a result of the grievance process and filed an appeal with the Employee Appeals Board on August 28, 2013. A Hearing was held in this matter, on March 7, and August 21, 2014. At the conclusion of the hearing on August 21, 2014, Kirk stipulated that she would not pursue her claim of discrimination based on race or age. The remaining issue before the Hearing Officer was whether Kirk had failed to receive a promotion to lieutenant because of her sex. After reviewing the testimony and the evidence the Hearing Officer found that Kirk had not been discriminated against on the basis of her sex.

Kirk is a black female over 40 years of age. Kirk is an excellent employee. Prior to being interviewed for the position of lieutenant Kirk served as an interim lieutenant in the Driver Services Bureau Central Region. Kirk was the only female who interviewed for the position of lieutenant. The interview panel did not have any female members. The interview panel scored each candidate's answer to each question on a scale from 1 to 5. The panel reviewed the scoring after the interviews and discussed any score that was more than 1 point difference between the interviewers. The interview panel scores showed that Cunningham received a score of 73 and Kirk received a score of 43. Following the

interviews the individual interviewers' notes were destroyed, but the scoring sheets were maintained.

The Hearing Officer found that once a candidate had qualified for an interview for the position of lieutenant, the candidate's interview was the sole determining factor as to who should receive a promotion. The Hearing Officer concluded that Kirk was not more clearly qualified for the lieutenant position than Cunningham.

On appeal to the Full Board Kirk asserts that some of the Hearing Officer's findings of fact were erroneous and that some of the findings were contrary to substantial evidence. Kirk also claims that the Hearing Officer placed a "heightened legal burden" on Kirk.

Kirk argues that the Hearing Officer's findings of fact are in error in and that they are incomplete. She argues that the Hearing Officer omitted some facts which were supportive of her claim of sexual discrimination and failed to give enough weight to other facts. Specifically, Kirk argues that the Hearing Officer failed to include findings regarding Kirk's experience in Driver Services, and a finding regarding the fact that the individual notes taken by members of the interview panel were destroyed after the interviews.

Clearly Kirk's assertion that the Hearing Officer did not consider her experience is erroneous. A review of the findings of fact clearly shows that

the Hearing Officer considered Kirk's experience in Driver Services as well as her overall supervisory experience in reaching his decision.

It is axiomatic that, as the trier of fact, it is within the Hearing Officer's discretion to determine which facts to include in his findings of fact unless a failure to include certain facts results in an error of law. With regard to the destroyed notes, Kirk asserts that the Hearing Officer's failure to include the destruction of the notes resulted in an error of law because the fact of the destruction of the notes entitled Kirk to an inference that the destroyed notes were supportive of Kirk's claim of sexual discrimination. There is no support for this assertion. It is clear that unless the notes are required by policy to be preserved no such inference attaches. *Talavera v. Shah*, 638 F.3d 303 (D.C. Cir. 2011). In this case, the notes were not required to be preserved and it can be inferred from the Hearing Officer's decision that he did not otherwise find the destruction of the notes to be significant.

Kirk also asserts that Cunningham was preselected for the position of lieutenant. Kirk claims that the interview scores, the fact that one of the persons conducting the interview was Cunningham's former supervisor, and the destruction of the interview notes support a finding that Cunningham was preselected. Again, a complete review of the Hearing Officer's Order indicates that he considered these facts and found that they did not support a conclusion that Cunningham was preselected.

The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation is a determination for the trier of fact. e.g. *Rainey v. Rainey*, 205 So.2d 514 (Miss. 1967).

Kirk also points to several factors that she claims support her charge of discrimination. These factors include the interview process, Kirk's lack of promotion for a number of years, the destruction of the interview notes, and the small number of female supervisors. While these factors may in fact support Kirk's claim there were a number of factors that did not support her claim. As the Hearing Officer sub judice stated, in his judgment, "Kirk did not develop sufficient probative proof to meet her burden that the MDPS discriminated against females generally or her specifically."

Finally, Kirk argues that the hearing officer incorrectly analyzed her case under *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973) and *Burrell v. Dr. Pepper/Seven Up Bottling Grp., Inc.*, 482 F.3d 408 (5th Cir. 2007). Kirk argues that she showed that she was a member of a protected class and thus the burden shifted to MDPS to offer a non-discriminatory reason for not promoting Kirk to lieutenant. Kirk argues that the "[m]anagement of MDPS failed to articulate a 'clear and reasonably specific basis' for its subjective assessment in the case . . ." In fact MDPS submitted evidence and testimony that Kirk did not do as well as

Cunningham when she interviewed for the position of lieutenant, which is a non discriminatory reason for not promoting her. The burden then shifted to Cunningham to show that MDPS' reason was pretextual and that MDPS did not promote her because she was female. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993).

As noted by Kirk in her brief

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of discrimination." *Id.* At 511

It is clear from the Order that The Hearing Officer did not disbelieve the reasons put forth by MDPS for not promoting Kirk, nor did he indicate that he found MDPS' testimony and evidence mendacious in any way. Even if the Hearing Officer disbelieved MDPS, which he did not, *St. Mary's allows*, but does not *require*, a finding of discrimination.

Kirk further argues that she was clearly so much more qualified than Cunningham that the Hearing Officer had to have found discrimination. The Hearing Officer considered this argument, and rejected it, stating that "a comparison does not show, as Kirk contends, that Kirk was clearly more qualified than Cunningham." Kirk's qualifications were not of such "weight and significance that no reasonable person, in the exercise of impartial judgment," could have chosen Cunningham over Kirk for the

position of lieutenant. *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 199).

The Hearing Officer determined, based on the testimony and evidence, that Kirk did not provide sufficient evidence to meet her burden of proof that she was discriminated against on the basis of sex. Kirk has failed to show that The Hearing Officer's findings were in error or that his decision was contrary to the law. For the foregoing reasons the Hearing Officer's Order is affirmed.

SO ORDERED this the 6th day of April, 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD
FULL BOARD

BY: 
INGRID DAVE WILLIAMS
Hearing Officer