

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

ERIC STIGLER

FILED
JUN 12 2015

APPELLANT

VS.

EMPLOYEE APPEALS BOARD

DOCKET NO. 15-004

MISSISSIPPI DEPARTMENT OF AGRICULTURE
AND COMMERCE

RESPONDENT

ORDER

There came on for hearing on April 22, 2015, Eric Stigler's (hereafter "Stigler") appeal to the Mississippi Employee Appeals Board. The genesis of Stigler's appeal is that he was terminated from the Mississippi Department of Agriculture and Commerce (hereafter "MDAC") because of his race and also because the allegations upon which the MDAC based its reason to terminate Stigler were untrue.

In addressing Stigler's racial discrimination issue, the tribunal is bound by Title VII of the Civil Rights Act of 1964. In the Fifth Circuit, to succeed on race discrimination a Plaintiff must first create a presumption of discrimination by making out a prima facie case of discrimination. *Lee v. Kansas City Southern Railway Co.*, 574 F.3d 253 (5th Cir. 2009). Specifically, Stigler, to establish a prima facie case of race discrimination, must demonstrate:

- (1) he is a member of a protected class,
- (2) he was qualified for the position at issue,
- (3) he was the subject of an adverse employment action, and
- (4) he was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class, under nearly identical circumstances.

Paske v. Fitzgerald, No. 14-20292 (5th Cir. May 4, 2015).

Did Stigler establish each of the four elements of a racial discrimination prima facie case?

The answer is no. Stigler, who is black was a member of a protected class, he was qualified for the position from which he was terminated, and he was the subject of an adverse employment action establishing the first three elements of a prima facie case of race discrimination. However, Stigler did not prove at his appeal hearing that because of his race that he was treated less favorably because of his membership in the protected class than were similarly situated employees who were not members of the protected class, under nearly identical circumstances. Stigler produced no probative evidence that a white employee was treated more favorably than he was under identical circumstances. Stigler did not meet his burden of proof that a white employee who engaged in the same or similar conduct for which Stigler was charged was not terminated or received lesser punishment. Because Stigler failed to adduce evidence that a white employee was treated more favorably than he was under identical circumstances, he failed to establish a prima facie case of race discrimination. *Paske* at p. 11. Accordingly, Stigler's race claim is dismissed, with prejudice.

Did Stigler meet his burden of proof that he did not engage in all of the conduct alleged in his January 21, 2015, termination letter? The answer is again, no.

Stigler's January 21, 2015, termination letter alleged the following:

Therefore, this is to advise you that your employment with the Mississippi Department of Agriculture and Commerce is terminated effective this date at the close of business. This action is based upon your commission of the following offenses, which are described more fully in the Hearing Officer's decision, to-wit:

1. Group Three, No. 6. Falsification of records. Nine counts.

2. Group Three, No. 14. An act of conduct related to job performance, so that allowing the employee to continue in that position could constitute negligence. Four counts.
3. Group Three, No. 17. Theft on the job, in conjunction with Group Three, No. 14, being an act of conduct related to job performance, so that allowing the employee to continue in that position could constitute negligence. Three counts.
4. Group Two, No. 1. Insubordination. One count.

An aggravating circumstance, verbal counseling was given to you on July 8, 2011 for failure to follow Petroleum General Operating Procedures.

The burden of proof is on Stigler to prove that he did not engage in the conducted alleged in his January 21, 2015, termination letter. *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.

Specifically, Stigler must prove, by a preponderance of the evidence, either (1) that the reasons stated in the January 21, 2015, notice of termination from the MDAC are not [were not] true or the reasons for the MDAC's decision to terminate Stigler are not sufficient grounds for Stigler's termination.

Having considered the testimony of all witnesses, having judged their credibility and having considered all exhibits introduced into evidence, this tribunal finds as a fact that Stigler failed to meet his burden of proof that some of the allegations upon which his termination is based, as delineated in his January 21, 2015, letter of termination, are untrue or that his termination was too severe a punishment for the conduct he engaged in. Accordingly, Stigler's termination is affirmed. The reasons for this decision are set forth below.

Stigler's January 21, 2015, termination letter is divided into four separate categories (1.) through (4.) This tribunal addresses each of those four allegations as follows:

1. Group Three, No. 6. Falsification of Records, Nine Counts.

This tribunal, in reaching its decision considered the testimony of all witnesses, judged their credibility and demeanor, and also considered the Affidavits of Mohamed Bousmara, Liz Holifield, Daniel Weldon, and Kalista Hendon. Having done so, this tribunal finds as a fact that Stigler failed to meet his burden of proof that he did not commit certain of the Group Three offense set forth in number 1 of his termination letter.

The Affidavits of Mohamed Bousmara, Liz Holifield, Daniel Weldon, and Kalista Hendon confirm that Stigler did not activate the pump for calibration as represented by Stigler in his Device Inspection Test Grid Summaries. Further, the testimony of Mr. Bousmara and Mr. Weldon further confirms that the Device Inspection Test Grid Summaries provided by Stigler

were not signed by the persons identified on the signature lines purporting to acknowledge receipt of the signature of the Device Inspection Test Grid Summary for each respective store. Specifically, Mr. Weldon stated that no person named "JECR" worked at Double Quick 104 in 2014. Mr. Bousmara stated that no one named "Priogy" has ever worked at Station 6950, 105 Champion Drive, Batesville, Mississippi.

As noted previously, certain witnesses testified by Affidavit. These witnesses testified Stigler did not calibrate the pumps as Stigler alleged in his various Device Inspection Test Grid Summaries. Stigler and his attorney were provided an opportunity following the conclusion of the hearing on April 22, 2015, to advise this tribunal if they wished to subpoena the persons testifying by Affidavit so that they could be cross-examined by Stigler or his counsel so Stigler could refute their testimony. Stigler did not avail himself of the right to have those witnesses testify personally or to cross-examine them concerning their testimony. Thus, the testimony of those persons who testified by Affidavit is undisputed and this tribunal accepts their testimony as true.

Further, based on the evidence and the inferences this tribunal draws from the testimony of Mohamed Bousmara, Liz Holifield, Daniel Weldon, and Kalista Hendon and having found that Stigler falsified the various Device Inspection Test Grid Summaries, this tribunal finds that he did not, in fact, appear at any of the gasoline stations on the days indicated in his Weekly Summary Report, nor did he incur the mileage alleged in his Automotive Equipment Expense Report. Likewise, Stigler failed to meet his burden of proof that he did not falsify his time sheets as alleged. In summary, Stigler failed to meet his burden of proof that any of the allegations set forth in subparagraph (1) of his January 21, 2015, termination letter were untrue. For this reason,

the allegation in Stigler's January 21, 2015, termination letter charging Stigler with the Group Three, No. 6 falsification of records is affirmed.

2. Group Three, No. 14, Three Counts.

The second Group Three offense stemmed from an allegation that Stigler took various gallons of gasoline from Double Quick #102 Station, 1410 West Second Street, Clarksdale, Mississippi, but failed to prepare or present to the MDAC an Inspector's Fuel Sample Report for the gasoline. The MDAC alleged that gasoline obtained by Stigler was not delivered to the petroleum laboratory for analysis as required by MDAC protocol. Having considered the evidence, this tribunal finds that Stigler failed to meet his burden of proof the Group Three, No. 14 allegation alleging that he took the gasoline from Double Quick #102 Station, 1410 West Second Street, Clarksdale, Mississippi, and did not present it to the petroleum laboratory for analysis is untrue. Further, Stigler's conduct in failing to deliver the gasoline to the petroleum laboratory is conduct related to his job performance that the MDAC's continued employment of Stigler could constitute negligence.

3. Group Two, No. 1 Insubordination, One Count.

In regard to the Group Two, No. 1 allegation of insubordination, this tribunal finds as a fact that Stigler failed to meet his burden of proof that he did not commit the Group Two, No. 1 allegation of insubordination by failing to maintain a current station I.D. decal on the front door of the Rebel Citgo, 1218 M.L. King Drive, Highway 3, Marks, Mississippi, having station identification number 60S0033. Exhibit 13 and the witness testimony established that the correct station I.D. decal was not displayed on the Rebel Citgo station. This is so because Exhibit 13 confirms that the ID station sticker reflects that Lester Spell was the MDAC Commissioner. Mr.

Spell retired as MDAC Commissioner in 2012. Stigler did not, in 2014, replace the old ID decal with a current one as his job duties required.

4. Group Three, No. 17, Theft on the Job, Three Counts.

In regard to the Group Three No. 17 allegation alleging theft on the job, Stigler testified the reason that more gasoline was pulled from the pump than the amount that was turned in to the Mississippi State Chemical Laboratory is because he needed to obtain a clear sample prior to obtaining the final sample to be submitted to the laboratory.¹ This tribunal notes that the discrepancies for an unaccounted amount of gasoline is very small. Having considered Stigler's testimony, the other evidence, and that the amount of gasoline alleged to have been stolen was minuscule, this tribunal finds that Stigler's denial of stealing the gasoline is sufficient to meet his burden of proof that he did not steal the gasoline. Accordingly, the allegation against Stigler alleging theft on the job is dismissed.

Conclusion

Mississippi State Personnel Board Policy and Procedures Manual provides that one Group Three offense may be punished by a written reprimand and/or may result in suspension without pay for up to thirty (30) working days, demotion, or dismissal. This tribunal has found as a fact that Stigler failed to meet his burden of proof that he did not commit a number of Group Three violations as alleged in his January 21, 2015, termination letter. As noted, the commission of even one Group Three violation is a sufficient ground for an employee's termination. In this

¹Testimony from Jennifer Thompson, Stigler's supervisor, was that Stigler had no need to clear a hose before pumping gasoline. This tribunal's finding that Stigler met his burden of proof on the allegation he did not steal the gasoline does not mean this tribunal believes Stigler followed the correct protocol in obtaining samples.

case, Stigler committed a number of Group Three violations. Because the MDAC's punishment of Stigler is in accordance with the punishment allowed by the *Mississippi State Personnel Board Policy and Procedures Manual* for a Group Three offense his termination is affirmed. Stigler's appeal is dismissed, with prejudice.

SO ORDERED, THIS THE 12 DAY OF JUNE, 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:

A handwritten signature in black ink, appearing to read "Michael N. Watts", is written over a horizontal line. The signature is cursive and somewhat stylized.

MICHAEL N. WATTS
Presiding Hearing Officer