

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

PETER T. CLINTON

FILED

APPELLANT

VS.

OCT 13 2015

DOCKET NO. 14-032

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY

EMPLOYEE APPEALS BOARD

RESPONDENT

ORDER

This tribunal entered Orders on February 4, 2015, and June 8, 2015. Subsequent to the entry of those Orders, the record was reopened to allow Peter Clinton to question Colonel Donnell Berry and Creede Mansell about their knowledge of the origination of Exhibit 20.

A hearing was held on September 9, 2015. At the September 9, 2015, hearing, Mr. Clinton questioned Colonel Berry and Officer Mansell concerning the origination of Exhibit 20. Both Colonel Berry and Officer Mansell testified that Exhibit 20 did not originate from the Mississippi Department of Public Safety (hereafter "MDPS"). Their testimony was that Exhibit 20 originated from Centrus Personnel Solutions. Following Colonel Berry and Officer Mansell's testimony, counsel for the MDPS stipulated the Exhibit 20 did not originate from the MDPS.

At the conclusion of the September 9, 2015, hearing, the undersigned hearing officer, over Mr. Clinton's objection, ordered the Mississippi Employee Appeals Board Administrative Staff contact Centrus Personnel Solutions and have it verify Mr. Clinton's 2013 Captain's Enforcement test score. On September 15, 2015, the Mississippi Employee Appeals Board received from Centrus Personnel Solutions confirmation that its records establish that Mr. Clinton's 2013 Captain's Enforcement test score was 85.23.

Upon receipt of Centrus Personnel Solutions' September 15, 2015, documents, this tribunal admitted it into evidence as Exhibit 28 on September 16, 2015. For the record, Mr. Clinton's

objection during the hearing of September 9, 2015, applies to the introduction into evidence of Exhibit 28 on September 9, 2015. The record was closed on September 16, 2015. Now that the record is closed, the final Order is issued in this case.

I.

Peter Clinton's Alleged Discrimination Claim

On July 23, 2014, Mr. 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"). Mr. 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 Mr. Clinton's appeal are dismissed. The MEAB can provide Mr. 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 Mr. Clinton not being promoted, or if Mr. Clinton established he should have been promoted absent discriminatory reasons.

Although Mr. Clinton's complaints of sex and race discrimination are predicated on a broad number of alleged facts, Mr. 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 Mr. Clinton's view was not qualified to hold the position of MBI Lieutenant.

Smith tested for MHP Captain Enforcement in April 2013. Mr. 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. Mr. Clinton was ranked number eleven (11) on the list with a reported score of 85.23.¹

Mr. 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 Mr. Clinton and the other seven (7) officers identified on the MBI Lieutenant promotion list. Mr. 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 Mr. Clinton argues that the MHP Captain Enforcement List was not

¹Questions arose during Mr. Clinton's appeal concerning his correct score on the Captain Enforcement test. For reasons set forth *infra*, Mr. 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 Mr. Clinton's claims of discrimination.

Mr. 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 Mr. 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 Mr. 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, Mr. 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 Mr. Clinton establish each of the four requirements of a prima facie discrimination case?

The answer is “no.”

Mr. Clinton, a black male, was within a protected class. However, Mr. 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, Mr. Clinton was not “rejected” for a MBI Captain position nor was a person outside of Mr. Clinton’s protected class – black or male – selected instead of Mr. Clinton and promoted to Captain MBI. For these reasons, Mr. Clinton cannot establish all of the four requirements of prima facie discrimination.

Even if Mr. 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 Mr. Clinton’s failure to be promoted in 2013 to Captain MBI. At the time Mr. 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 Mr. 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 Mr. Clinton contends that the PIN for the MBI Captain position was not abolished prior to 2013 as contended by the MDPS, Mr. 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, Mr. 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 Mr. 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, Mr. 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. Mr. Clinton could have subpoenaed records from the Mississippi State Personnel Board to disprove that the MBI Captain position was not eliminated. However, Mr. Clinton did not do so, or subpoena any witness to support his

contention that the MBI Captain position was not eliminated. Even if Mr. 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 Mr. 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 Mr. 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, Mr. 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 Mr. Clinton. Accordingly, this tribunal finds in favor of the MDPS on Mr. Clinton's claim of sex and race discrimination. Mr. Clinton's appeal on those claims is dismissed, with prejudice.

II.

Whether Peter Clinton Scored Higher than Walter Duncan on the Captain's Enforcement Test

In this tribunal's February 4, 2015, Order, it held that Mr. Clinton scored higher than Walter Duncan on the Captain's Enforcement Test. The reason for this tribunal's determination in its February 4, 2015, Order that Mr. Clinton scored higher than Mr. Duncan on the Captain's Enforcement Test was based on Exhibit 20 in the record. Exhibit 20 is a string of emails between Mr. Clinton and counsel for the MDPS. In that email, the MDPS represented that an attached document, established that Mr. Clinton's Captain's Enforcement Test score was 87.5.

The record also reflects that Mr. Duncan's Captain's Enforcement score was 86.32. Therefore, when Mr. Clinton's 87.5 score as reflected in Exhibit 20 was compared to Mr. Duncan's score of 86.32, Mr. Clinton's score was higher than Mr. Duncan's.

Subsequent to that February 4, 2015, Order finding that Mr. Clinton's score was higher than Mr. Duncan's, this tribunal reopened the record to obtain additional evidence concerning whether or not Mr. Clinton's Captain's Enforcement Test score was higher than Mr. Duncan's. This tribunal has authority to reopen the record. *See, Herring Gas Company v. Mississippi Employment Security Commission*, 944 So. 2d 943 (2006). Further, as reflected in Chapter 10, paragraph 18.A. of the

Mississippi State Personnel Board Policy and Procedures Manual, effective 7/1/2014, states:

18.A. Conduct of Hearing

The purpose of the hearing is to ascertain the truth. (Emphasis added).

See also, Parker v. Benoist, 160 So.3d 198 (Miss. 2015), where the Mississippi Supreme Court held “courts exist to ascertain the truth and to apply it to a given situation.” *Parker* at ¶11.

On May 15, 2015, Dr. Brian Bellenger testified via video conference. Dr. Bellenger is employed by Centrus Personnel Solutions. Centrus Personnel Solutions is the official testing company for the MDPS. Centrus Personnel Solutions’ test scores are utilized by MDPS in promoting its officers. It was the testimony of Dr. Bellenger that Mr. Clinton scored 85.23 on the Captain’s Enforcement Test and Mr. Duncan scored 86.32. Further, Dr. Bellenger testified that Centrus Personnel Solutions was the sole company that provided testing procedures for the MDPS and that the only test results it had ever computed concerning the Captain’s Enforcement Test of either Mr. Clinton and Mr. Duncan were the ones set forth above – Mr. Clinton’s score was 85.23. Duncan’s score was 86.32.

On June 8, 2015, this tribunal, after receiving the testimony of Dr. Bellenger and Centrus Personnel Solutions on May 15, 2015, reversed part of its February 4, 2015, Order holding that Peter Clinton scored higher than Walter Duncan and ruled that Walter Duncan scored higher than Mr. Clinton. Specifically, in the June 8, 2015, Order, this tribunal held as follows:

Based on all the evidence, this tribunal finds as a fact that Mr. Clinton’s Captain’s Enforcement Test score was 85.23 and Mr. Duncan’s score was 86.32 as reflected on Exhibit 27. Exhibit 27 lists in sequential order from highest to lowest the Captain’s Enforcement Test scores of all MDPS employees who took the Captain’s Enforcement Test during 2013. Having found that Exhibit 20 was not

generated by Centrus Personnel Solutions and having further found that Centrus Personnel Solutions' scoring of the Captain's Enforcement Test established that Walter Duncan scored higher than Peter Clinton, this tribunal finds that Peter Clinton did not score higher on the Captain's Enforcement Test than Walter Duncan and that the MDPS' promotion of Duncan over Mr. Clinton was appropriate. Accordingly, this tribunal's February 4, 2015, Order finding that Peter Clinton scored higher than Walter Duncan on the Captain's Enforcement score is withdrawn and held for naught. Judgment is entered for the MDPS on all of Mr. Clinton's claims as set forth in his Notice of Appeal dated July 23, 2014. Mr. Clinton's appeal is dismissed, with prejudice.

Subsequent to the entry of the June 8, 2015, Order, Mr. Clinton filed a Motion requesting that the record be reopened to allow him the opportunity to question Colonel Donnell Berry and Officer Creede Mansell concerning the origin of Exhibit 20. Mr. Clinton's motion was granted. For a detailed discussion of Mr. Clinton's Motion and this tribunal's ruling concerning his Motion, *see* the Order dated July 16, 2015.

On September 9, 2015, Colonel Berry and Mr. Mansell testified that Exhibit 20 did not originate with the MDPS. Counsel for MDPS stipulated that Exhibit 20 did not originate with MDPS. Based on these facts, the only reasonable conclusion that can be reached is that Exhibit 20 originated with Centrus Personnel Solutions even though Dr. Bellenger testified on May 15, 2015, he did not know the origin of Exhibit 20 and did not believe it was a Centrus Personnel Solutions document.

However, the issues are not where Exhibit 20 originated, but what was Peter Clinton's score on his 2013 Captain's Enforcement Test, and did Peter Clinton score higher than Walter Duncan on the 2013 Captain's Enforcement Test. This tribunal, having considered all the facts developed at the hearings on December 2, 2014, May 15, 2015, and September 9, 2015, and having reviewed all

documents in the record and having drawn certain inferences from the testimony of the witnesses and the documents, finds that Peter Clinton scored 85.23 on the 2013 Captain's Enforcement Test and Walter Duncan scored 86.32. When rounded to the next whole number, Peter Clinton's score for the 2013 Captain's Enforcement Test was 85.25 and Walter Duncan's 2013 Captain's Enforcement Test score was 86.50.

The fact that Exhibit 20 originated from Centrus Personnel Solutions does not prove that Peter Clinton's score for the 2013 Captain's Enforcement Test was a score of 87.5 as indicated on Exhibit 20. This is so because Exhibit 20 does not identify, in any way, what test Exhibit 20 applies to. There is no proof in the record that Exhibit 20 applies to the 2013 Captain's Enforcement Test, other than MDPS' counsel's admittedly mistaken comment in an email to Mr. Clinton dated October 3, 2014, at 1:50 p.m.³ MDPS' counsel, subsequent to his October 3, 2014, email to Mr. Clinton, stated on the record that he made a mistake in stating that Exhibit 20 pertained to the 2013 Captain's Enforcement Test score. While a stipulation is evidence, statements made by counsel are not evidence. MDPS has not stipulated that Exhibit 20 was Mr. Clinton's 2013 Captain Enforcement Test score and MDPS' attorney's statement concerning Exhibit 20 does not obviate the other evidence in the record.

Centrus Personnel Solutions, through Brian Bellenger, in testimony on May 15, 2015, and in submission of Exhibit 28 on September 9, 2015, stated that Mr. Clinton's 2013 Captain's Enforcement Test score was 85.23 and that Walter Duncan's Captain's Enforcement Test score was 86.32. Dr. Bellenger, notwithstanding his testimony about the origin of Exhibit 20, has not

³This email is not numbered as an exhibit, but is in the record. It was submitted by MDPS in response to an Order issued by this hearing officer directing MDPS to provide Mr. Clinton documents concerning Mr. Clinton's test score.

waivered in his testimony that Mr. Clinton's 2013 Captain's Enforcement Test score was 85.23. Dr. Bellenger testified to that fact on May 15, 2015, and reconfirmed that Mr. Clinton's 2013 Captain's Enforcement Test score was 85.23 when he responded to the Mississippi Employee Appeals Board's inquiry on September 16, 2015. Specifically, on May 15, 2015, Dr. Bellenger testified he "went back through every document [before his May 15, 2015, testimony] to determine it [scores] was accurate.

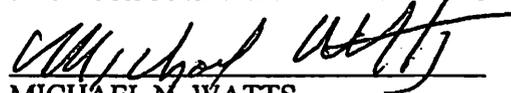
It is the finding of this tribunal that the score of 87.5 on Exhibit 20 is Mr. Clinton's score for the MBI Lieutenant's position. *See*, the document included within Exhibit 28 titled "MHP MBI Lieutenant." That document shows Mr. Clinton's MBI Lieutenant score was 87.46. When rounded to the next whole number, Mr. Clinton's MBI Lieutenant score is 87.5 – as reflected on Exhibit 20.

In summary, Mr. Clinton had the burden of proof to prove that he scored higher than Walter Duncan on the 2013 Captain's Enforcement Test. For the reasons set forth in this Order, this tribunal finds that Peter Clinton scored 85.23 on the 2013 Captain's Enforcement Test and was rounded to 85.25. Walter Duncan scored 86.32 on the 2013 Captain's Enforcement Test and was rounded to 86.50. Accordingly, Judgment is entered for the Mississippi Department of Public Safety on Mr. Clinton's appeal and Mr. Clinton's appeal is dismissed, with prejudice.

SO ORDERED, THIS THE 13 DAY OF OCTOBER, 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS
Presiding Hearing Officer