

FULL BOARD OF THE MISSISSIPPI EMPLOYEE APPEALS BOARD

CAROLYN MYLES

FILED

APPELLANT

VS.

SEP 23 2015

NO. 15-007

MISSISSIPPI DEVELOPMENT AUTHORITY

EMPLOYEE APPEALS BOARD

APPELLEE

ORDER OF MEAB, EN BANC

Mississippi Development Authority (MDA), appealed the Order entered by Chief Hearing Officer Ingrid D. Williams on July 13, 2015. The Mississippi Employee Appeals Board, *en banc*, has reviewed and considered the appeal of the MDA filed in this matter. The Mississippi Employee Appeals Board, *en banc*, affirms in part and reverses in part, Chief Hearing Officer Ingrid D. Williams' July 13, 2015, Order.

FACTS

Myles is employed as an Accountant Auditor III with MDA. On February 4, 2015, Myles filed a grievance with MDA alleging that she was being treated unfairly in her position as Accountant Auditor III. In the first level meeting on the grievance, Myles alleged age discrimination, race discrimination and a hostile work environment. By letter dated February 19, 2015, but actually given to Myles on February 24, 2015, in response to the grievance process, Myles was reprimanded for insubordination. On February 24, 2015, Myles filed a grievance alleging that the reprimand constituted retaliation for filing the February 4, 2015, grievance. On March 11, 2015, Myles filed an appeal of both grievances with the MEAB attaching copies of both grievances. On March 13, 2015, Myles received a final response from the MDA to her February 24, 2015 grievance. The MEAB treated Myles' appeal as an appeal of both grievances. In her appeal, Myles alleged retaliation for filing a grievance, age discrimination, and hostile work environment.

Chief Hearing Officer Williams, following a hearing, found as follows: Myles was 53 years of age. She has been employed with MDA for 8 years in accounts receivable. She has never experienced any documented employment issues until Brian Daniel (Daniel) became her immediate supervisor in November 2014.

Co-employee Brandi Smith, 30 years old, started employment with the MDA in 2010 and has risen to become an Accountant Auditor II. Smith was acting as Daniel's administrative assistant. Tension developed between Myles and Smith. Daniel was aware of the tension and believes that Myles is not "as fast" as Smith in learning new processes for work.

Co-employee Lynette Hearn is a 32 year old Accounting Auditor 1 at MDA. Hearn began working on December 4, 2014. Myles was assigned to train Hearn. Hearn reported to Daniel that Myles' "training method did not work for me."

MAGIC, designed to replace the State's previous account system, went live in July of 2014. There were problems transitioning from the old system to MAGIC. Hearn did not have access to MAGIC until January of 2015. Because of the difficulty with the transition to MAGIC from mid-December through the holidays, payments could not be processed because of problems. This limited Myles' interaction with Hearn.

In January 2015, payment processing issues with MAGIC persisted. Daniels expressed frustration about rate at which payments were being processed. Myles perceived these statements were meant for her, meaning she was slow, and she was instructed to deliver unpaid invoices, which she did to Daniels. Myles left work upset by the implication she was working in an untimely manner.

In January 2015, there was also a problem with the "S&D" payment in MAGIC for which Myles was responsible. DFA offered training on the problem. Daniel sent Smith "for no

particular reason” over Myles. This prompted Myles to send an email to Jay McCarthy, Daniel’s supervisor. Human Resources was copied on the email, and Myles stated “Brian [Daniel] has displayed double standards, favoritism towards a certain employee and does not value my job expertise...I have had to miss work due to the extreme emotional distress.” Later that day, Daniel called a meeting with Myles, Smith and Hearn. Daniel explained changes were to occur. As a result, Myles would no longer be training Hearn, but Smith would train her. Daniel contends that Myles was disruptive and disrespectful during the meeting, which led to an end of the meeting before Daniel could fully communicate the changes. Myles contends she was upset about Daniel changing her job duties, which explained her behavior. Daniel’s reorganization of work duties reassigned order processing to Hearn and Hearn’s training over to Smith, with no other changes being made. Myles was never consulted about these changes beforehand.

On February 3, 2015, Myles wrote another email to HR complaining about the changes Daniel made, ultimately contending that Daniel was moving her out of the way for a younger employee. On February 4, 2015, Daniel’s email to Myles provides that he attempted to discuss the reassignment of duties but that due to Myles’ insubordination and disrespect, he could not explain. He further instructed Myles all further issues or questions would be delivered to him. On February 5, 2015, Myles responded that she does work with her employees in a proper manner, and that she was neither disrespectful nor insubordinate -- that she was asking about the change in job duties. Daniel forwarded this email to the HR Director expressing in his message the need to discuss this “ASAP.” Daniel further communicates, “I do not feel the agency can let this go as is. She needs to be disciplined as per the State Employee handbook.”

Myles filed her grievance alleging age discrimination, race discrimination and hostile work environment on February 4, 2015. On February 19, 2015, in response to Myles’ grievance,

she was provided a letter in which she was cited for a Group Two, No. 1 offense of insubordination. This offense was filed based on statements of Smith and Hearn regarding Myles' behavior during the February 2, 2015 meeting. No actual investigation into whether Daniel discriminated against Myles was specifically investigated. Instead, HR investigated only whether there was a history of discrimination in the Accounting Department.

OPINION OF THE MEAB, *EN BANC*

The MEAB, *en banc*, reviews the Hearing Officer's Order in accordance with MEAB Rule 25, which states that the MEAB may review the Hearing Officer's Order to determine "whether the: 1. Findings are in error; 2. Decision is contrary to the law; or, 3. Procedural decisions were in error." The MEAB, *en banc*, having reviewed the Hearing Officer's Order, and the evidence and testimony presented at the hearing, concludes that the Hearing Officer's findings were in error in part, and were correct in part. For this reason, the MEAB reverses the Hearing Officer's opinion that Myles was discriminated against on the basis of age and was subject to a hostile work environment. The MEAB affirms that Myles was improperly reprimanded and further affirms that the MDA should remove the reprimand from Myles' personnel file.

The ADEA makes it "unlawful for an employer to... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To prevail on an ADEA claim, a plaintiff must establish, by direct or circumstantial evidence, "that age was the 'but-for' cause of the employer's adverse action." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009). "Where, as here, a plaintiff provides no direct evidence of age discrimination, we apply the familiar McDonnell Douglas burden-shifting framework." *Holliday v. Commonwealth Brands, Inc.*, 483 F.Appx. 917, 921 (5th Cir. 2012) (citations omitted).

Under that framework, Myles must first establish a prima facie case by showing: (1) she was demoted or not promoted; (2) she was qualified for the position at issue; (3) she was within the protected class at the time of the demotion or non-promotion; and (4) she was either i) not selected in favor of someone outside the protected class, ii) not selected in favor of someone younger, or iii) otherwise not selected or demoted because of her age. *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378 (5th Cir. 2010). If Myles establishes a prima facie case, the burden shifts to the MDA to articulate a legitimate, non-discriminatory reason for demoting or not promoting her. *See, Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010). Once the MDA meets its burden of production, Myles must "rebut the employer's purported explanation, to show that the reason given is merely pre-textual." *Id.* She may do so "either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence." *Jackson*, 602 F.3d at 378-79 (citation omitted). Ultimately, Myles must show that age was the "but for" cause of the adverse-employment actions. *Gross*, 557 U.S. at 173-78.

The evidence demonstrates that there was no age discrimination. Myles has not lost her job. Her salary was not reduced. Myles' job duties were altered and training was offered to a co-employee younger than Myles. However, there are insufficient facts and evidence in the record for Myles to meet her burden of proof that Daniel's actions constitute age discrimination as opposed to other reasons. Myles' interpretation of Daniel's insinuation that she worked slowly simply fails to meet the burden of proof requirements for age discrimination. The employment action taken by Daniel simply does not demonstrate a demotion, a non-promotion or an adverse-employment action because of age.

The record raises questions concerning Daniel's supervisory manner. Testimony at the evidentiary hearing from MDA employees, other than Myles, established that Daniel had personality conflicts with MDA employees regardless of their age or race and that Daniel's supervising style conflicted with various employees of different ages and races. Based on all the evidence, the MEAB, *en banc*, finds that Daniel's management style and personality conflicted with Myles, but that Daniel did not change Myles' job responsibilities or take any other adverse employment action against Myles because of her age or race.

There are insufficient facts in the record to support Myles' contention she was working in a hostile environment. According to the EEOC's definition of a hostile environment, harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive. While Myles may have considered her work environment and conflict with Daniel uncomfortable, the objective and reasonable person would not find that the conduct as so severe or pervasive as to create a hostile environment.

Despite Myles' failure to establish a claim under either the ADEA or establish a hostile work environment existed, the MEAB, *en banc*, finds MDA retaliated against Myles. MDA's argument that Myles was not reprimanded is not credible. Rule 10.2 (C) of the Mississippi State Personnel Board Policy and Procedures Manual, provides "[t]he following issues are grievable under the State Service grievance procedure: 'acts of reprisal against an employee for using a grievance procedure.'" The MDA's February 19, 2015, letter from MDA Executive Director Brent Christensen, citing Myles for insubordination and cautioning Myles about possible

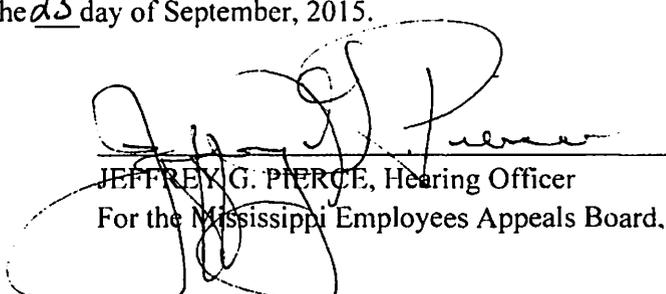
dismissal, is a reprimand, and under the facts of this case, the MEAB finds such reprimand was retaliatory. This is so for the following reasons.

The February 19, 2015, letter was placed in Myles' personnel file. The date Myles received the reprimand was after she had complained to upper management about Daniel. Further, the wording of Director Christensen's February 19, 2015, letter to Myles belies MDA's position it was not a reprimand. For example, Director Christensen's February 19, 2015, letter to Myles stated: "It has been found that your actions are in direct violation of MS State Personnel Board State Employee Handbook, and are considered a Group Two, Item 1 Offense." (Emphasis added). Myles was also informed that an accumulation of two (2) Group Two written reprimands in one year could result in termination. These statements by Director Christensen, when viewed objectively, confirm the February 19, 2015, letter was a reprimand. Therefore, the MEAB, *en banc*, affirms Chief Hearing Officer Ingrid D. Williams' Order concerning the written reprimand, and orders the removal of the reprimand from Myles' personnel file.

SUMMARY

For the foregoing reasons Chief Hearing Officer Ingrid D. Williams' July 13, 2015, Order is reversed in part, and affirmed in part, as directed in this Order.

SO ORDERED, this the 23rd day of September, 2015.



JEFFREY G. PIERCE, Hearing Officer
For the Mississippi Employees Appeals Board, *en banc*