



# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE  
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CITY CIVIL SERVICE COMMISSION

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MAYOR

Tuesday, December 8, 2020

Ms. Gnai Marchand

Re: **Gnai Marchand VS.  
Recreation Department  
Docket Number: 8870**

Dear Ms. Marchand:

Attached is the decision of the City Civil Service Commission in the matter of your appeal.

This is to notify you that, in accordance with the rules of the Court of Appeal, Fourth Circuit, State of Louisiana, the decision for the above captioned matter is this date - 12/8/2020 - filed in the Office of the Civil Service Commission at 1340 Poydras St. Suite 900, Orleans Tower, New Orleans, Louisiana.

If you choose to appeal this decision, such appeal must conform to the deadlines established by the Commission's Rules and Article X, Sec.12(B) of the Louisiana Constitution. Further, any such appeal shall be taken in accordance with Article 2121 et. seq. of the Louisiana Code of Civil Procedure.

For the Commission,

A handwritten signature in blue ink that reads "Doddie K. Smith".

Doddie K. Smith  
Chief, Management Services Division

cc: Larry Barabino  
Eraka Williams Delarge  
Brendan M. Greene  
file

**CIVIL SERVICE COMMISSION  
CITY OF NEW ORLEANS**

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**G'NAI MARCHAND,  
Appellant**

**vs.**

**DOCKET NO. 8870**

**NEW ORLEANS RECREATION  
DEVELOPMENT COMMISSION,  
Appointing Authority**

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**I. SUMMARY OF THE DECISION**

At all times relevant to the instant appeal, the New Orleans Recreation Development Commission (“Appointing Authority”) employed G’nai Marchand (“Appellant”) as a Grounds Patrol Officer on probationary status. The Appointing Authority terminated Appellant’s employment effective on November 30, 2018. (Exh. HE-1). Appellant’s probationary status would have ended on December 18, 2019. (Exh. HE-2). Because the Appellant was a probationary employee at the time of her termination, she has no appeal rights pursuant to Article X, §8(A) of the Louisiana Constitution or Rule II, § 4.1 of the Civil Service Rules. However, the Appellant alleges that she has an appeal right under Article X, §8(B) of the Louisiana Constitution and Rule II, Section 10.1 – the provision of the Civil Service Rules that prohibits retaliation against employees for engaging in protected activity. In this case, the Appellant contends that she was terminated because she engaged in protected activity when she complained of harassment and

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gender discrimination. The Appellant also alleges discrimination under Rule II, § 4.5 – the provision of the Civil Service Rules that prohibits discrimination based upon gender. She contends that she was treated differently from similarly situated male employees, that she was terminated for pretextual reasons because of her gender, and that she was replaced by a male employee. In contrast, the Appointing Authority contends that the Appellant was terminated for misconduct.

After reviewing applicable Louisiana law and the entire record in this matter, including the transcripts and exhibits from the May 22, 2019 Hearing and the January 30, 2020 advisory Report from the Hearing Examiner, the Commission DENIES the Appellant’s appeal for the reasons set forth below.

## **II. FACTUAL BACKGROUND**

The Appellant was employed as a Grounds Control Officer assigned to the Laffite Greenway. (Tr. at 174). The Appellant had a brief sexual relationship with her supervisor Tyrone Vincent that culminated in an altercation with Vincent’s spouse on September 12, 2018, while Appellant was on duty. (Tr. at 185; Exh. NORD-11). In the narrative attached to her appeal form, Appellant stated that “[a]fter Tyrone and I ended our romantic relationship he and his wife started to harass me on and off the clock.” (Exh. HE-1). Specifically, Vincent’s wife learned of the affair, came to the workplace, and attacked the Appellant. (Tr. at 102-03). According to Appellant, Vincent drove his spouse to the workplace and pointed Appellant out to his spouse. (Tr. at 192-93). Shortly afterward, the Appellant’s spouse had a confrontation with Vincent. (Tr. at 185 – 190; NORDC Exh. 8).

Appellant called Matt Patin, the Chief of Operations for the Department of Homeland Security, from the bathroom of the Sojourner Truth building adjacent to the Laffite Greenway,

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wherein Appellant had locked herself to avoid Vincent's spouse. (Tr. at 108). Patin went to the scene to assist Appellant. (Tr. at 108). After the incident, Patin conducted a formal interview of Appellant on September 15, 2018. (Exh. NORD-11). Appellant supplied a written statement describing her consensual relationship with Vincent, the termination of the relationship, and the alleged harassment she subsequently experienced from Vincent and his spouse. (Exh. NORD-11). According to Patin, the Appellant informed him that she was uncomfortable working with Vincent because of what had happened and how he was treating her as a consequence. (Tr. at 107). Patin testified that he informed Debra Calderon, the Human Resources Manager, and Maya Wyche, the Director of the Department, of the Appellant's complaint and forwarded Appellant's written statement to Wyche. (Tr. at 116). Patin further stated that Wyche informed him that she intended to demote Vincent and move him away from the Lafitte Greenway. (Tr. at 122-23). However, that never occurred. (Tr. at 96-97; NORD Exh. 9). Appellant later complained to Patin that Vincent was "still coming around." (Tr. at 97, 121). Patin further testified that the Appellant's work was satisfactory and that he recommended to the Appointing Authority that she receive permanent status. (Tr. at 97). He also confirmed that the Appellant was replaced by a male employee after her termination effective November 30, 2018. (Tr. at 97 - 98).

On January 22, 2018, the Appellant was involved in a minor vehicular accident while operating a City vehicle. (Tr. at 178). Appellant backed into a motorcycle. (Tr. at 178). Her supervisor, Tyrone Vincent, was a passenger in the vehicle. Vincent testified that he determined that, because of the minor nature of the accident, no further reporting was necessary.<sup>1</sup>(Tr. at 179). On May 29, 2018, the Appellant was involved in a second traffic accident. She testified that she was struck from behind while operating a City vehicle. She immediately notified her supervisor

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<sup>1</sup> This occurred prior to the time that the Appellant and Mr. Vincent were involved.

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and was taken for a drug screen, which was negative. (Tr. at 179 -180). On September 11, 2018, the Appellant was involved in a third minor vehicular accident while operating a City vehicle. She reported the accident to her immediate supervisor, Thaddeus Azore, (Tr. at 126) who testified that he determined that the accident was insignificant. Azore decided that, because of the minor nature of the accident, no further reporting was necessary. The Appellant and Azore tried to patch-up the scraped paint and were disciplined for their efforts. (Tr. at 56–57, 200–201). According to NORD policy, Appellant had an independent duty to report the accident to NORD. (Tr. at 126-27). Because Appellant served in a safety-sensitive position, Appellant was also required to undergo a drug test following the accident. (Tr. at 128-29).

Liana Elliot, the Interim Director of NORD from October 17, 2018 until December of 2018, signed the November 26, 2018 termination letter which provided the following reason for the termination: “As a pattern of failing to report incidents and vehicular accidents, you have failed your probationary period. This letter is to inform you that your employment with the City of New Orleans has been terminated effective November 30, 2018.” (H.E. Exh. 1). While in this role, Elliot performed ministerial tasks that included personnel decisions. For those decisions, she relied upon recommendations from her staff due to her limited knowledge of the operation and the temporary nature of her appointment. (Tr. at 205). Specifically, Elliot relied upon the advice of Shawn Wyatt, the Recreation Center’s Director. She stated that Wyatt recommended not retaining the Appellant because she failed to report vehicular accidents during her probationary period. Elliot accepted his recommendation without further inquiry and signed the termination letter. (Tr. at 211–215).

Wyatt was not called to testify. However, an email from him to Debra Calderon, the Human Resources Manager, dated November 20, 2018, was made part of the record. In the email,

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Wyatt states that “after conferring with Mr. Patin from Homeland, I recommend that we do not offer Ms. Marchand a permanent position with NORD due to the disciplinary pattern of failing to report 2 incidents, serving a suspension for failure to report and being involved in 3 traffic accidents in City vehicle during the probationary period.” (NORD Exh. 11).

### III. LEGAL STANDARD

The Commission applies the same standard to “whistleblower” action under Rule II, § 10.1 as to other discrimination appeals. *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12). In disciplinary actions where the classified employee alleges discrimination, the burden of proof on appeal, as to the factual basis for the discrimination, is on the employee. La. Const. art. X, § 8(B); *East v. Office of Inspector Gen.*, 2011-0572 (La. App. 4 Cir. 2/29/12), 87 So. 3d 925, 927 (quoting *Goins v. Dep't of Police*, 570 So.2d 93, 94 (La. App. 4th Cir.1990)). *See also* Civil Service Rule II, §§ 4.4, 4.8. In 1983, the Fourth Circuit Court of Appeal held the Commission erred by relying on the Title VII *McDonnell-Douglass* burden-shifting framework for discrimination claims under Article X, Section 8(B) of the Louisiana Constitution. *Mixon v. New Orleans Police Dep't*, 430 So. 2d 210, 212 (La. App. 4 Cir. 1983) (“we conclude the Commission erred in applying the federal burden of proof standard instead of the burden specified in LSA–Const. Art. 10 § 8(B).”).

### IV. ANALYSIS

#### A. Employee Protected Activity

Civil Service Rule II, Section 10.1 provides:

No employee shall be subjected to discipline or discriminatory treatment by an appointing authority because he or she gives information, testimony or evidence in a prudent manner to appropriate authorities concerning conduct prohibited by law or regulation which he or she reasonably believes to have been engaged in by any

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person(s). If the employee incurs such treatment despite this admonition, he or she shall have a right of appeal to this Commission.

Based upon the record before us, the Commission finds that the Appellant established that she engaged in protected activity under Civil Service Rule II, Section 10.1, when she complained to Patin about her difficult working relationship with her immediate supervisor in the aftermath of their failed consensual sexual relationship. Appellant reasonably believed Vincent's treatment of her following the end of the consensual relationship constituted harassment. The federal Fifth Circuit Court of Appeals has recognized that a hostile work environment may be created by a supervisor after a failed consensual relationship with a subordinate when the hostile work environment is based on the subordinate's refusal to continue the consensual relationship. *Green v. Administrators of Tulane Educ. Fund*, 284 F.3d 642, 655 (5th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Apr. 26, 2002) (overruling recognized on other grounds). "In a consensual relationship with a supervisor, courts have found that a plaintiff can satisfy the 'unwelcome harassment' element of the *quid pro quo* inquiry where following the termination of the consensual relationship the supervisor engages in conduct that is unwelcome." *Ruggles v. Greco*, No. CIV.A. 14-1021, 2015 WL 1538803, at \*9 (E.D. La. Apr. 7, 2015) (citing *Green, supra*).

#### **B. Termination Because of Failure to Report Accidents**

The Commission finds that Appellant has failed to meet her burden of showing causation between the Appellant's protected activity and her termination. Although the decision to terminate her employment (November 30, 2108) was made close in time to Appellant's complaint of harassment (September 12, 2018), the decision was also close in time to the third accident (September 11, 2018), which Appellant failed to report. Of particular concern to the Commission is Appellant's and her supervisor's actions to cover up the third accident, including cleaning the

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vehicle and using white-out to attempt to repair the damage, all of which were recorded by cameras on-site and entered into evidence. (Tr. at 131-33). The Commission acknowledges that Patin, to whom Appellant reported the alleged harassment, testified that he recommended that Appellant obtain permanent status and that the recommendation from Wyatt to the ultimate decision maker stated that Patin was consulted. (NORD Exh. 11). Appellant offered only her own testimony that Wyatt had a close relationship with the harasser. The Commission finds this evidence to be insufficient for Appellant to carry her burden of showing the decision was motivated by a retaliatory motive. Therefore, the Commission finds that Appellant has failed to prove causation between her protected activity and her termination.

### **C. Gender Discrimination**

The Commission also finds that Appellant failed to show she was treated differently than similarly situated male employees who failed to report an accident. The Commission finds that Appellant failed to carry her burden of proving that her termination was based on gender discrimination.

## **V. CONCLUSION**

Based upon the foregoing, the Appellant's appeal is DENIED. The Appellant engaged in protected activity, which she reported to the Appointing Authority. However, Appellant has failed to meet her burden of showing that her termination was caused by discriminatory animus by the Appointing Authority following her complaint of harassment. Likewise, Appellant has failed to carry her burden of showing that her termination was motivated by gender discrimination.

Judgment rendered this 8<sup>th</sup> day of December, 2020.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION



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WRITER:

Mark C. Surprenant  
Mark C. Surprenant (Nov 17, 2020 18:33 CST)

MARK SURPRENANT, COMMISSIONER

Nov 17, 2020

DATE

CONCUR:

J H Korn  
J H Korn (Dec 7, 2020 22:07 CST)

JOHN KORN, COMMISSIONER

Dec 7, 2020

DATE

DISSENT:

I concur with the hearing examiner's recommendation<sup>2</sup> to grant this appeal. Specifically, I find that the temporal proximity between Ms. Marchand's report of sexual harassment and her termination (September 12 to November 30) in combination with Patin's testimony that he recommended Ms. Marchand for permanent status<sup>3</sup> (Tr. at 163) suffices to show causation.

Further, NORD's reason for terminating Ms. Marchand's employment – that she failed to report accidents – is pretextual. First, Ms. Marchand failed to report only one accident, which occurred on September 11, 2018. Second, Marchand complied with her duty to inform her supervisor of the accident. Third, NORD elected not to terminate Ms. Marchand's employment immediately after NORD discovered the accident.

Ms. Marchand testified that she received a copy of the departmental handbook (Tr. at 234), which provides as follows:

**REPORTING ACCIDENTS OR INJURIES**

All on-the-job injuries and accidents, regardless of their severity, must be reported immediately to the employee's supervisor. Supervisors should determine the circumstances of the claimed injury (or accident) and submit a First Report of

<sup>2</sup> Because the hearing examiner, Brendan Greene, had left the employ of the Commission, Jay Ginsberg, who also serves as a hearing examiner for the Commission, drafted the hearing examiner's report.

<sup>3</sup> Ms. Marchand testified that the harasser, who managed the Treme Center, had a "close relationship" with Shawn Wyatt, who supervised all NORD rec centers. (Tr. at 194, 211). The decisionmaker relied on Wyatt's recommendation to terminate Ms. Marchand's employment, and in this recommendation, Wyatt erroneously stated that Patin was consulted. (NORD Exh. 11).

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Injury/Employer's Report of Occupational Injury or Disease form to the HR manager in order to protect the employee's rights to workers compensation. Each supervisor has been provided with a First Report of Injury Form that can be completed on the computer. NORDC expects the "fillable" form to be used unless access to the form is unavailable or would delay the accident/injury report in any way.

(NORD Exh. 2 at 34).

The appellant satisfied these requirements by notifying her supervisors of accidents, including notifying Mr. Azore of the September 11, 2018, accident. Mr. Azore failed to comply with a separate policy, the CAO policy memorandum (NORD Exh. 4) and failed to explain to Ms. Marchand the necessary action required under the CAO policy memorandum. While even new employees are familiar with departmental handbooks, a probationary employee might not be as familiar with CAO policy memoranda. While NORD is technically correct that Ms. Marchand violated the CAO policy memorandum, this infraction should be given less weight because of Ms. Marchand's probationary status and the failure on the part of Mr. Azore to provide appropriate guidance to Ms. Marchand and to report the September 11, 2018, accident.

  
CJ Moore (Dec 8, 2020 10:12 CST)

CLIFTON J. MOORE, VICE-CHAIRMAN

Dec 8, 2020

DATE