



CITY OF NEW ORLEANS

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CITY CIVIL SERVICE COMMISSION

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MAYOR

Thursday, July 26, 2018

LISA M. HUDSON
DIRECTOR OF PERSONNEL

Mr. Homer White

Re: **Homer White VS.**
Department of Safety & Permits
Docket Number: 8651

Dear Mr. White:

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 - 7/26/2018 - 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: Jared Munster
Renee E. Goudeau
Jay Ginsberg
file

CIVIL SERVICE COMMISSION

CITY OF NEW ORLEANS

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| HOMER WHITE vs. DEPARTMENT OF SAFETY AND PERMITS | DOCKET No.: 8651 |
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I. INTRODUCTION

Appellant, Homer White, brings the instant appeal pursuant to Article X, §8(B) of the Louisiana Constitution and this Commission’s Rule II, §4.5. The Appointing Authority, the Department of Safety and Permits for the City of New Orleans, (hereinafter the “Appointing Authority”) filed a Motion for Summary Disposition related to certain aspects of Appellant’s appeal. The Commission granted the Appointing Authority’s motion and limited the instant appeal to Appellant’s claims of racial discrimination. The Commission’s analysis will thus be limited to whether or not Appellant has established that the Appointing Authority discriminated against him based upon race.

On Tuesday, August, 2017, a referee appointed by the Commission presided over an appeal hearing during which both Parties had an opportunity to call witnesses and present evidence. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing, as well as the referee’s report. Based upon our review, we render the following judgment.

II. FACTUAL BACKGROUND

A. Department of Safety and Permits

The Department of Safety and Permits is the municipal entity in New Orleans that oversees building permits and enforces building codes and residential zoning ordinances. (Tr. at 62:22-63:5).

B. Alleged Discrimination

Employees in the classified service who allege discrimination based on political or religious beliefs, sex or race may bring an appeal before the Commission. (C.S. Rule IV, § 4.5). Any employee availing him or herself of this rule must specifically identify the following information:

- (a) The type of alleged discrimination.
- (b) The name(s) of the person(s) alleged to have committed the discriminatory act(s).
- (c) The date(s) of such act(s).
- (d) Where and in what manner such act(s) occurred.

(C.S. Rule IV, § 4.7).

In his appeal, Appellant alleged that the appointing authority discriminated against him based upon his race.¹ The alleged discriminatory act was his termination effective December 9, 2016.

The Appointing Authority hired Appellant on or about July 18, 2016 as the Chief Plans Examiner. (Tr. at 9:5-24). As part of his day-to-day responsibilities, Appellant supervised “plan reviewers.” *Id.* Prior to his employment with the Appointing Authority, Appellant served as an

¹ Appellant also alleged that the appointing authority discriminated against him on the basis of his sexual orientation. The Commission dismissed this aspect of the appeal as it is not a specifically enumerated protected class within Article X of the Louisiana Constitution.

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architect with the Louisiana State Fire Marshals where he directed the Lafayette plan review office. *Id.* at 18:20-19:1.

Appellant alleged that Zachary Smith – his immediate supervisor and Chief Building Official – called Appellant into an office on December 9, 2016 and verbally notified him that his employment with the Appointing Authority would be terminated. *Id.* at 11:7012:1. According to Appellant, the meeting with Mr. Smith lasted only a few minutes during which Mr. Smith declined to provide Appellant with a reason for his termination. *Id.* at 13:16-14:7. Following the meeting, Appellant left the Appointing Authority’s building and did not return.

Appellant asserted that there was only one occasion when Mr. Smith has discussed any issue with Appellant’s job performance. *Id.* at 15:5-13. That one instance involved a conversation Appellant had with an off-duty employee regarding an upcoming certification test. *Id.* at 15:5-13.

During the course of the appeal hearing, the hearing examiner gave Appellant an opportunity to explain why he believed his termination was discriminatory. In response, Appellant first alleged that the Appointing Authority was not a “diverse organization” and that he believed he was one of two black supervisors. *Id.* at 17:5-17. Appellant then claimed that he was not provided with the same training opportunities as other new supervisory employees. *Id.* at 17:17-19. Specifically, Appellant alleged that the Appointing Authority “went out of [its] way” to train another supervisor. Walking the other supervisor through the various operations of the Appointing Authority on a “step-by-step” basis while Appellant did not receive any training. *Id.* at 19:13-20:1. Appellant did, however, state that the other supervisor was in a different job and division within the Appointing Authority. *Id.* at 60:2-7.

Appellant contrasted the training the white supervisor received to the training he received that consisted mainly of Mr. Smith pulling him to the side and showing him administrative tasks

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related to the operation of software. *Id.* at 20:1-6. Appellant acknowledged that the other supervisor was responsible for a different area he described as “transportation and tickets.” *Id.* at 20:19-23. In fact, the other supervisor, Wesley Pfeiffer, was a taxicab administrator who did not report to Mr. Smith and had nothing to do with enforcement of building codes or ordinances. *Id.* at 79:8-19.

When pressed by the hearing examiner, Appellant stated that he did not explicitly request training but believed that his supervisor should have recognized the need to train Appellant on various proprietary systems within the Appointing Authority. *Id.* at 21:6-16. Later, on cross-examination, Appellant claimed that he did request training related to an exam. *Id.* at 44:1-8. While the Appointing Authority did not pay for the training, Appellant admitted that he did ultimately attend the training using his own funds. Appellant did, however, receive his regular rate of pay during the time he attended the training and did not have to use annual leave. *Id.* at 46:2-5.

Mr. Smith had a very different account of the training opportunities made available to Appellant. He testified that Appellant had access to regular training provided directly by the Appointing Authority on a wide range of job-related issues. *Id.* at 75:9-17. Such training was also available to Appellant’s subordinates who allegedly acquired the necessary level of expertise in the same amount of time provided to Appellant. *Id.* at 75:18-22.

Appellant also took issue with what he perceived as limited feedback from the Appointing Authority regarding alleged deficiencies in his performance. He claimed that the December 9, 2016 termination notice was the first document that identified any problems with Appellant’s performance. *Id.* at 22:5-10. Appellant also challenged the reasons for his termination provided by the Appointing Authority in a February 17, 2017 correspondence. *Id.* at 23:8-26:1.

On cross-examination, Appellant admitted that Mr. Smith had emailed him about various projects under review by the Appointing Authority for which Appellant was responsible. *Id.* at 32:11-22. In one email sent on October 7, 2016, Mr. Smith requested that Appellant complete review of a project originally assigned two weeks prior. (City Exh. 3). In several emails introduced by the Appointing Authority, Mr. Smith repeatedly requested that Appellant address outstanding project reviews. (City Exhs. 3-5). Appellant agreed that the emails show three occasions when Mr. Smith had to follow-up on requests to perform plan reviews. (Tr. at 39:5-7). In addition to emails regarding outstanding tasks, Mr. Smith sent Appellant an email on November 23, 2016 in which Mr. Smith identified additional areas of concerns with respect to Appellant's performance. (City Exh. 6). Specifically, Mr. Smith directed Appellant to make better use of his time and focus on productive interactions with staff. *Id.* On December 7, 2016 – two days before Appellant's termination – Mr. Smith sent another email to Appellant regarding another project Appellant had failed to complete. (City Exh. 7).

During his testimony, Mr. Smith stated that his concerns regarding Appellant's performance were "wide-ranging" and included; a lack of timely/efficient communication with supervisors and subordinates and inability to manage the review of plans that came through the office. (Tr. at 64:13-21). In one instance, Mr. Smith fielded a complaint from a business entity regarding the lack of feedback Appellant had provided regarding a construction project. *Id.* at 65:17-66:6. In response to this concern, Mr. Smith investigated the matter and determined that Appellant had failed to maintain timely communication with the owner of the project. *Id.* at 66:13-19. According to Mr. Smith, any lack of communication with the public (e.g., architects, project owners, taxpayers, etc.) results in chaos. *Id.* at 81:15-21. Appellant's alleged shortcomings prompted several conversations with Appellant regarding the need to constantly communicate with

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project owners/managers. Mr. Smith also expressed frustration regarding an incident during which Appellant missed a substantial portion of a work day taking an examination without first coordinating with Mr. Smith. *Id.* at 73:12-76:8.

Appellant asserted that there was a substantial backlog of projects within the Appointing Authority when he began his employment and he spent the majority of his time dealing with older cases. (Tr. at 50:15-21). He went on to state that the projects required a level of attention and detailed work that he could not accomplish in a short period of time. *Id.* at 51:10-25.

III. LEGAL STANDARD

To determine whether or not an appellant has established that he or she has been the victim of discrimination in violation of the Louisiana State Constitution and Commission Rules, the Commission has adopted the burden-shifting framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1819, 36 L.Ed.2d 668 (1973). Pursuant to *McDonnell Douglas* and its progeny, an appellant must first make a prima facie case of racial discrimination by showing that; 1) he is a member of a protected class, 2) he was qualified for the position he held, 3) suffered an adverse employment action, and 4) 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 or was replaced by someone outside of his protected class. *Vaughn v. Woodforest Bank*, 665 F.3d 632, 636 (5th Cir. 2011); *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009).

If an appellant makes such a showing, the appointing authority has an opportunity to proffer a legitimate, non-discriminatory reason for firing the appellant. In the event that an appointing authority does produce such a legitimate, non-discriminatory reason, appellant bears the final burden of establishing that the proffered reason was pretext for racial discrimination.

IV. ANALYSIS

A. Prima Facie Case of Discrimination

There is no dispute that Appellant, as an African-American, is a member of a protected classification. Further, there can be no dispute that he was qualified for his position as Chief Plans Examiner. Thirdly, Appellant's termination certainly meets the definition of an "adverse employment action." We are therefore left with the question of whether or not Appellant "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 or was replaced by someone outside of his protected class." It is Appellant's burden to establish this final element of the prima facie case.

Appellant alleged that the Appointing Authority did not provide him with the same training opportunities afforded to other supervisory employees. He noted that the Appointing Authority "cannot produce any documentation to show they trained me." The Commission notes that it is not the Appointing Authority's burden at this stage of the analysis. In order to establish this element, Appellant must do more than merely allege he was treated less favorably than his white peers. It is on Appellant to introduce some evidence that newly-employed white supervisors were provided with more training/resources than him. Appellant's challenge to the Appointing Authority to produce training records is misplaced and ill-timed. He was certainly in a position to subpoena training records maintained by the Appointing Authority, he did not.

Appellant attempted to argue that a white supervisory employee, Wesley Pfeiffer, received far more guidance, support and training than he did. The Commission notes that Mr. Pfeiffer was not a Chief Plans Examiner for the Appointing Authority. In fact, Mr. Pfeiffer was in an entirely different division than Appellant and was responsible for enforcing ordinances related to taxis as

opposed to building codes and zoning ordinances. Bearing that in mind, we do not find Mr. Pfeiffer to be “similarly situated” with Appellant with respect to training and support. Additionally, we observe that the Appointing Authority replaced Appellant with an African-American male shortly after Appellant’s termination.

Bearing the above in mind, we do not find that Appellant has established a prima facie case of racial discrimination.

B. Appointing Authority’s Proffered Reason for Adverse Job Action

Even if Appellant had been able to meet his initial burden, the Commission finds that the Appointing Authority has proffered a legitimate, non-discriminatory reason for Appellant’s termination. Pursuant to federal case law, the employer’s burden at this stage is one of “production” rather than “persuasion.” *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007). Meaning that the Appointing Authority need only **articulate** a legitimate, non-discriminatory reason for Appellant’s termination. The burden then shifts back to Appellant who must establish that the articulated reason was pretext for discrimination.

Specifically, the Appointing Authority identified Appellant’s failure to maintain regular communications with customers, failure to complete assignments in a timely fashion and failure to effectively manage his subordinates as reasons for his termination. On their face, these are business-related, non-discriminatory reasons. Therefore, the Commission finds that the Appointing Authority has met its burden even if Appellant had established a prima facie case of discrimination.

C. Appellant's Burden to Establish Pretext

To meet his burden in the final stage of the burden-shifting analysis, Appellant must establish (1) that the Appointing Authority's reason for terminating him is not true, but is instead a pretext for discrimination; or (2) that the Appointing Authority's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is Appellant's race. *Dees v. United Rentals N. Am., Inc.*, 505 Fed.Appx. 302, 304 (5th Cir. 2013); *Delphin v. Grayson Cty., Tex.*, 484 Fed.Appx. 958, 963 (5th Cir.2012). Importantly, "simply disputing the underlying facts of an employer's decision is not sufficient to create an issue of pretext." *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 391 (5th Cir. 2007).

In an attempt to discredit the Appointing Authority's reasons for his termination, Appellant alleged that he did not receive sufficient training on the Appointing Authority's proprietary LAMA software. Yet he failed to introduce any evidence to this effect. In fact, Mr. Smith testified that Appellant received the same amount of training as other employees who were able to absorb the training and put it into practice far quicker than Appellant. Appellant also suggested that he did not receive the same amount of support as other supervisors within the Appointing Authority. As noted above, the only other supervisor Appellant identified was in an entirely different division with separate functions and responsibilities. Appellant claimed that he did not receive any feedback from his supervisors and the first time the Appointing Authority raised an issue with his performance was the termination notice in evidence as "Hearing Examiner Exhibit 1." This is not true. Through the course of numerous emails and conversations, Mr. Smith regularly expressed concern about Appellant's volume of work and ability to manage his staff.

Finally, Appellant claims that there was an existing backlog of projects when he arrived at the Appointing Authority and that there was no way for him to know which projects were assigned

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to him. There is ample evidence and testimony to the contrary. Emails introduced by the Appointing Authority show that Mr. Smith emailed Appellant directly regarding specific projects and had to repeatedly follow up with additional emails when Appellant failed to timely address such projects.

As a result of the foregoing, we find that Appellant has failed to establish that the Appointing Authority's proffered reason for termination was pretext for unlawful discrimination or that Appellant's race was a motivating factor in his termination.

V. CONCLUSION

As a result of the above findings of fact and law, the Commission hereby DENIES the Appellant's appeal.

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Judgment rendered this 26th day of July, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

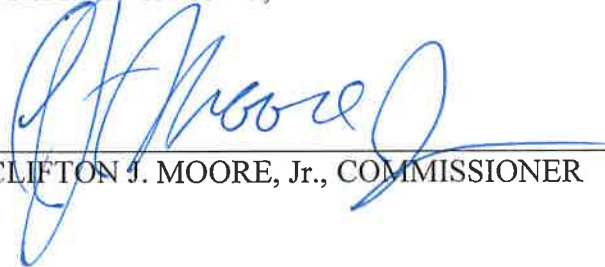

MICHELLE CRAIG, CHAIRWOMAN

7/9/2018
DATE

CONCUR


STEPHEN CAPUTO, COMMISSIONER

7-13-18
DATE


CLIFTON J. MOORE, Jr., COMMISSIONER

7-25-18
DATE