# CITY OF NEW ORLEANS

DEPARTMENT OF CITY CIVIL SERVICE
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Wednesday, September 12, 2018

Ms. Tomeka Miller

Re: **Tomeka Miller VS.**
**Sewerage & Water Board**
**Docket Number: 8697**

Dear Ms. Miller:

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 - 9/12/2018 - 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,

Doddie K. Smith
Chief, Management Services Division

cc: James E. Thompson, III
Jay Ginsberg
file

**CIVIL SERVICE COMMISSION**
**CITY OF NEW ORLEANS**

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| TOMEKA MILLER<br><br>vs.<br><br>SEWERAGE & WATER BOARD of NEW ORLEANS | DOCKET No.: 8697 |

## I. INTRODUCTION

Appellant, Tomeka Miller, brings the instant appeal pursuant to this Commission's Rule II, Section 4.5 and Article X, Section 8(B) of the Louisiana Constitution. In her appeal, Appellant asks the Commission to find that the Sewerage and Water Board of the City of New Orleans (hereinafter "S&WB") discriminated against her on the basis of sex. Specifically, Appellant alleges the S&WB terminated her employment because she did not succumb to a supervisor's sexual advances. At all times relevant to the instant appeal, Appellant served as an executive secretary in the classified service and had probationary status as a classified employee. Pursuant to our rules and the Louisiana State Constitution, Appellant bore the burden of proof in this matter.

A referee, appointed by the Commission, presided over one day of hearing on December 20, 2017. At the hearing, both Parties had an opportunity to call witnesses and present evidence. The referee prepared a report and recommendation based upon the testimony and evidence in the record. The undersigned Commissioners have reviewed the transcript and exhibits from this hearing as well as the hearing examiner's report. Based upon our review, and for the reasons articulated below, we hereby DENY the Appeal.

## II. FACTUAL BACKGROUND

### A. Applicable Rule & Procedural History

As a probationary employee, Appellant did not have the right to bring an appeal challenging whether or not the S&WB had sufficient cause to terminate her employment. However, the Louisiana State Constitution prohibits appointing authorities from discriminating against any classified employee on the basis of political beliefs, religious beliefs, sex or race. (La. Con. art. X, § 8(b)). Our rules provide an opportunity for any classified employee, regardless of his or her permanent, provisional or probationary status to bring an appeal. (C.S. Rule II, § 4.5). Appellants pursuing discrimination claims under Article X, Section 8(b) bear the burden of proof.

Prior to the hearing, the S&WB moved to dismiss the underlying appeal arguing that Appellant had failed to timely file an appeal based upon the individual instances of harassment cited in Appellant's appeal filing. The Commission denied the S&WB's motion finding that Appellant had timely filed an appeal alleging that her termination was the result of sexual harassment. Specifically, the Commission held that Appellant could pursue an appeal based upon what was essentially a quid pro quo sexual harassment claim. (Commission Minute Entry 11/8/2017).

### B. Alleged Sexual Harassment

The S&WB hired Appellant on November 21, 2016 in the classification of "Executive Assistant." (Tr. at 5:8-17). In that role, Appellant reported directly to Ronald Doucette, who was the S&WB's Deputy Director of Security at all times relevant to this appeal. As Deputy Director of Security, Mr. Doucette oversaw the operations for the security of the S&WB facilities and employees. He also supervised the S&WB's Risk Management Division and Worker's Compensation Office. *Id.* at 50:24-51:11. Appellant's day-to-day responsibilities as Mr.

Doucette's executive assistant included proofreading correspondence, managing appointments for her supervisor and department, scheduling interviews with security personnel, and working with the S&WB's risk management department. *Id.* at 6:4-14. She frequently interacted with Felicia Lovince, who was the S&WB's risk manager and would perform various administrative tasks for Ms. Lovince.

As a newly-hired classified employee, Appellant was subject to a working-test-period during which the S&WB had the discretion to terminate her employment for any reason (provided that such a reason was neither discriminatory nor retaliatory). Appellant's initial working-test-period was six months long. At some point in March 2017 – prior to the running of Appellant's six-month probationary period – the Mr. Doucette notified Appellant that the S&WB was extending her probationary status an additional six months. *Id.* at 10:8-14. According to Appellant, Mr. Doucette indicated that he made the decision to extend Appellant's probationary period because he "didn't feel comfortable with [her]" and wanted to give her five weeks to find another job because she had family obligations. *Id.* at 11:15-20. Appellant testified that Mr. Doucette's lack of comfort was due to the fact that Appellant would not repeat the word "shit" to him. *Id.* at 11:21-12:5. Mr. Doucette had a very different recollection of his conversation with Appellant in March 2017 regarding the extension of her probationary period. According to Mr. Doucette, he told Appellant that he did not "trust" Appellant's abilities and did not believe that Appellant was always truthful in her responses to questions. *Id.* at 83:9-20.

Two months after the S&WB notified Appellant that it was extending her probationary period, it terminated her employment. The termination notice indicated that Appellant failed to perform in a satisfactory manner during her probationary period. Appellant claimed that the real reason for her termination was her rejection of Mr. Doucette's sexual advances. *Id.* at 14:13-15:2.

The first instance of sexual harassment described by Appellant during her testimony occurred in January 2017 when Appellant and Mr. Doucette were at a local grocery store after a meeting and he commented that "he liked the way men look[ed] at [her] from behind and that he want[ed] to watch [her] while [she] walked." *Id.* at 16:15-19. Mr. Doucette denied this incident ever took place. Appellant further claimed that Mr. Doucette's frequent offers to drive her to her car was harassment and that Mr. Doucette was "not happy" when she declined his offers. *Id.* at 16:21-17:2. Other incidents of alleged harassment included Mr. Doucette asking where Appellant's tattoos were, complimenting Appellant on her "real nice legs," complaining that his wife does not give him any affection at home, and chastising Appellant for her choice of stockings by commenting that other women in the office would come to the office with bare legs. *Id.* at 18:1-17, 36:3-19.

Appellant also alleged that there were two incidents of unwelcomed physical contact. One incident involved Mr. Doucette placing his hands on Appellant's waist while the two of them were in the office. *Id.* at 17:15-24. Appellant also alleged that Mr. Doucette "groped" her by putting his arms around her waist and tried to excuse the physical contact by claiming that he did not see her. *Id.* at 43:7-13. Appellant did not report Mr. Doucette's alleged conduct because she was afraid that she would lose her job as probationary employee. *Id.* at 44:4-16.

The Parties agree that Mr. Doucette met with Appellant in February 2017 to discuss his concerns with Appellant's performance. During the meeting, Mr. Doucette reviewed numerous examples of Appellant's failure to successfully execute basic administrative tasks ranging from filing documents properly to creating complex spreadsheets using Microsoft Excel. *Id.* at 58:6-61:14. Appellant acknowledged that Mr. Doucette spoke to her in February regarding her performance and allegedly told her that her "skill level isn't where he thought it should be at."

*Id.* at 19:17-21. Specifically, Mr. Doucette identified Appellant's lack of familiarity with certain Microsoft Office applications and failure to create a "mail merge." Appellant called into question Mr. Doucette's claims by pointing out that she was able to accomplish specific tasks assigned by Mr. Doucette using alternative technology. *Id.* at 20:4-16. Mr. Doucette claimed that the purpose of the meeting was to place Appellant on notice that she had not been successfully accomplishing many of the essential tasks of an executive secretary. *Id.* at 63:19-64:4.

Despite Mr. Doucette's attempts at intervention, Appellant's performance allegedly did not improve. *Id.* at 64:22-65:1. Mr. Doucette testified that he explored other positions within the S&WB as options for Appellant once he determined that Appellant's performance as an executive secretary was not satisfactory. *Id.* at 65:20-66:15. Once such position was as an analyst in the Risk Management Division under Ms. Lovince. Mr. Doucette claimed that his motivation in requesting an extension in Appellant's working test period was to give Appellant an opportunity to work in the Risk Management Division to see if she would be a good fit there. *Id.* at 67:3-15. Ultimately, Ms. Lovince did not take any action to offer Appellant a position in the Risk Management Division. *Id.* at 71:3-17.

Mr. Doucette also had to speak with Appellant on several occasions regarding tardiness. *Id.* at 70:4-18. Mr. Doucette acknowledged that other employees on his administrative staff were late and claimed that he counseled them as well. *Id.* at 86:8-16. Yet, Mr. Doucette indicated that Appellant's tardiness was more frequent than that of her peers. *Id.* at 87:7-13.

## III. LEGAL STANDARD

In determining whether or not an appellant has established that he or she was the victim of sexual harassment under Article X, Section 8(b), the Commission has adopted the approach used by the United States Court of Appeals for the Fifth Circuit when analyzing harassment claims

under Title VII of the 1964 Civil Rights Act. Under such an analysis, the Commission must first determine if an appellant suffered a "tangible employment action." *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000). If so, then the Commission will view the matter in the context of a "quid pro quo" case. See *id.* The next question for the Commission will be whether or not the tangible employment action suffered by the appellant "was the result of his/her acceptance or rejection of his/her supervisor's alleged sexual harassment." *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 772 (5th Cir. 2009). In this context, "sexual harassment" is "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 171 (5th Cir. 2018)(internal citations omitted).

## IV. ANALYSIS

### A. Has Appellant Established that she was the Victim of Sexual Harassment?

There is no question that Appellant's termination constitutes a "tangible employment action" for the purposes of the Commission's analysis. Therefore, we move on to the question of whether or not Appellant's termination was the result of her rejection of her supervisor's alleged sexual harassment.

But quid pro quo cases are typically "based on threats which are carried out," which is "distinct from bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment," the second type of actionable claim." *Richard v. St. Tammany Par. Sheriff's Dep't*, CV 17-9703, 2018 WL 2065594, at *5 (E.D. La. May 3, 2018)(quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *see also*, *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir.1982). Appellant alleged in her appeal that her termination

was the result of her refusal to comply with Mr. Doucette's "sexual advances." According to Appellant, Mr. Doucette's sexual advances occurred over a seven-month period and included:

- Comments that he liked to watch Appellant from behind
- Noting that Appellant should wear high-heels to work
- Commenting about Appellant's tattoo and asking where others were while saying that he knew Appellant was a "bad girl."
- Complaining that he did not get attention "at home" and
- Two instances where Mr. Doucette placed his hands on Appellant's waist

For his part, Mr. Doucette strongly denied engaging Appellant in sexually themed conversations and conveyed a very different version and context for exchanges he did have with Appellant. But, even if the Commission were to credit Appellant's version of events, Mr. Doucette's comments did not rise to the level of sexual advances, requests for favors or other sexual harassment that would support a claim of unlawful quid pro quo discrimination. See e.g., *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481 (5th Cir. 2002)(expression of jealousy towards a partner and touching of anus constituted "an explicit or implicit proposals of sexual activity."); *Davenport*, *supra* at 169 (5th Cir. 2018)(supervisor's suggestion that employee date client in order to get a bonus).

The Commission observes that Title VII – and related Louisiana Law – does not impose a "general civility code. *Vance v. Ball State Univ.*, 570 U.S. 421, 452, 133 S.Ct. 2434, 2455, 186 L.Ed.2d 565 (2013)(GINSBURG, J. dissenting). Nor does it reach "the ordinary tribulations of the workplace, for example, sporadic use of abusive language or generally boorish conduct." *Id.* (internal citations omitted). Thus, even if we were to accept all of Appellant's allegations as true, what she described is the "generally boorish conduct" that, while inappropriate, does not rise to the level of illegal discrimination. There was no allegation that Mr. Doucette explicitly or implicitly tied Appellant's continued employment or working test period extension to her submission to requests for sexual favors.

Furthermore, Appellant failed to establish a causal connection between her reactions to Mr. Doucette's alleged harassment and her termination. As a preliminary matter, Mr. Doucette took measures to extend Appellant's probationary period in April 2017, which was after several incidents that Appellant described as her rebuffing Mr. Doucette's advances. Furthermore, Appellant acknowledged that Mr. Doucette spoke to her on several occasions regarding her performance, including her frequent tardiness. While Mr. Doucette admitted that other employees in the office were also tardy on occasion, Appellant's failure to consistently report on time was evidently more frequent than her peers. Appellant did not rebut this assertion. Mr. Doucette further testified that he attempted to counsel Appellant on her work performance in February 2017, but that Appellant's performance did not improve. Appellant acknowledged this meeting but claimed that she had been performing well. The fact that Appellant disagreed with her supervisor regarding the quality of her work product is not evidence of harassment.

The Commission observes that it is Appellant's burden to establish a connection between her alleged responses to Mr. Doucette's "advances" and her termination. She has not introduced sufficient evidence to establish that connection.

## V. CONCLUSION

As a result of the above findings of fact and law, the Commission finds that Appellant has failed to establish that the S&WB termination of her employment constituted discrimination based upon sex. In doing so, the Commission does not and will not minimize the consequences of sexual harassment in the workplace. We recognize the debilitating impact of such harassment and take our responsibility to adjudicate such claims seriously.

Judgment rendered this 12th day of September, 2018.

CITY OF NEW ORLEANS CIVIL SERVICE COMMISSION

WRITER

STEPHEN CAPUTO, COMMISSIONER — DATE 8-31-18

CONCUR

MICHELLE D. CRAIG, CHAIRPERSON — DATE 9-7/2018

CLIFTON MOORE, COMMISSIONER — DATE 9/11/18