

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

HARRY ROSS,

Appellant,

v.

ALASKA STATE COMMISSION
FOR HUMAN RIGHTS,

Appellee.

CASE NO. 3AN-10-06322 CI

OPINION

I. Introduction

This appeal arises from a racial discrimination complaint filed by Harry Ross against the Alaska Railroad Corporation, alleging a violation of Alaska’s Human Rights Act when the Railroad failed to promote Ross to a supervisory position. After the Alaska Human Rights Commission found no evidence of racial discrimination in the Railroad’s decision, Ross appealed to the Anchorage Superior Court. The superior court found that the Commission had not fully investigated the issue and remanded the case. On remand, an Administrative Law Judge issued a Recommended Decision finding that Ross had not established by a preponderance of the evidence that the Alaska Railroad Corporation’s failure to hire him as a Trainmaster was motivated by race. Ross appealed after the Commission entered a Final Order adopting in full the ALJ’s Recommended Decision and dismissing the complaint. The Court finds that it was unclear whether the ALJ considered the controlling Ninth Circuit precedent for the evaluation of subjective promotion criteria in hiring discrimination claims, and remands the case for further consideration.

II. Factual and Procedural History

Harry Ross has worked for the Alaska Railroad Corporation (the “Railroad”) since 1968. In 2004, the Railroad created six new supervisory positions known as “trainmasters” for its Anchorage branch. The trainmasters were to supervise the performance, training and certifications of train and engine personnel.¹ The Railroad solicited applications from existing train and engine service employees. Its solicitation notice included a description of the job and the minimum qualifications.²

Ross, then working as a Conductor for the Railroad, was one of seventeen or eighteen employee-applicants who met the minimum requirements when he applied for the position of a trainmaster in Anchorage. Of these applicants, two were African American and the rest were Caucasian. Ross was one of the two African American candidates.

Ross interviewed with a hiring committee composed of five Railroad superiors: Curt Rudd, Anchorage Terminal Superintendent; Mike Olson, Fairbanks Terminal Superintendent; Mark Turberville, Manager of Safety Systems; Cheryl Evans, Manager of Recruitment; and Pat Flynn, Manager of Special Projects. All five of the interviewers are Caucasian. After the interviews were completed, the committee compiled a list of candidates it believed were successful in their interviews. Ross was not included on this list. The hiring panel then submitted the names of the successful candidates to Matt Glynn, the Vice President of operations.

The Railroad did not hire Ross for an Anchorage trainmaster position. The four employees that it hired for the Anchorage positions were all Caucasian males.

¹ Recommended Decision, OAH No. 08-0230-HRC at 3 (July 15 2009).

² The minimum qualifications were (1) fifteen years of experience in train service and (2) one year serving in a position that supervises operating personnel. R. at 406, 409, 412.

On 19 November 2004, Ross filed an internal complaint of discrimination with the Railroad, claiming that he was not hired as trainmaster because of his race. The Railroad's Equal Employment Opportunity Manager, Ouida Morrison, began an investigation, requesting copies of the interview notes and an explanation of the process from the interviewing panel. After learning of the internal complaint, Matt Glynn met with Ross and tried to resolve the matter by offering him a trainmaster position, which Ross declined. Ultimately, no final determination came from the internal investigation.

On 22 April 2005 Ross filed a complaint with the Alaska Human Rights Commission (the "Commission"), alleging racial discrimination on the part of the Railroad that violated Alaska's Human Rights Act.³ The Commission initiated an investigation and requested that the Railroad respond to Ross' claims. The Railroad provided a number of reasons for why Ross did not receive the trainmaster position, none of which were race-based. The Railroad informed the Commission that Ross "performed very poorly" in the interview, "showing no enthusiasm, no motivation, and essentially no real interest in the job at all, other than the fact that it would improve his retirement position."⁴ Ross had given "the impression that he was entitled to the position of trainmaster simply because he was number one on the seniority roster. He did not have to compete on his own merit; he should have the job based solely on his longevity."⁵ The Railroad further explained that it had concerns about hiring from union-represented positions, where seniority and union contracts were the predominant factors, for a non-represented

³ The Alaska Human Rights Act prohibits employers from discriminating against an individual because of his or her race, religion, ethnicity or national origin. AS 18.80.220(a)(1).

⁴ Appellant's Exc. of R. at 3.

⁵ *Id.*

management position, which would allow them to weigh more heavily factors such as judgment, direction and self-motivation.⁶ In addition, the Railroad stated that Ross had “indicated ... he was not comfortable with computers” and that “some of the responsibilities of the position require work on computer systems.”⁷

In response, Ross argued that he had worked for the Railroad for over thirty-seven years as a dedicated employee, that he possessed extensive experience as a railroad person and as a supervisor of railroad employees, that he did show enthusiasm for the trainmaster position, and that he believed the interviewers had existing knowledge of the questions so he gave “pointed answers.”⁸ Ross claimed that he did not believe nor act as if the Railroad owed him the job.⁹ He admitted that he mentioned his “high three”¹⁰ for retirement as a benefit to the trainmaster job, but that this was not his sole motivation.¹¹ Ross countered that he did possess basic computer skills but did not have familiarity with a new software program that the Railroad had recently started using.¹² He argued that none of the Anchorage trainmasters chosen had his level of

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ “High Three” refers to an equation used by the Railroad for calculating employee retirement benefits, where the benefits received are determined by the employee’s three highest-earning years during his or her tenure with the Railroad. Since overtime pay is not factored into this equation, a year’s earnings are calculated on the employee’s base pay.

¹¹ Appellant’s Exc. of R. at 4.

¹² *Id.*

experience working on the Railroad, nor were they any more knowledgeable about computers than he was.¹³

The Commission then reviewed documents provided by the Railroad, including Ross' personnel file, the applications and resumes of the trainmaster applicants, a list of questions asked during the interview, the notes taken by the hiring panel during the interviews of Ross and the successful applicants, and a list of all applicants for the trainmaster position detailing each candidate's name, race, date of hire, position held at the time of interview, and the result of the interview. The Commission also interviewed Ross and each member of the interviewing committee.¹⁴ The Commission did not, however, interview any other applicants or any other employees of the Railroad.¹⁵

On 29 March 2007 the Commission concluded that the "evidence did not support Ross' allegation that the Railroad discriminated against him on the basis of his race when he was not hired as a trainmaster."¹⁶ The Commission closed Ross' case on 29 April 2007 because the investigator did not find substantial evidence to support Ross' claims.¹⁷

Ross appealed to the Superior Court, arguing that the Commission did not complete the investigation because it only questioned the interview committee and only reviewed a limited

¹³ *Id.*

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.*

number of documents, which Ross contends the Railroad manipulated after the interview. Ross also claimed that a history of discrimination existed already in the Railroad's hiring practices.

On 10 March 2008 Judge Rindner ruled that the Commission had committed an error of law in failing to fully investigate the Railroad's purported legitimate reasons for not hiring Ross:

Substantial evidence in the Commission's record does not raise a genuine dispute about the Railroad's purported legitimate reasons for not hiring Ross. However, this lack of evidence results because the Commission conducted an extremely limited investigation, not because evidence does not exist. The record reflects that the Railroad asserted legitimate reasons for not hiring Ross, that the Commission interviewed a limited number of Railroad employees who corroborated the Railroad's position, and that the Commission terminated the investigations following these interviews. Nothing in the record shows the Commission Investigator responded to Ross' assertions that Railroad employees were amazed that he did not receive the position or that successful applicants lacked computer skills.¹⁸

Judge Rindner found that a *prima facie* case of discrimination existed and that objective evidence created a genuine issue of fact as to the legitimacy of the Railroad's hiring decision. Because factual disputes regarding this decision persisted between the parties, Judge Rindner concluded that the Commission was required by law to grant Ross a hearing.¹⁹ Ross had the right on appeal to supplement the record by submitting documents that (1) supported his claims of a pattern of discrimination in the Railroad's hiring practices, (2) showed that the applicants hired as Trainmasters lacked computer skills, and (3) reflected that he had been a victim of

¹⁸ Mem. of Decision at 14 (March 10 2008).

¹⁹ When a claimant files a complaint to the Commission and the Commission finds in the course of investigation that there is substantial evidence of facts which establish a *prima facie* case of discrimination under Alaska Statute 18.80.110, the Commission must first try to eliminate or remedy the discriminatory practice by conciliation. If no agreement is reached, however, the executive director will determine whether to refer the complaint for hearing pursuant to AS 18.80.120, to be presided over by an administrative law judge.

discrimination in the past. Judge Rindner reversed the dismissal of Ross' complaint and remanded back to the Commission to hold a hearing under the Alaska Human Rights Act.²⁰

Pursuant to the Act, Administrative Law Judge Rebecca Pauli presided over a hearing that this time included testimony from Ross, the members of the interview panel, Matt Glynn, Ouida Morrison, and several Railroad employees called by Ross to testify about the Railroad's treatment of African American employees.

On 15 July 2009 the ALJ found that Ross had not shown by a preponderance of the evidence that the Railroad's decision not to hire him as a trainmaster was motivated by racial discrimination. "The record supports a finding that it is more likely than not that Mr. Ross interviewed poorly and that the [Railroad]'s hiring decision was supported by legitimate business considerations. I therefore recommend that the Commission dismiss Harry Ross' complaint against the [Railroad]."²¹

On 3 March 2010 the Commission issued a two-page Final Order adopting the ALJ's Recommended Decision in its entirety and dismissing Ross' claim.²²

Ross filed an administrative appeal to the Anchorage Superior Court on 27 April 2011. Ross asks the Court to reverse the Final Order of the Alaska State Commission for Human Rights and find that the Alaska Railroad violated AS 18.80.220(a)(1) when it refused to promote Ross to trainmaster. Ross asks the Court to remand for an award of damages for the difference in Ross' retirement benefit based on a high-three average subject pay of \$82,000, the sum that he

²⁰ Mem. of Decision at 16 (March 10 2008).

²¹ Recommended Decision, OAH No. 08-0230-HRC at 16 (July 15 2009).

²² Final Order, ASCHR No. R-05-080 (March 3 2010).

would have received as a trainmaster, and \$66,000, the sum that he would have received as a conductor.

III. Standard of Review

Where the superior court serves as an appellate court for an administrative agency's decision, it independently reviews the merits of the agency decision.²³ The Commission's factual findings are reviewed using the substantial evidence test,²⁴ which examines whether the findings are "supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁵ Where there is conflicting evidence, the court "will not reweigh the evidence and substitute its judgment for that of the trier of fact."²⁶ Rather, "[w]hat matters is whether the determination of the [agency] is supported by substantial evidence on the whole record."²⁷ The adequacy of the findings of fact is reviewed de novo.²⁸

IV. Discussion

²³ *Premera Blue Cross v. State, Dep't of Commerce, Cmty & Econ. Dev., Div. of Ins.*, 171 P.3d 1110, 1115 (Alaska 2007) (citing *Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 956 (Alaska 2004)).

²⁴ *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights*, 153 P.3d 994, 998 (Alaska 2007).

²⁵ *Widmyer v. State, Commercial Fisheries Entry Comm'n*, 267 P.3d 1169 (Alaska 2011) (quoting *State, CFEC v. Baxter*, 806 P.2d 1373, 1374 (Alaska 1991)).

²⁶ *Alaska State Comm'n for Human Rights v. Yellow Cab*, 611 P.2d 487, 490 (Alaska 1980).

²⁷ *Anderson v. Employers Liab. Assurance Corp.*, 498 P.2d 288, 290 (Alaska 1972).

²⁸ *W.R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1003 (Alaska 1974).

A. Legal Framework for Hiring Discrimination Claims

The Alaska Supreme Court has adopted from federal law the three-part burden-shifting *McDonnell Douglas* test for the adjudication of hiring discrimination claims brought under AS 18.80.220.²⁹ First, the employee bringing the discrimination claim bears the burden of establishing a *prima facie* case of discrimination. A *prima facie* case of discrimination is shown when a complainant proves that (1) he or she is part of a protected class, (2) he or she is qualified for the position in dispute, (3) he or she was not selected for the position despite meeting the qualifications, and (4) the employer either continued to solicit applications from other qualified persons after the rejection or hired another individual not within the same protected class as the complainant.³⁰ A *prima facie* showing “eliminates the most common nondiscriminatory reasons

²⁹ *Perkins v. Doyon Universal Services, LLC*, 151 P.3d 413, 416 (Alaska 2006); *Raad v. Alaska State Comm’n for Human Rights*, 86 P.3d 899, 904, n. 16 (Alaska 2004). The *McDonnell Douglas* test is drawn from the United States Supreme Court case in which it was first articulated, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). Alaska subsequently adopted the test in *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

³⁰ *See Haroldsen v. Omni Enters.*, 901 P.2d 426, 430-31 (Alaska 1995) (holding that the fourth element of proving a *prima facie* case necessitates a showing that non-members of the protected class were treated “more favorably”); *Alaska State Comm’n for Human Rights v. Yellow Cab*, 611 P.2d 487, 490 (Alaska 1980) (finding that a *prima facie* case of hiring discrimination established where a position remained open before employer hired applicants not belonging to the protected class).

for the plaintiff's rejection,"³¹ and creates "a presumption that the employer unlawfully discriminated against the employee."³²

Where a *prima facie* case is successfully demonstrated, the employer then has the burden of producing a legitimate, non-discriminatory reason for the employment decision.³³ "To satisfy this burden, the employer 'need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.'"³⁴ The employer must "articulate legitimate business reasons existing at the time the employment decision was made and supported by admissible evidence."³⁵

If the employer can provide such a reason, the burden then shifts back to the employee to show that the employer's explanation is merely a pretext for the prohibited discrimination.³⁶ The plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."³⁷ Claims of pretext must be

³¹ *Era Aviation, Inc. v. Lindfors*, 17 P.3d 40, 44 (Alaska 2000) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

³² *Burdine*, 450 U.S. at 254.

³³ *Raad*, 86 P.3d at 905.

³⁴ *Veco, Inc. v. Rosebrock*, 970 P.2d 906, 919 (Alaska 1999) (quoting *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731 (9th Cir. 1986)).

³⁵ *Raad*, 86 P.3d at 905 (quoting *Thomas v. Anchorage Tel. Util.*, 741 P.2d 618, 624 (Alaska 1987)).

³⁶ *Id.*

³⁷ *Smith v. Anchorage School Dist.*, 240 P.3d 834, 840 (Alaska 2010) (quoting *Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

based on more than a claimant’s “unsupported assumptions and speculation.”³⁸ In *Raad v. Alaska State Commission for Human Rights*, the supreme court recognized that pretext in disparate treatment hiring cases could be proven either with direct or indirect evidence of discrimination. Examples of indirect evidence of pretextual justification include (1) statistical evidence reflecting an employer’s general pattern of discrimination,³⁹ so long as the “weight to be accorded such statistics is determined by the existence of independent corroborative evidence of discrimination,”⁴⁰ and (2) comparative evidence, such as evidence that the complainant’s qualifications were clearly superior to those of the applicants eventually hired.⁴¹

B. The ALJ’s Recommended Decision

The ALJ’s recommended decision described in detail its findings regarding the trainmaster position, its responsibilities, and the qualities that the Railroad sought in successful applicants. The ALJ also described at length the interview process for the trainmasters, listing the interview panel members and the methodology that they used to assess the interviewees. The ALJ found that the interviewers had prepared a list of interview questions beforehand and had originally intended to rank each interviewee’s answer on a scale of 1-5, but that this numerical

³⁸ *Mahan v. Arctic Catering, Inc.*, 133 P.3d 655, 661 (Alaska 2006) (citing *French v. Jadon, Inc.*, 911 P.2d 20, 25 (Alaska 1996)).

³⁹ *Raad*, 86 P.3d at 905-06 (quoting *McDonnell Douglas*, 411 U.S. at 805, 93 S. S. Ct. 1817). *See also*, *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

⁴⁰ *Raad*, 86 P.3d at 906 (quoting *Am. Fed. Of State, County, & Mun. Employees, AFL-CIO v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985)).

⁴¹ *Id.* (quoting the Ninth Circuit’s decision in *Odima v. Westin Tucson Hotel*, 53 F.3d 1484 (9th Cir. 1995)).

scoring plan was abandoned partway through the interviews when the hiring panel realized that they were not scoring consistently.⁴² The interviewers discussed at the conclusion of each interview whether the interviewee was a successful candidate for the position. When all the interviews had been conducted, a list of successful candidates was passed on to Matt Glynn, who approved the list without conducting further research or interviews.⁴³ The ALJ found that the panel members were “unanimous” in their agreement that Ross had not interviewed well and that he had failed to explain why he would be a good fit for the job.⁴⁴

With regard to Ross’ claims about racial discrimination at the Railroad, the ALJ found that Ross had been called “Black Magic” by Rudd, one of his interviewers.⁴⁵ Rudd did not dispute this claim at the hearing. The ALJ further noted Ross’ complaints about the use of racial names in his early years at the Railroad and management’s refusal to ride in the same car as him.⁴⁶ In addition to Ross’ testimony, three other witnesses testified that they had experienced or observed discriminatory treatment while in the employ of the Railroad. The ALJ’s Decision recounted one African American witness’ testimony that he had been called racial epithets by a coworker as recently as 2000.⁴⁷ Another witness, also African American, recalled that he, too, had sought and been denied a promotion for a job that eventually went to Caucasian males, and

⁴² Recommended Decision at 5.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 5.

⁴⁷ *Id.*

that he had once designed the winning logo for a Railroad contest that management ultimately decided not to use after it emerged that the winner was African American.⁴⁸ Ross' third witness, a Caucasian male, testified that he had observed during his time at the Railroad a lack of opportunities for African American employees, citing the lack of African American managers in the Transportation Department.⁴⁹

Having summarized the testimony presented, the ALJ then applied the *McDonnell Douglas* analysis to the facts of the case. With regard to the first step, the ALJ found that Ross had successfully carried the burden of demonstrating a *prima facie* case of discrimination, because (1) as an African American, Ross was a member of a protected class, (2) he had fulfilled the minimum qualifications for the trainmaster position as enumerated by the Railroad, (3) he had not been chosen for the position, and (4) all the successful applicants were Caucasian employees.⁵⁰ These facts were not disputed by the Railroad or the Commission. The Court finds that substantial evidence supports the ALJ's finding of a *prima facie* case of discrimination. The burden then shifted to the Railroad to provide a legitimate and non-discriminatory rationale for its hiring decision.

The ALJ found that both parties agreed that the Railroad had presented admissible evidence that would allow a trier of fact to conclude that there was a legitimate and non-discriminatory reason behind the Railroad's decision not to hire Ross.⁵¹ The ALJ accepted evidence indicating that the decision was driven by the interviewers' belief that Ross had

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 11.

⁵¹ *Id.*

interviewed poorly compared to the successful applicants, and that more so than Ross, the applicants hired had exhibited the qualities that the interviewing panel considered to be most important. A review of the record shows that there was substantial evidence to support the ALJ's finding.

The burden then shifted back to Ross to show that the Railroad's explanation was merely pretextual. Here, the ALJ found that Ross had not carried his burden. She found that neither the previous usage of the nickname "Black Magic" by one of the interview panel members nor the lack of African American managers in the Transportation Department amounted to persuasive evidence of disparate treatment in Ross' case. The ALJ stated that Ross had failed to demonstrate that it was more likely than not that he possessed superior qualifications for the trainmaster position, given that (1) longevity was not a consideration in the hiring process, (2) interviewer Olson believed that the duties of a yardmaster was not the same as those of a trainmaster, (3) Ross did not explain in his interview about how his experience of yardmaster was relevant to the trainmaster position, and (4) the panel was interested in ideas for improving operations, whereas Ross' involvement with retail-oriented programs in the Railroad was not as relevant as the safety- and operations-oriented programs that some other applicants had discussed.

The ALJ concluded that the evidence as a whole was insufficient to support a finding that the Railroad had discriminated against Ross when it failed to promote him to trainmaster. "The past use of the racial epithets, the lack of African Americans in management in the Transportation Department and Mr. Ross' seniority do not detract from the legitimate subjective factors relied upon by the hiring panel when selecting persons to fill the trainmaster positions."⁵² The ALJ ended by recommending that the Commission dismiss Ross' complaint.

⁵² *Id.* at 16.

C. Pretext

On appeal, Ross disputes the ALJ's finding that he failed to demonstrate pretext on the part of the Railroad. Ross claims that Judge Pauli made four crucial mistakes in her application of the *McDonnell Douglas* analysis: (1) she wrongly ignored evidence about Ross' superior qualifications to that of the other candidates, (2) ignored the undisputed evidence that Ross was called "Black Magic" by one of the Railroad interview panel members, which should have been considered direct evidence of racial animus, (3) ignored the fact that the interviewing panel for Railroad failed to use an objective scoring matrix, and (4) refused to evaluate evidence of the lack of African Americans promoted in the Transportation Department as evidence of pretext. Given this alleged failure to properly consider whether the Railroad's explanation was pretextual, he argues that the ALJ's Recommended Decision and the Commission's Final Order could not have been supported by substantial evidence.

Upon examination of the ALJ's treatment of the four issues brought on appeal, the Court finds that it is unclear from the Recommended Decision whether the ALJ properly considered Ninth Circuit rulings that scrutinize the use of subjective hiring and promotion criteria in race discrimination claims.

Ross' complaint that the interviewers failed to use objective criteria is characterized by the ALJ as a "non-starter."⁵³ The ALJ stated that the Railroad's interviewing process, however imperfect, did not reflect any discriminatory motives.⁵⁴ In this section of the Recommended Decision, the ALJ noted that Ross had admitted himself that (1) he had been annoyed during the

⁵³ *Id.* at 14.

⁵⁴ *Id.*

interview process due to a perceived lack of respect from hiring panel member Flynn when he arrived late for the interview, and (2) he did not expand on the relevancy of his work as yardmaster to the trainmaster position.⁵⁵ The ALJ further observed that Ross did not challenge the testimony of hiring panel members Olson and Rudd that the Harry Ross at the trainmaster interview behaved differently from the Harry Ross that they knew, and rejected Ross' argument that it was Olson and Rudd's responsibility to inform the other interviewers about their impressions of Ross apart from the interview.⁵⁶ The ALJ stated that it was Ross' responsibility to expand upon his qualifications for the trainmaster job and that the interviewing panel could not be blamed for his failure to do so.

In addition, the ALJ stated that it was "unlikely" that Ross' lack of familiarity with the necessary computer skills was the determinant factor in the hiring decision. She found that all of the successful candidates had computer skills ranging from "excellent to basic," and that while one interview panel member, Flynn, may have focused on this part of Ross' qualifications more than other members did, the panel ultimately considered the interviewees' attitude to be the more important factor.⁵⁷

The Court cannot agree with the ALJ's observation that Ross' complaint regarding the failure to use objective criteria was a "nonstarter." Though the Commission cites in the Appellee's Brief cases from the Eleventh, Sixth and Fifth Circuits stating that an employer's use

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 15.

of subjective factors is not *per se* evidence of discriminatory bias,⁵⁸ the Ninth Circuit has recognized that subjective criteria can disguise both conscious and unconscious discrimination, as it provides a convenient pretext for discrimination.⁵⁹ “Careful analysis of possible impermissible motivations is warranted because such evaluations are particularly ‘susceptible of abuse and more likely to mask pretext.’”⁶⁰ Thus, the use of subjective evaluations to hire, terminate or promote employees, while not prohibited, should be inherently suspect and “closely scrutinized.”⁶¹ The suspicion is lessened in examining decisions made regarding the “higher echelons” of employment, where “the skills... are necessarily measured in more subjective terms,” but “the same potential for abuse exists.”⁶²

The trainmaster job that Ross interviewed for qualifies as a “higher echelon” position. The Court understands that the desired skill set for that management position, which entails training and supervising lower-level employees, may involve some qualities that are not readily quantifiable in an objective manner, such as effective communication skills, leadership skills, initiative, enthusiasm and dedication. However, even when taking into account the *Nanty* court’s conclusion that the inherently suspicious nature of subjective criteria is lessened when examining management-level promotion decisions, it is still unclear from the Recommended Decision whether the ALJ was aware of the Ninth Circuit rulings and applied any kind of scrutiny to the

⁵⁸ Appellee’s Br. at 22.

⁵⁹ *Jauregui v. City of Glendale*, 852 F.2d 1128, 1135-36 (9th Cir. 1988).

⁶⁰ *Xin Liu v. Amway Corp.*, 347 F.3d 1125, 1136-37 (9th Cir. 2003) (citing *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990)).

⁶¹ *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1481 (9th Cir. 1987)(en banc).

⁶² *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981), overruled on other grounds by *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996).

Railroad's process. By the Railroad's own admission, the interview process lapsed into a subjective test. Furthermore, the scoring system was abandoned partway through and the interview notes of the panel members became subjective narratives. Combined with other evidence, such as the undisputed allegations that Ross had been called a racial nickname by a member of the interviewing panel, and the claims of systemic discrimination made by Ross' witnesses, the lack of objective criteria should have warranted a closer examination than what the Recommended Decision afforded.

Having said this, the Court recognizes that the Railroad has provided evidence that this deviation from the use of objective criteria was not motivated by racial discrimination. The Court is not ruling that the interviewers were wrong to use subjective criteria with regard to promoting applicants for this management-level position. But while subjective practices and decisions are not illegal *per se*, the Court cannot ignore the Ninth Circuit rulings recognizing that these practices are susceptible to discriminatory abuse and thus trigger scrutiny.⁶³ Because the decisions as to the trainmaster promotions were grounded in subjective evaluations, the hearing examiner had a duty to scrutinize carefully the Railroad's reasons for using the subjective criteria. It is not enough to dismiss this claim as a "non-starter." The ALJ's Recommended Decision does not appear to acknowledge the relevant Ninth Circuit precedents or explain how the Railroad's subjective evaluations pass scrutiny, and for this reason, the Court remands.

D. Disputed Issues on Remand

To be clear, the Court is not overturning the entirety of the ALJ's *McDonnell Douglas* analysis. There is substantial evidence in the record to support the ALJ's findings that Ross met his burden of showing a *prima facie* case of discrimination and that the Railroad offered

⁶³ *Kimbrough v. Secretary of United States Air Force*, 764 F.2d 1279, 1284 (9th Cir. 1985).

legitimate non-discriminatory reasons to support its decision not to promote Ross to trainmaster. Neither party is free to re-litigate these issues on remand.

The Court remands on the issue of whether Ross has proven pretext, however, because it is unclear from the record whether the ALJ adequately scrutinized the usage of subjective criteria in the hiring panel's evaluation of the trainmaster applicants. The Court does not reach Ross' other three arguments on appeal, but leaves the ALJ to address them in totality when she applies the precedents set out by the Ninth Circuit.

V. Conclusion

The task of the Court in an appeal of an administrative agency's decision is not to re-evaluate the evidence provided by the parties and replace the agency's findings with its own judgment, but to examine whether the agency's conclusions are supported by substantial evidence. A review of the record reflects that it is unclear whether the ALJ acknowledged and considered the Ninth Circuit's guidance in hiring discrimination cases involving the usage of subjective criteria. Thus, the Court reverses and REMANDS the Commission's decision.

DONE this 30th day of March 2012, at Anchorage, Alaska.

Signed

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 30 March 2012 a copy of the above
was mailed to each of the following
at their addresses of record:

M. Choate
Milks
Mede

Signed _____
Ellen Bozzini
Judicial Assistant

[This document has been modified to conform to the technical standards for publication.]