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

HARRY ROSS,)	
)	
)	
Appellant,)	
vs.)	
)	
STATE OF ALASKA HUMAN)	
RIGHTS COMMISSION,)	
)	
Appellee.)	
<hr/>		Case No. 3AN-16-09261CI

ORDER DENYING APPEAL

Appellant Harry Ross appeals the State of Alaska Human Rights Commission's ("the Commission") dismissal of Ross's complaint that he was not denied a promotion to the new position of trainmaster by the Alaska Railroad ("the Railroad") because of racial discrimination. In his appeal Ross asserts the Commission erred in ruling he had not proven that the Railroad's explanation for not hiring him for the position of trainmaster because of poor interview performance was pretext and the actual decision was based on racial discrimination. The Commission argues there is substantial evidence in the record supporting their determination and therefore the Court should deny this administrative appeal.

STATEMENT OF FACTS

The Railroad created the nonunion position of trainmaster in 2004 and sought to hire nine people at the position. Ross is an African American employee who has worked

with the Railroad since 1968 and had extensive experience as both a conductor and a yardmaster. He decided to apply for the job believing he met all of the necessary qualifications. As part of the application process Ross interviewed with a five person panel of other Railroad employees, all of whom were Caucasian. Including Ross, a total of 17 applicants received interviews with the panel, 15 of them were Caucasian and 2 were African American. Ross asserts he believed he performed well during the interview and described with enthusiasm his qualifications for the job and what he could bring to the position. The interview panel had a different recollection; all five members felt Ross performed poorly. They specifically stated Ross appeared disengaged or disinterested, failed to sell himself or explain his qualifications, provided short glib answers to their questions, and came across as though he felt the interview process was a mere formality and he already was entitled to the job if he wanted it. Furthermore, the panel believed Ross presented his self-interest in the job and how it would benefit him personally by positioning himself for more favorable retirement benefits, but he failed to convey how he would benefit or improve the Railroad as a trainmaster.

The Railroad did not offer Ross a position as trainmaster after the interview. They only hired six of the 17 applicants deciding to leave three of the positions they had sought to fill vacant. All six of the employees hired were Caucasian. Believing he had been discriminated against because of his race, Ross filed an internal complaint with the Railroad. Although the internal investigation found the interview process to be “wacky” because the interview panel had switched from a qualitative review scoring each response

to a question on a scale of one to five to a determination at the end of each interview of whether or not they believed the candidate should be recommended for the position, no written decision was produced regarding whether or not Ross was subjected to racial discrimination.

Ross subsequently filed a complaint with the Commission in April 2005. The Commission did a cursory investigation but determined there was not substantial evidence to support Ross's claim of discrimination and dismissed his complaint. Ross appealed the dismissal to the Superior Court which ruled it was error to dismiss the case without conducting a thorough investigation and remanded the case back to the Commission. In 2009 a hearing was held regarding Ross's complaint before Administrative Law Judge Pauli who issued a recommended decision in favor of the Railroad. Judge Pauli found it more likely than not the Railroad did not offer Ross the position of trainmaster because he performed poorly in the interview rather than because of racial animus. In March 2010 the Commission accepted Judge Pauli's recommended decision and dismissed the case.

Ross appealed and again the Superior Court reversed the dismissal, remanding the case for review of the subjective criteria the Railroad used in its hiring decision and for a review of if the explanation of poor interview performance was pretext for discrimination. Judge Pauli reviewed the case again looking to see if the Railroad's proffered explanation was mere pretext and found that although the use of subjective criteria in a hiring process requires heightened scrutiny, that alone does not mean the

explanation is pretext for racial discrimination. The Judge found the interview panel's testimony credible and concluded while it is possible the Railroad was masking discrimination, the totality of the circumstances did not support a conclusion that it is more likely than not the Railroad's explanation was pretext for a racial discrimination. The Commission once again accepted and agreed with the Judge Pauli's recommendation and dismissed Ross's complaint. Ross now appeals the dismissal to this Court.

STANDARD OF REVIEW

The Superior Court has jurisdiction to act as an intermediate appellate court and review appeals from administrative agencies pursuant to Alaska Statute §22.10.020(d).¹ The Alaska Supreme Court in *Handley v. State, Dept. of Revenue* stated four standards of review can apply when a court considers administrative appeals: (1) questions of fact are subject to the "substantial evidence" test; (2) questions of law involving agency expertise are subject to the "reasonable basis" test; (3) questions of law where no agency expertise is involved are subject to the "substitution of judgment" test; and (4) review of administrative regulations is subject to the "reasonable and not arbitrary" test.²

Appellant asserts evidence in the record clearly shows the explanation the Railroad provided for failing to hire Ross is pretext for racial discrimination. Ross disagrees with the Commission's factual determination that he has not met his burden of proof in demonstrating the Railroad's explanation is more likely than not mere pretext for discrimination. The issue on appeal presents a question of fact. The Court applies the

¹ Alaska Stat. Ann. § 22.10.020.

² *Handley v. State, Dep't of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

substantial evidence test in reviewing an agency's factual findings.³ The substantial evidence standard of review requires the administrative body's ruling be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴ In applying the substantial evidence test we view the evidence in favor of the findings and where the evidence is conflicting this Court "will not reweigh the evidence and substitute its judgment for that of the trier of fact."⁵

ANALYSIS

Ross asserts the Railroad's decision not to offer him the position of trainmaster was based on racial discrimination. Alaska Statute §18.80.220(a)(1) states it is unlawful for an employer to refuse employment or discriminate against a person on the basis of race.⁶ The Alaska Supreme Court has adopted a three part test to determine whether an employee has been subjected to unlawful discrimination: first the employee has the burden of establishing a prima facie case of discrimination, then if a prima facie case is established the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for their action, and finally if legitimate nondiscriminatory reasons are presented the burden shifts back to the employee to show the employer's offered reasons are pretextual.⁷

In this case, it is accepted that Ross presented a prima facie case of discrimination and the Railroad set forth a nondiscriminatory reason for not hiring him, poor interview

³ *Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899, 903–04 (Alaska 2004).

⁴ *Handley* at 1233.

⁵ *Raad* at 903.

⁶ Alaska Stat. Ann. § 18.80.220(a)(1).

⁷ *Raad v. Alaska State Comm'n for Human Rights*, 86 P.3d 899, 904 (Alaska 2004).

performance. Therefore, the burden has shifted back to Ross to prove the Railroad's stated reasons were mere pretext for discrimination. Ross can satisfy this burden by directly persuading the Commission it is more likely than not a discriminatory reason motivated the employer or by persuading the Commission that the employer's offered explanation is not worthy of credence.⁸ The Commission determined based on the evidence presented in the record and the recommendation of Administrative Law Judge Pauli that Ross was unable to prove it was more likely than not the Railroad acted based on discrimination rather than their explanation that Ross was not hired because of his poor interview. As a result, the Commission ruled Ross had not met his burden of proof that he suffered unlawful discrimination.

Ross's appeal disputes the Commission's factual determination that he did not present sufficient evidence to demonstrate the Railroad's explanation was mere pretext for discrimination. Because this is an appeal of the Commission's factual findings the Court does not base its ruling on its own interpretation of the evidence or whether it agrees with the Commission's order, it rules only the limited question of whether the Commission's decision was supported by substantial evidence. If a reasonable mind could accept that sufficient evidence has been presented to support the Commission's decision, then the Court shall accept the Commission's determination.

Sufficient evidence exists in the record such that a reasonable mind could find the Commission's determination adequately supported. The administrative law judge heard

⁸ *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981).

testimony from each member of the hiring committee and found their testimony credible and their hiring and interview expectations reasonable. Although the administrative law judge stated the interview process was flawed, the judge also rejected the theory that the panel of five independent employees acted together to use the pretext of poor interview performance in order to reject minority applicants, especially because they also rejected three qualified Caucasian applicants for the same stated reason of poor interview performance while leaving three positions unfilled. Furthermore, it is reasonable to expect a hiring committee would consider how a candidate presented themselves in the interview when determining whether to recommend they be hired or not, even if enthusiasm and interview performance is not specifically stated as one of the considerations or necessary qualifications in the hiring process.

The administrative law judge also addressed the issues of the historic lack of African American managers at the Railroad and the nickname “black magic” Curt Rudd, one of the members of the interview panel, had given and used when speaking with Ross in the past. The judge concluded Rudd’s testimony was credible when he stated there was no intent for the nickname to be derogatory and he ceased using it upon finding out Ross did not wish to be called by that name. The judge also concluded the lack of African American managers with the railroad was inconclusive evidence to determine discrimination without further context being presented such as the number of qualified minority applications for the position.

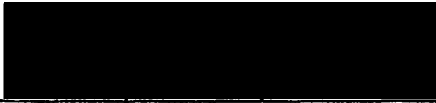
While it is not possible to conclusively determine if the Railroad's actions were truly done out of racial animus and discrimination, the administrative judge concluded based off of the presented testimony and evidence that Ross had not proven it was more likely than not the Railroad's provided explanation of not hiring Ross because of poor interview performance was pretext for discrimination. Although there was conflicting testimony, a reasonable mind could find the Commission's decision to accept the administrative law judge's recommendation that the case be dismissed was supported by sufficient evidence to justify their decision.

CONCLUSION

The substantial evidence test is the standard of review the Court should use for an appeal of the Commission's factual finding that Ross did not present sufficient evidence to prove the Railroad's explanation for not hiring him was more likely than not pretext for discrimination. Under this standard the Court cannot substitute its own judgment for that of the trier of fact, nor can the Court reweigh the evidence or assess the credibility of testimony. The Court's review is limited to whether or not the Commission's ruling is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Although it is not possible to determine with complete certainty that the Railroad's actions were not motivated by discrimination, there was sufficient evidence in the record and from the administrative law judge's findings that the Commission's ruling was adequately supported. Therefore, the Court must DENY Ross's Appeal and AFFIRM the Commission's final order.

It is so Ordered.

Dated at Anchorage, Alaska this 18th day of December 2017.


Erin B. Marston
Superior Court Judge

I certify that on 12/18/17
a copy of this notice was mailed to:
Choate; Choate, Miles


K. DiCarlo, Judicial Assistant