

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2018-156**

JAMES THOMAS STANLEY

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

TRANSPORTATION CABINET

APPELLEE

*** **

This matter came on for an evidentiary hearing on March 21, 2019, before E. Patrick Moores, Hearing Officer, at the office of the Personnel Board, 1025 Capital Center Drive, Suite 105, Frankfort, Kentucky. The proceedings were recorded by audio-video equipment pursuant to the authority found at KRS Chapter 18A.

The Appellant, James Thomas Stanley, was present and represented by the Hon. Natalie Lile. The Appellee, Transportation Cabinet (hereinafter "the Cabinet"), was present and represented by the Hon. William Fogle.

This appeal was filed by the Appellant on July 24, 2018, in which he alleged that he was discriminated against due to race and age when his application for promotion was denied.

I. STATEMENT OF THE CASE

1. The appeal filed by James Thomas Stanley concerned the Cabinet's denial of his application for a promotion from his position as a Highway Technician Superintendent I to a position as Highway Technician Superintendent II in Simpson County, Kentucky. Stanley submitted a letter with his appeal in which he stated that he was a 60-year-old, African-American, who has been employed with the Cabinet for over twenty-five years, has been serving in his current position since September 1, 2000, and that, after seventeen years of continued service, he applied for the posted position of Highway Technician Superintendent II for Simpson County. The position was awarded to a younger white male who did not have the experience, who was less qualified than Stanley, and also had a conflict with a private sector business he owned to which he devoted some of his attention while working on the Cabinet's time. Stanley

also alleged that the Cabinet failed to follow the statutory and regulatory procedures in making the appointment. Stanley further alleged in his letter that he had served as an acting Superintendent II, as needed, and that he has trained and is still training the person given the position. Finally, Stanley alleged that, in his seventeen years in the position as Superintendent I, he is being paid less than the appropriate wage for his position, and that he is the third lowest paid Superintendent.

2. A pre-hearing conference was held before the Personnel Board on October 4, 2018, following which an Interim Order was issued scheduling the matter for an evidentiary hearing on February 13, 2019, which was subsequently rescheduled to March 21, 2019.

3. The evidentiary hearing was conducted on March 21, 2019, commencing at 9:34 a.m., local time, and concluded by noon. At issue was whether the Cabinet complied with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400 in selecting the person promoted to the Highway Technician Superintendent II position for the Simpson County office, and whether Stanley was denied the promotion due to racial and age discrimination. The burden of proof on all issues was on the Appellant, by a preponderance of the evidence. At the conclusion of Appellant's direct proof, the Cabinet made a Motion for a Directed Verdict, which was **OVERRULED** on the grounds that the Appellant had introduced *prima facie* evidence of his race and age issues, together with a discriminatory conflict involving Stanley and a supervisor resulting in the filing of a grievance, and of very few African-Americans employed in the District. The case then proceeded with the Cabinet presenting its evidence supporting the decision to award the position to Barry Phillippi. Following the presentation of all the evidence, the attorneys for the parties made closing arguments, and were further provided the opportunity to submit legal briefs on the evidence and argue the law on the matter, which was declined. The matter was then submitted on the record.

II. SUMMARY OF EVIDENTIARY TESTIMONY

1. **James Thomas Stanley** testified that he was hired by the Commonwealth of Kentucky, Department of Transportation, in 1993, working in the Traffic Division in Warren County. Four years later, he was promoted to the position of Timekeeper in the Simpson County office. In August 2000, he was promoted to the position of Highway Superintendent I for

District 3 of the Department of Transportation office in Simpson County. Over the subsequent years, he had five managers, the last being Barry Phillippi, who was given the promotion that Stanley also applied for as Highway Technician Superintendent II.

2. Stanley testified that, before Phillippi was promoted, he was brought into the Simpson County office by State Highway Engineer Patty Dunaway, who asked Stanley if he could work with him. Stanley testified that he was under the assumption that Phillippi was only going to be in the Simpson County office for one year to temporarily fill-in for Stanley's manager, Shawn Cary. Cary and Stanley had a conflict arising from Cary allegedly making racial comments during Stanley's 2016 performance evaluation done by Cary, in response to which Stanley had filed a grievance against Cary. Stanley testified that his performance evaluations the year before and the year after 2016 were "Highly Effective" and "Outstanding."

3. Stanley stated that he learned that Phillippi was brought into the Simpson County office (under Executive Order) for the purpose of taking over the management of the office as a Highway Technician Supervisor II. Stanley testified that he believed the Cabinet brought Phillippi into the Simpson County office to become its manager because Stanley would soon be 62 years of age and was black. Stanley said that Phillippi did not know the job, as Stanley had to train and show him how to perform everything in his job responsibility. Stanley stated that he was asked to help Phillippi because he had eighteen years' supervisory experience with twelve employees in the Simpson County office. Stanley testified that, since Phillippi has been awarded the management position in the Simpson County office, he has taken four one-week vacations, causing Stanley to do all his work.

4. Stanley testified that when the opening for the Highway Technician Supervisor II position was posted, he and two other people, including Phillippi, applied for the position, and that he was interviewed for the position. He said that when he was later told that Barry Phillippi had been chosen for the position, he got upset and went home. Stanley testified that he has twenty-six years' experience with the Cabinet and has been a Highway Technician Superintendent I for eighteen years, but that his job required him to do everything a Highway Technician Superintendent II does in highway maintenance. He described the position of Superintendent II as the "foreman" of the office. Stanley testified that he is the only employee in the ten-county District Office that has gone without a promotion over that time, which he

believed was because he was an African-American and eligible to retire in a couple of years, whereas Phillippi is Caucasian and much younger. He said that Phillippi was initially brought in as a Tech III, which is a higher job grade than Highway Technician Supervisor I, but that Phillippi's experience over his thirteen years with the Cabinet was in construction. Stanley stated that, although he did not know Phillippi's education qualifications, he (Stanley) had twice the experience and had done a lot of training of personnel in the office. He stated that after Phillippi came to work for the Transportation Cabinet office, he continued to work on his private business while working on Cabinet time.

5. **Joe Plunk** is the Executive Director of District 3 and a Professional Engineer. He served on the panel that reviewed and interviewed the three applicants. He testified that both Stanley and Phillippi had supervisory experience. He stated that an important factor in the consideration for the position was the 26 years of project management experience that Phillippi had, both in the private sector before coming to work at the Cabinet and as a supervisor in the Cabinet's Warren County office. He stated that he did not recall ever saying that he was bringing Phillippi into the Simpson County for the job as Highway Technician Supervisor II to manage the office. He further acknowledged that he was aware of the issues between Stanley and Cary, including the dispute over the Performance Evaluation, and that he had some involvement in the resolution of the conflict between the two men, although he was not involved in any decision to resolve the conflict or redo the evaluation. He said that Cary is now in a Highway Tech II position in the District 3 office in Warren County. Plunk testified that, within the Simpson County office, of the twelve to fourteen employees, two were African-Americans. He said that he was not aware of the allegation that, while Phillippi has been serving as the manager of the Simpson County office, he was making phone calls for his private business.

6. Plunk testified that it was a priority that the Cabinet fill the position in Simpson County with someone with experience in project planning, preparing budgets, and handling complaints. He stated that the considerations that favored Phillippi were his management experience in the private sector, where he managed restaurants and other companies, and that he had served as a Transportation Engineering Tech III, the highest grade in that position, which is considered an elite individual. He further explained the differences between a Transportation Tech and a Highway Superintendent, and that Phillippi had over ten years' experience in

highway construction, whereas Stanley had none.

7. Plunk verified his memo dated May 29, 2018, to the office of the Cabinet's Human Resource Management, signed by Ashley Graves, Transportation Engineer Supervisor, that recommended that Phillippi be awarded the position as the Simpson County Highway Technician Superintendent II. The memo reported that, in considering the candidates for the open position, they followed the promotional criteria required under 101 KAR 1:400, and KRS 18A.0751. Further, during the interview process of the three candidates, Phillippi received a rating of "Very Good," and Stanley was rated as "Good," while the third candidate considered for the position was rated as "Fair." Additionally, Phillippi demonstrated leadership and problem solving ability throughout his career in both the private sector and with the Cabinet. The memo stated that given the shift in emphasis within the Cabinet for performance and knowledge in both the maintenance and oversight of construction projects by contractors, Phillippi's experience in both maintenance and construction made him the ideal candidate for the open position.

8. **Jill Harmon** is the Administrative Coordinator for District 3 of the Cabinet, and her duties include overseeing District operations, including matters involving management of the District's human resources. She stated that she was aware that there had been a lot of conflict in the Simpson County office between Cary and the office's crew and that Stanley had filed a grievance against Cary. This ultimately led to the opening for the position as Highway Technician Superintendent II in the Simpson County office.

9. Harmon testified that she was on the interview panel that interviewed the three candidates for the Highway Technician Superintendent II position over the Simpson County office. She testified that they also reviewed the candidates' application, performance evaluations, internal mobility forms, and the position description. Harmon testified that they ran background checks on the candidates, but, since they had performance evaluations on the candidates, they did not do reference checks. She stated that after the panel reviewed and took into consideration all the information on each of the three candidates that applied for the position, including the interviews, they considered Phillippi to be the most qualified candidate. She testified that he had worked for 128 months on the construction side, supervising construction crews and contractors doing highway construction, and that he had experience in a varied management background,

both in the private sector and with the state.

10. Harmon introduced into the record the Applications and Questionnaire Job Responses submitted on the behalf of Stanley and Phillippi, which contained their employment history, education history, training, previous positions held and duties performed, in addition to all supervisory and management experience. Stanley's documentation showed that he was born on February 13, 1958 and graduated from Franklin Simpson High School in 1976. Stanley began working with the Kentucky Department of Transportation on January 1, 1993. On August 16, 2000, he was promoted to a Superintendent I position, which he has held to the date of his application for the promotion to Superintendent II, in the Simpson County Office. Stanley's duties included supervising and coordinating highway maintenance, maintaining records and reports, addressing inquiries concerning said maintenance, and acting as a Superintendent II when one was not present. Phillippi's application and questionnaire response revealed that he was born on May 5, 1971, and in 1990 graduated from Warren East High School and Bowling Green Technical College. He began working in the private sector in 1989 as an assistant manager of a restaurant, which required him to hire, schedule and manage employees, delegate tasks, in addition to maintaining and improving the facility. He subsequently was employed as a carpenter, a parts clerk in shipping and receiving, a crew chief responsible for the maintenance and performance of a racecar crew, an assistant manager of a bakery company, driving a tow truck, and as a general manager of a pizza restaurant. Each of these jobs required managing employees, overseeing the maintenance of equipment, and planning projects. On February 16, 2005, he was hired by the Transportation Cabinet as a Highway District Equipment Supervisor in Warren County. On November 16, 2006, Phillippi was promoted to the position of Transportation Engineering Tech III, in which position he served until March 1, 2017, overseeing highway construction projects, preparing plans and reports, and other duties. On March 1, 2017, he was placed in the position of Superintendent II at the Simpson County office, with the duties of scheduling and supervising highway units in the maintenance and repair of roads, bridges, and related construction projects, in addition to the managerial responsibilities related to said responsibilities.

11. **J.R. Dobner** is a Deputy Executive Director in the office of Human Resource Management with the Cabinet, and supervises employees in the Personnel Branch. His

experience in the Cabinet's office of Human Resource Management involved serving as a staff attorney in the Personnel Branch, and becoming Human Resource Administrator in 2008. He was made a Deputy Executive Director in 2016. He testified that after the interview panel goes through the documentation on the candidates and conducts the interviews of the candidates, the panel's recommendation is forwarded to his office. Dobner said that he then reviewed the panel's recommendation, the personnel files of each of the candidates, and the factors provided on the Internal Mobility forms on each candidate.

12. Dobner testified that Stanley had more experience in the maintenance side, but that Phillippi had more management experience. He said that in considering the qualifications of the candidates, "Stanley had a lot going for him," but Phillippi had supervisory experience both outside and inside state government; Dobner also said that Phillippi's management experience in the private sector was transferrable, including skills such as handling employees, conflict management, and equipment knowledge. Dobner noted that Phillippi's experience and performance evaluations were all rated as "Outstanding." He confirmed that Phillippi is significantly younger than Stanley, as he will be 48-years-old in May 2019. He also acknowledged that Phillippi's only maintenance experience was obtained during the prior year he worked in the Simpson County office as the Superintendent II.

III. FINDINGS OF FACT

1. Appellant, James Stanley, is an African-American male over the age of 60, with 26 years' experience working in the maintenance section of the Transportation Cabinet's District 3 office located in Simpson County. His abilities and skills were obviously highly considered within the Cabinet, as he performed the duties of a Superintendent II when one was not available, and he was asked to train other workers, including Phillippi, who was ultimately awarded the managing Superintendent position of the office in Simpson County.

2. Barry Phillippi is a Caucasian male, 47 years of age, with thirteen years' experience in construction oversight working for the Cabinet, the last year of which was located at the Simpson County office. He also had sixteen years' experience previously working in the private sector, and his experiences exhibited to the panel that reviewed the qualifications of the applicants, that he was an applicant possessing significant management experience in handling

and supervising employees, resolving conflicts, and overseeing highway construction projects.

3. Due to a conflict that arose between Stanley and his former supervisor, Shawn Cary, in 2017, over an Annual Performance Evaluation conducted by Cary on Stanley for 2016, on which Stanley alleged the grading of him was racially motivated, Cary was transferred out of the supervisory position in Simpson County. This created an opening on which Phillippi was assigned on March 17, 2017, which was subsequently posted for permanent placement in 2018.

4. Three candidates submitted applications and were considered for the position. Interviews were conducted with the applicants by the panel of reviewers on May 23, 2018. During the interview process of the three candidates, Phillippi received a rating of "Very Good," Stanley was rated as "Good," and the third candidate considered for the position was rated as "Fair."

5. The panel reviewing the candidates took into consideration all the information on each of the three candidates that applied for the position, and the responses given during the interviews, and they concluded that Phillippi's experience in both maintenance and construction made him the ideal candidate for the open position. Accordingly, the panel considered Phillippi to be the most qualified candidate for the position of Highway Technician Superintendent II at the Simpson County office.

6. The evidence provided by witnesses Plunk, Harmon, and Dobner, as well as the exhibits produced by the Cabinet of the applications, questionnaire responses, and the internal mobility forms on Stanley and Phillippi, establish that the Cabinet complied with the statutory and regulatory requirement of posting the position, and considering the applicants' qualifications, record of performance, conduct, seniority, and performance evaluations in making the selection of Phillippi for the Superintendent II position. No evidence was presented by the Appellant that the Cabinet failed to follow the required procedures.

7. Stanley claimed that his below average salary and failure to receive the promotion was the result of age discrimination and racial bias within the Cabinet, particularly within District 3. However, Stanley presented no evidence to support his allegation that he continued to be discriminated against after he filed his grievance against Cary, which resulted in the opening for which he applied. Further, no evidence was presented to support the age discrimination or low wage claims he raised.

IV. CONCLUSIONS OF LAW

1. KRS 18A.0751(4)(f) requires that, during a promotional process, the Agency “shall give appropriate consideration to the applicant's qualifications, record of performance, conduct, and seniority. Except as provided by this chapter, vacancies shall be filled by promotion whenever practicable and in the best interest of the service.”

2. Pursuant to 101 KAR 1:400(1), the Kentucky Administrative Regulation pertaining to promotions, “Agencies shall consider an applicant's qualifications, record of performance, conduct, seniority and performance evaluations in the selection of an employee for a promotion.”

3. Concerning Stanley’s allegation that he was denied the promotion due to racial and age discrimination, the law establishes that, for Title VII claims, discrimination can be proven either directly, by presenting direct and/or circumstantial evidence on the issue of discriminatory intent, or indirectly, using burden shifting method stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The direct method requires that the employee produce evidence that the employer was motivated by animus toward a protected class when he suffered some adverse employment action. *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 849-50 (7th Cir. 2008). To succeed under the direct method, the Appellant must offer either direct evidence that would prove discriminatory intent, without reliance on inference or presumption, or “a convincing mosaic” of circumstantial evidence that would demonstrate intentional discrimination to the decision maker. *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729 (7th Cir. 2011). The focus of the direct method of proof is whether the evidence offered “points directly” to a discriminatory reason for the employer's action. *Darchak v. Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009).

4. Under the three broad types of circumstantial evidence, the employee must show behavior toward, or comments directed at, other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn. *Silverman*, 637 F.3d at 734. Alternatively, the employee could introduce evidence showing that the employer “systematically treated other, similarly situated, employees better.” *Id.* Lastly, the employee could introduce evidence that the employee was passed over or replaced by a person not having

the protected class characteristic, and that the employer's stated reason for the different treatment was pretextual. *Id.*

5. The evidence presented by the Cabinet provided a legitimate, non-discriminatory reason for its actions, which was based on: (1) the review of the promotional panel of the applications submitted, the information provided by the applicants in the responses to the questionnaires concerning the applicants' education, work history, performance evaluations, and experience, particularly in areas of management; (2) the overall rating the applicants were given from their interviews; and (3) the determination that experience in construction matters was equally as important for the position as experience in maintenance. Not only did the Appellant fail to provide any evidence that the Cabinet's hiring practices showed any discriminatory practices, the Appellant did not provide any evidence, beyond his own conclusory allegations, of discriminatory conduct towards him by the Cabinet.

6. The Appellant established a *prima facie* case in the record that he is an African-American, over 60 years of age, and that the person promoted into the position he was seeking was Caucasian and 47 years of age. To establish a *prima facie* case of discrimination requires only a minimal showing before shifting the burden to the employer. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, (1993). On the other hand, when the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the action taken against the employee, the law applies a "rigorous standard" when evaluating the employee's evidence of "pretext" at step three of the *McDonnell Douglas* analysis.

7. Pretext may be demonstrated if "the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged actions, or (3) was insufficient to warrant the challenged action." *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000). However, at all times, "[t]he plaintiff retains the burden of persuasion." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

8. Here, while the Appellant established a *prima facie* case of race and age discrimination, the Cabinet provided sufficient evidence of legitimate, nondiscriminatory reasons for selecting Phillippi for the Superintendent II position and there was no evidence presented that those reasons were mere pretext for discrimination. *Id. at 253. Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996). As the Cabinet satisfied its burden, any

presumption of intentional discrimination is negated; the Appellant must then prove by a preponderance of the evidence that the Cabinet intentionally discriminated against the Appellant. *Cline v Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). Stanley clearly failed to meet this burden, as he failed to prove by a preponderance of the evidence that the Cabinet's articulated reason, for selecting Phillippi were actually pretext for illegal discrimination. *Boyd, supra*. Nor did the Appellant present any circumstantial evidence sufficient to demonstrate discrimination by the Cabinet. The clear weight of the evidence establishes that Phillippi was selected for the Superintendent position for legitimate, nondiscriminatory reasons.

9. In this case, the Cabinet clearly articulated a nondiscriminatory and legitimate business reason for promoting Phillippi to the Superintendent's position over Stanley. There was no evidence whatsoever that the reasons given by the Cabinet were not in the legitimate interests of the employer.

10. No evidence was presented concerning any discrimination against the Appellant concerning his wage, other than his own self-serving allegation. Further there was no evidence of notice given to the Cabinet concerning Phillippi's alleged conflict with a private sector business he owned to which he devoted some of his attention while working on the Cabinet's time. Therefore, consideration of these alleged issues is unnecessary.

11. It is the conclusion of this Hearing Officer that the promotion of Barry Phillippi by the Cabinet complied with the provisions of KRS 18A.0751(4)(f) and 101 KAR 1:400, and that the Appellant failed to prove by a preponderance of the evidence that his salary or the failure to promote him into the position of Highway Technician Superintendent II to the Cabinet's office in Simpson County was due to discrimination based on age or race.

V. RECOMMENDED ORDER

The Hearing Officer recommends to the Personnel Board that the appeal of **JAMES THOMAS STANLEY V. TRANSPORTATION CABINET (APPEAL NO. 2018-156)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer E. Patrick Moores**, this 23rd day of May, 2019.

KENTUCKY PERSONNEL BOARD


MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Natalie Lile
Hon. Will Fogle
J. R. Dobner