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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2016 JAN 19 11:54

TRG CUSTOMER SOLUTIONS, INC.,

Petitioner,

v.

Civil Action No. 15-AA-100

Hon. Charles E. King, Jr.

WEST VIRGINIA HUMAN RIGHTS COMMISSION
and KENNITA L. THOMAS

Respondents.

FINAL ORDER

Presently pending before the Court is the administrative appeal of TRG Customer Solutions, Inc. (hereinafter "Petitioner"). Petitioner appeals the July 17, 2014 Final Order of Respondent West Virginia Human Rights Commission (hereinafter "Commission") affirming the March 14, 2014 Final Decision and May 28, 2015 Supplemental Final Decision of Administrative Law Judge *pro tempore* Frank Litton. In his Final Decision, the ALJ *pro tempore* concluded that Petitioner unlawfully retaliated against Respondent Kennita Thomas (hereinafter "Thomas") with respect to hiring for engaging in activity protected by the West Virginia Human Rights Act.

The parties have submitted written memoranda to the Court in support of their respective positions. After reviewing the Petition for Appeal, the parties' submissions, the record, and applicable law, and being otherwise fully advised, and after careful deliberation, the Court is of the opinion that the Final Order of the Commission is contrary to the law of West Virginia and the United States and is not supported by substantial evidence on the record. Accordingly, the Final Order of the Commission should be, and the same is, **REVERSED**, for the following reasons:

FINDINGS OF FACT

1. Thomas worked for her previous employer, TRG Insurance Solutions, Inc. ("Insurance Solutions") at its Beckley, West Virginia call center. Insurance Solutions sold insurance through outbound telemarketing.
2. In 2009, Thomas filed a race discrimination complaint against Insurance Solutions in the Beckley Human Rights Commission. At the time Thomas filed her complaint, Brian Helton was Vice President of Operations of Insurance Solutions. Insurance Solutions denied wrongdoing, but offered Thomas a position as a quality analyst. Thomas accepted and the matter was settled. As a quality analyst, Thomas earned \$15.00 per hour.
3. TRG Insurance Solutions, Inc. is incorporated in Florida.
4. In late 2009, TRG Insurance Solutions, Inc. sold its business and liquidated its assets, ceasing operation in January 2010. Employees at the Beckley, West Virginia call center were informed that the company was closing and that they would be laid off.
5. Thomas was selected as part of the closing team for TRG Insurance Solutions, and thus was one of the last employees laid off. Thomas's last day of employment was January 24, 2010.
6. Petitioner entered into a lease to occupy TRG Insurance Solutions's former space in order to open an inbound call center providing customer service. This lease was standalone and separate from TRG Insurance Solutions's.
7. Petitioner is incorporated in Delaware.

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8. Petitioner is a separate and distinct corporate entity from TRG Insurance Solutions. The two companies have separate management structures, officers, and boards of directors and are incorporated in different states.
 9. Petitioner offered former employees of TRG Insurance Solutions the opportunity to apply for positions with Petitioner. Petitioner did not make any guarantees of employment. Former TRG Insurance Solutions employees were required to follow Petitioner's standard application process.
 10. For an applicant to be considered for a position with Petitioner, he or she must submit a completed, signed application.
 11. On January 10, 2010, a recruiter for Petitioner approached Thomas about applying for a job and provided Thomas with two applications, one each for trainer and customer service positions. The recruiter suggested that Thomas apply for both positions.
 12. Thomas was interested only in supervisory positions with Petitioner, and/or positions which paid at the same rate of pay as her previous job with Insurance Solutions. The trainer position with Petitioner was supervisory and paid \$12.75 per hour. The customer service position was not supervisory and paid \$9.00 per hour.
 13. Thomas submitted a completed, signed application for the trainer position and was given a telephone interview for the trainer position by Donna Williams. Ms. Williams, an African-American woman, was then the Senior Vice President of Petitioner. Thomas never followed up on the interview, nor did she ever inquire about the status of her application.

14. The trainer position required a college degree, which Thomas did not have. Thomas was not selected for the trainer position. Both successful candidates for the trainer position had college degrees.
15. The Commission's ALJ *pro tempore* found that Petitioner's nonselection of Thomas for the trainer position was not retaliatory because she was not qualified for the position.
16. Thomas also submitted an incomplete application for the customer service position. Thomas filled out only her name, the date, and two (2) of the fourteen (14) questions on the application. Thomas left the remaining twelve (12) questions blank and did not sign the application.
17. Thomas was not offered a customer service position.
18. Jackie Denise Ward, Petitioner's Director of Client Services, was responsible for hiring at the Beckley location in early 2010, including customer service employees.
19. By early 2010, Mr. Helton was employed by Petitioner as Vice President of Operations. Ms. Ward recommended Thomas to Mr. Helton for a quality analyst position. Mr. Helton did not endorse the recommendation because of Thomas's 2009 complaint against Insurance Solutions. Thomas had not submitted an application for a quality analyst position.
20. Ms. Ward did not know that Thomas would be interested in a customer service position.
21. The ALJ *pro tempore* found that Thomas had established a *prima facie* case of retaliation with regard to the customer service position based upon Mr. Helton's conversation with Ms. Ward.

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22. The ALJ *pro tempore* recognized that Petitioner articulated a legitimate, nondiscriminatory reason for nonselection of Thomas to the customer service position – that Thomas had failed to complete the application for the customer service position.
23. The ALJ *pro tempore* further found that Petitioner “failed to meet its burden of proving [its] legitimate nondiscriminatory reason for failing to hire [Thomas] for a customer service position. Accordingly, the ALJ *pro tempore* held that Petitioner’s nonselection of was retaliatory and awarded judgment in favor of Thomas. The ALJ *pro tempore* ordered, *inter alia*, that Thomas be instated to a customer service position.
24. Upon administrative appeal, the Commission revised the ALJ *pro tempore*’s Final Order to change the word “proving” to “providing.” The Commission upheld the ALJ *pro tempore*’s Final Order.

STANDARD OF REVIEW

The West Virginia Administrative Procedures Act sets out the parameters for the review of a final order of the West Virginia Human Rights Commission:

The Court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- 1) In violation of constitutional or statutory provisions; or
- 2) In excess of the statutory authority or jurisdiction of the agency; or
- 3) Made upon unlawful procedures; or
- 4) Affected by other error of law; or

- 5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- 6) Arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. VA. CODE § 29A-4-4(g). While the Court accords deference to the Commission's factual findings which are supported by substantial evidence, the Court is not bound to give such extensive deference to the Commission regarding the interpretation of the law or the application of the law. Questions of law are reviewed *de novo*. *Mayflower Vehicle Systems v. Cheeks*, 218 W. Va. 703, 629 S.E.2d 762 (2006); *Fairmont Specialty Servs. v. W. Va. Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999); *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999). If aspects of the agency's decision are shown to deviate from the applicable law, they are to be corrected upon review.

DISCUSSION AND ANALYSIS OF PETITIONER'S ASSIGNMENTS OF ERROR

As the basis for its Petition for Appeal before this Court, Petitioner asserts six (6) assignments of error. To the extent Petitioner has articulated legitimate assignments of error grounded within the record below, this Order shall address the same.

Assignment No. 1

Petitioner's first assignment of error contends that the cause of action upon which the Commission's Final Order is based, a claim of retaliatory failure to hire against a prospective employer, does not exist. (Petition for Appeal, pp. 6-8). The Supreme Court of Appeals has stated in no uncertain terms that it "has not recognized a cause of action for failure to hire based upon an applicant's history of filing a lawsuit against a former employer." *Toth v. Bd. of Parks & Rec. Comm'rs*, 215 W. Va. 51, 54 (2003). Thus, the claim Thomas asserts, and upon which

the Commission awarded relief, does not exist in West Virginia. Accordingly, the Commission's Final Order deviates from applicable law and is not in conformity with the laws of this state.

The Court is not persuaded by the Respondents' assertions that the Commission may award relief pursuant to any unrecognized cause of action that has not been explicitly foreclosed by the Supreme Court of Appeals. Interpretation of the law is a function peculiarly reserved for the judicial branch of government. *Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 144 S.E.2d 156 (1965). The Commission is an executive branch agency. Until such time as a judicial court recognizes a cause of action, it is the function of the Commission as an executive agency to apply the law as it exists, not create new law through the court function of interpretation. The Court finds that the Commission erred in law by awarding relief pursuant to a claim of retaliatory failure to hire against a prospective employer, prejudicing the substantial rights of Petitioner.

Assignment No. 2

Petitioner's second assignment of error contends that the Commission's conclusion that "but for" Brian Helton's comments, Thomas would not have been hired for the customer service position, is not supported by substantial evidence on the record. (Petition for Appeal pp. 8-10, 12-16). Thomas herself testified that she was only interested in supervisory positions, and/or positions which paid the same as her previous job with Insurance Solutions. The customer service position was not supervisory, and paid \$6.00 per hour less than her previous job. Nor did Thomas submit a completed application for the customer service position. Even though the trainer position for which Thomas submitted a completed application also paid less than her old job, it was supervisory.

Jackie Ward was the decisionmaker with regard to hiring for customer service positions at the new Beckley facility. She recommended Thomas to Brian Helton for a quality analyst

position, not a customer service position. Brian Helton declined to endorse Thomas for a quality analyst position, not a customer service position. Ms. Ward testified that she was entirely unaware that Thomas would have been interested in a customer service position. Thus, the reason Ms. Ward would have (or would not have) offered Thomas a customer service position is nothing more than speculation. As a matter of law, speculation does not constitute sufficient evidence upon which to rest the ALJ *pro tempore*'s and Commission's conclusions. *White v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999) ("Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence.").

Reliable, probative, and substantial evidence on the record shows that Thomas was neither interested in a customer service position, nor did she submit a completed application for the same. Thus, evidence on the record does not support a conclusion that Thomas would have been hired into a customer service position absent wrongful conduct. Accordingly, the Court finds that the Commission's conclusion that "but for" Brian Helton's comments, Thomas would not have been hired as a customer service representative, is not supported by substantial evidence in the record.

Assignment No. 3

Petitioner's third assignment of error contends that the Commission erred by rejecting the "but for" causation standard espoused by the United States Supreme Court in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (U.S. 2013). (Petition for Appeal pp. 11-12). The Supreme Court of Appeals has repeatedly commanded that the WVHRA is to be construed consistent with the prevailing application of Title VII unless the statute's language demands otherwise. *See, e.g., Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995). As a United States Supreme Court decision, *Nassar* represents the "prevailing" analysis of Title VII

retaliation claims. There has been no presentation to this Court that the language of the language of W. VA. CODE § 5-11-9-7(c) demands a differing interpretation from 42 U.S.C. 2000e-3, upon which the *Nassar* decision is based.

This Court is not persuaded by Respondents' arguments that the Commission need not be influenced by the prevailing federal interpretation of Title VII. Such an assertion is legally incorrect. The Court finds that the Commission erred in law by rejecting the *Nassar* standard of "but for" causation in adjudicating this case.

Assignment No. 4

Petitioner's fourth assignment of error contends that the ALJ *pro tempore* applied an incorrect legal standard in analyzing the retaliation claim against it. (Petition for Appeal pp. 16-18). Specifically, Petitioners allege that the ALJ *pro tempore* failed to properly apply the three-step analytical framework first articulated in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The framework is best encapsulated as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' (citation omitted). Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (citation omitted).

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). West Virginia has explicitly adopted this three-step inferential proof formula. *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983).

The hurdle an employer must clear to articulate a legitimate, nondiscriminatory reason is not a high one. The burden is one of production, not of proof. The burden of production merely

requires a party to present some evidence to rebut evidence offered by the party having the burden of persuasion. *Mayhew v. Mayhew*, 205 W. Va. 490, 497, 519 S.E.2d 188, 195 n. 15 (1999). At no time does the burden of proof shift to a respondent, but rather “at all times the burden of proof or the risk of nonpersuasion . . . remains on the plaintiff.” *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 72, 479 S.E.2d 561, 582 (citing *Burdine*, 450 U.S. at 253).

In his Final Decision, the ALJ *pro tempore* explicitly acknowledged that Petitioner articulated a legitimate, nondiscriminatory reason for nonselection of Thomas to the customer service position – that her application for the position was incomplete and she did not show up for training. He proceeded, however, to hold that Petitioner had “failed to meet its burden of proving a legitimate nondiscriminatory reason” for its actions. Such a burden is explicitly forbidden by all applicable jurisprudence under the West Virginia Human Rights Act, and this Court finds that the ALJ *pro tempore*’s Final Decision is clearly inconsistent with West Virginia law.

This Court is not persuaded by the Respondents’ arguments that the ALJ *pro tempore* followed the correct framework and found Petitioner’s legitimate, nondiscriminatory reason to be pretext. Such an assertion is factually and legally incorrect, as there is no such finding in the ALJ *pro tempore*’s Final Decision. In fact, any analysis of whether Thomas carried her required burden to prove pretext is entirely absent from the ALJ *pro tempore*’s Final Decision.

Neither is this Court persuaded by the Commission’s argument, without support in the record, that the ALJ *pro tempore*’s error is typographical, nor by the corresponding assertion that merely changing “proving” to “providing” renders the ALJ *pro tempore*’s analytical framework proper. The change by the Commission in its Final Order would render the Final Decision

internally inconsistent, because the ALJ *pro tempore* recognized that Petitioner had, in fact, articulated a legitimate, nondiscriminatory reason.

Moreover, the Commission's typographical change would be contrary to the context provided by a full reading of the ALJ *pro tempore*'s Final Decision. Thomas raised a *prima facie* case of discrimination. As the ALJ *pro tempore* recognized, Petitioner provided a legitimate, nondiscriminatory reason for its actions. At this point, the presumption of discrimination had been rebutted and the inquiry should have risen to a new level of specificity. *Skaggs*, 198 W. Va. at 71-72, 479 S.E.2d at 581-82. The ALJ *pro tempore* did not adjust his inquiry and instead, in essence, shifted the burden of proof to Petitioner. This Court finds that a higher legal standard than the mere burden of production prescribed by law was applied in adjudicating this case, prejudicing the substantial rights of Petitioner.

Assignment No. 6

Petitioner's sixth and final assignment of error contends that the Commission erroneously awarded back pay damages for the period that Thomas was enrolled as a full-time student. Given that, as discussed above, the Commission erred in liability, this Court finds that the question of damages need not be reached.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear the instant Petition for Appeal pursuant to W. VA. CODE § 5-11-11(a).
2. A cause of action against a prospective employer for retaliatory failure to hire has not been recognized in West Virginia. Accordingly, the Final Order deviates from applicable law and the Commission erred in law by awarding relief to Thomas pursuant to an unrecognized cause of action.

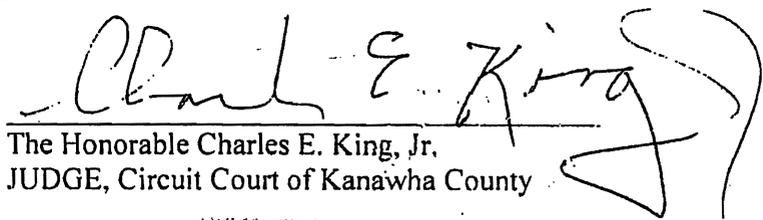
3. The West Virginia Human Rights Act is to be construed consistent with the prevailing application of Title VII unless statutory language demands otherwise. There is no showing to this Court that the language of W. VA. CODE § 5-11-9-7(c) demands a differing interpretation from 42 U.S.C. 2000e-3. Accordingly, the Commission erred in law by failing to adopt the “but for” causation standard expressed in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (U.S. 2013).
4. Thomas did not submit a completed application for the customer service position. Nor did Ms. Ward, the decisionmaker, know that Thomas would be interested in a customer service position. In fact, Thomas expressed desire only for supervisory positions. The customer service position is not supervisory. Moreover, the ALJ *pro tempore*'s and Commission's conclusion that “but for” Brian Helton's comments, Thomas would not have been hired into the customer service position rests entirely on Ms. Ward's speculation. Accordingly, the Commission's conclusion that Petitioner's nonselection of Thomas to the customer service position was retaliatory is not supported by substantial evidence on the record.
5. The ALJ *pro tempore* did not apply the appropriate *McDonnell-Douglas* legal standard in concluding that Petitioner failed to “prove” its articulated legitimate, nondiscriminatory reason. The Commission's finding, without support on the record, that the ALJ *pro tempore*'s chosen language was typographical error is not supported by the context of the ALJ *pro tempore*'s Final Decision. Petitioner was substantively held to an inappropriate legal standard in deviation from applicable law and the Commission erred in law by affirming the ALJ *pro tempore*'s reasoning in its Final Order.

Therefore, this Court, after mature consideration and after a review of the Court file, the lower level record, and pertinent legal authority hereby **ORDERS** that the July 17, 2014 Final Order of the West Virginia Human Rights Commission should be, and the same is, **REVERSED** and judgment is **ENTERED** for the Petitioner.

The objections and exceptions of any party to this Order are hereby noted and preserved.

The Circuit Clerk is **DIRECTED** to mail a certified copy of this Order to all counsel of record via First Class United States Mail.

ENTERED this the 19TH day of Jan, 2016


The Honorable Charles E. King, Jr.
JUDGE, Circuit Court of Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, ss
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th
DAY OF FEBRUARY, 2016
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 10A

Presented by:


Bryan R. Cokeley (WVSB # 774)
Mark C. Dean (WVSB #12017)
STEPTOE & JOHNSON PLLC
Seventeenth Floor, Chase Tower
P.O. Box 1588
Charleston, WV 25326-1588
(304) 353-8000
(304) 353-8180 facsimile
Counsel for Petitioner

Date: 1/25/16
Certified copies sent to:
 counsel of
 parties
 other (please indicate) M. Dean
By: A. Wright
 certified/first class mail
 fax
 hand delivered
 info deposited
Other/officially accomplished
A. Wright
Deputy Circuit Clerk