

STACY L. MESSICK AND
STEPHANIE R. MOSES
(MESSICK AND MOSES I),
Appellant
v.

WICOMICO COUNTY
BOARD OF EDUCATION,

Appellee.

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 13-50

OPINION

INTRODUCTION

Ms. Messick and Ms. Moses jointly appealed their terminations as Coordinator of Employee Relations and Director of Human Resources respectively. The Wicomico County Board of Education (local board) filed a Motion for Summary Affirmance of the termination decisions. Messick and Moses responded to the Motion. The local board filed a Reply. Messick and Moses filed a Supplemental Memorandum of Law.

FACTUAL BACKGROUND

The facts relevant to this appeal are these. On September 28, 2011, the local superintendent sent memos to Ms. Messick and Ms. Moses discussing their job performance. The three page memo to Ms. Messick explained where the superintendent believed she needed to improve. The superintendent, however, expressed appreciation for her work and offered to help her in any way he could. (Hearing, Sup. Ex. 1). The one page memo to Ms. Moses was more pointed, expressing dismay over her handling a personnel matter and directing her to complete several tasks. The superintendent expressed confidence in Ms. Moses, however. (Hearing, Sup. Ex. 2).

On October 13, 2011, Ms. Messick submitted a 12 page rebuttal to the memo from the superintendent. In it, among many other things, she asserts that the superintendent discriminated against her on the basis of age and sex. She says:

While I have felt uncomfortable and troubled by your comments, the inequity of discussing my master's degree as a means of credibility, and the illegality of the double standard when compared to other executive staff, particularly the male directors in administration. I have tried to ignore these standards and comments in an effort to not "rock the boat" and to continue to perform my duties. Now that you have moved to disciplinary action, and have documented concerns that I believe to be arbitrary, illegal and unreasonable, I must ask that you refrain from further suggestion that my age or gender impact my work credibility. I further ask that you refrain from requiring me to complete degrees, or any other requisites, not required by my

official job description, and not required of my peers on the executive staff. I also expect that I not be retaliated against with any type of adverse employment action or environment for voicing these concerns and asserting my legal rights. Lastly, I ask that you refrain from requiring a progress report as dictated in your memo in light of the questions of illegality I have raised.

(Hearing, Sup. Ex. 3).

On October 18, 2011, Ms. Moses sent a six page rebuttal letter to the superintendent providing the “exact facts and timelines” governing the personnel matter about which superintendent expressed concern. (Hearing, Sup. Ex. 4). In response, on October 20, the superintendent offered to meet with Ms. Moses and Ms. Messick. (Hearing, Sup. Exs. 6 &7). Ms. Moses declined the meeting by letter of October 20, 2011, asking that the superintendent’s September 29 memo be rescinded or she would appeal to the local board. (Hearing, Sup. Ex. 8). Similarly, Ms. Messick declined to meet. She too explained that she would appeal to the local board. She also said she was considering filing a grievance with the Maryland Commission on Human Relations (MCHR) to address her concerns about illegal employment actions. (Hearing, Sup. Ex. 9).

Both Messick and Moses appealed to the local board seeking to have the September 29 “cautionary” memos removed from their files. In addition, among other things, they asked the local board to instruct the superintendent to stop all illegal actions, to allow another person to supervise Messick and Moses, to refrain from retaliation, and to provide written guarantees to all witnesses that they will suffer no adverse action. (Hearing, Sup. Ex. 10). They requested an evidentiary hearing to bring witnesses to testify about the superintendent’s “leadership” and the “unprofessional environment and conditions he creates for female employees.” (Hearing, Sup. Ex. 10). Thereafter, the local board received several additional letters from the superintendent and Messick and Moses arguing about the appeal. (Hearing, Sup. Exs. 11 &12).

On November 2, 2011, the superintendent decided to remove the September 29 memos from the Messick and Moses personnel files, but to retain them in a separate file of his own. (Hearing, Sup. Exs. 13 & 14). Thereafter, Mr. Ronald Willey, President of the Board, wrote to Messick and Moses asking them to clarify the appeal issues and noting that they had “filed a complaint of discrimination and sexual harassment, but that...must be pursue[d]... ‘in accordance with [the] policy/procedures applicable to all employees.’” (Hearing, Sup. Ex. 15). That direction to follow policy/procedure evoked a strong response from Messick and Moses. They declared that such a response “demonstrates ignorance of the Board’s own policy and procedures...an open defiance of applicable federal and State laws....” *Id.* They asserted that they could not file complaints according to procedure because they themselves were the Title VII and Title IX coordinators designated to receive such complaints. They asked that the Board appoint a neutral investigator to examine their claims. They asked for a response by November 9, 2011 or they would file a complaint with MCHR. *Id.*

Mr. Willey replied on November 8, 2011 by explaining how the internal complaint process could work. He said:

Recognizing that you serve as the Title VII [Title IX] coordinator, and that your complaint concerns the Superintendent, the process will begin at Level Two and that you should submit a *Title VII and Title IX Complaint Filing Form* to Dr. Cathy Townsend, Assistant Superintendent of Administrative Services who is your immediate supervisor. If you are dissatisfied with Dr. Townsend's disposition of the complaint at Level Two, you may appeal directly to the Board under Level Four. When you submit the *Title VII and Title IX Complaint Filing Form*, please be as specific as possible in detailing the specific facts or events underlying your complaints and allegations to help facilitate a timely and comprehensive response.

Again, the Board takes complaints of discrimination seriously. Please follow the process set forth above so that your complaint may be handled appropriately.

(Hearing, Sup. Exs.16 & 17).

Thereafter, the local board dismissed the appeal because the superintendent had removed the "cautionary" memos from the personnel files. The board again explained that there was a separate procedure to handle the claims of discrimination. (Hearing, Sup. Exs. 18 & 19). The board reiterated that same advice on November 22, 2011.¹ (Hearing, Sup. Exs. 20 & 21).

Sometime during this time period, Mr. David White, President of the Wicomico County Education Association, reported to the superintendent on a conversation he had on October 18 over lunch with Messick and Moses. His written statement says, among other things:

Stephanie and/or Stacy then stated that I may want to consider delaying the campaign for a month or so. I asked why with the upcoming budget/parent meetings that were scheduled to be held. They then explained that the BOE would be considering the renewal of the Superintendent's contract shortly; and that we should not do anything that may enhance his chances of being renewed. They then indicated that there were many other people at the BOE (no one was specifically named) that were not happy with the way the Superintendent did business and felt the same way as they did. They then stated it would be in everyone's best interest if the Superintendent were not renewed and that I should do whatever I could to make sure this happened.

(Hearing, Sup. Ex. 22).

¹ The date on all four letters (Exs. 18-21) is November 22, 2011 but it appears that Exhibits 18 & 19 were or were intended to be sent earlier than that date.

In a second statement, Mr. White recounted a conversation he had with Ms. Messick on October 12 or 13. That statement says, among other things:

She then gave me a funny look and said, “you know why she resigned as President [of the local board], don’t you?” I said I knew what she had told me. Specifically, Mrs. Wright had shared with me that between the demands of her business, family, and the BOE, she just could not do everything and her family and business had to come first. Stacy then stated, “you don’t know about Michelle and John?” I said, “what about them?” She hesitated and looked at me in disbelief. I asked what are you trying to say? She stated that they are having an affair and that Mrs. Wright has resigned to keep things quiet and to not raise any more eyebrows. According to Ms. Messick some people had started to question some of the decisions that were being made by the Board. I replied that I did not believe it; and I knew Mrs. Wright and her husband and that she would not do something like that. Ms. Messick responded simply that it is true.

(Hearing, Sup. Ex. 22).

On January 11, 2012, the local superintendent issued termination of employment letters to Messick and Moses. The January 11, 2012 letters set forth reasons for the termination including the conversation on October 18, 2011 with David White in which Mr. White reported to the Superintendent that both Messick and Moses disparaged the Superintendent and among other things said, “it would be in everyone’s best interest if the Superintendent were not renewed and that [Mr. White] should do whatever [he] could to make sure this happened.” (Hearing Sup., Exs. 23 & 24).

To Ms. Messick, the Superintendent added

Mr. White also advised me that in a previous meeting with you in October, 2011, you shared with Mr. White that Board Member Michelle Wright and I were having an affair and that she resigned as Board President to try to keep things quiet and to not raise any eye brows. You further advised him on several occasions that there are people who are doing what they can so that my contract is not renewed and that a replacement has already been selected. Mr. White advised me as early as September, 2010, you repeatedly told him that he should not be meeting with me, that I am “using” him, that he should be careful what he says to me, and that he should not trust or believe anything that I said to him.

(Hearing, Sup. Ex. 24). On those grounds, the Superintendent concluded that both Appellants were insubordinate.

Messick and Moses pursued their appeal of their terminations before the local board. The local board appointed an independent hearing examiner who conducted a three day evidentiary hearing and issued a 51 page decision. The decision focuses solely on the issue of insubordination as a basis for the termination. It upheld the Superintendent's decision to terminate Messick and Moses. It did not address discrimination issues.

The local board adopted the Hearing Examiner's Decision on March 12, 2013. This appeal ensued.²

STANDARD OF REVIEW

Because this appeal involves a decision of a local board concerning a local controversy, the local board's decision is considered *prima facie* correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal. COMAR 13A.01.05.05A.

ANALYSIS

The decision for review is the local board decision of March 12, 2013, which adopted the hearing examiner's recommended decision. (Appeal, Ex. 1). It is the Appellants' burden to show that the decision was arbitrary, unreasonable, or illegal. The Appellants attack the decision of the local board in two ways. They challenge the credibility determinations of the Hearing Examiner. They also assert that their claims of discrimination should have been heard and decided by the local board.

Demeanor Credibility Determination

In *Gwin v. Baltimore City Board of School Commissioners*, MSBE Op. No. 12-19, 12-13 (2012), this Board explained the weight of demeanor credibility determinations:

In appellate review, great deference is given to demeanor credibility determinations because the trier of fact has had an opportunity to see, hear, and judge the witnesses' truthfulness as the witness testifies.

Deference to demeanor based credibility findings is understandable when the agency has not had the opportunity to observe the live testimony.

Weight is give the [trier of fact's] determinations of credibility for the obvious reason that he or she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records." All aspects of the witness's demeanor – including the expression of his countenance, how he sits or stands, whether

² In briefing this appeal, in a Supplemental Memorandum Appellants request that a separate appeal they filed with this Board be consolidated with this one. We decline to do so. We intend to deal with that appeal separately.

he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other nonverbal communication – may convince the observing [trier of fact] that the witness is testifying truthfully or falsely.

Demeanor credibility determination must be shown to be “clearly erroneous” to be overturned. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74(1985). As the Court in *Anderson* explained:

When a trial judge’s finding is based on his decision to credit testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 575.

Moreover, as we have explained in the past, the State Board will not substitute its judgment for that of the local board unless there is independent evidence in the record to support the reversal of a credibility decision. *See Philip A. v Howard County Bd. of Educ.*, MSBOE Op. No. 05-20 citing *Dept. of Health and Mental Hygiene v. Anderson*, 100 Md. App. 283, 302-303 (1994). Thus, the Appellants here face a heavy burden to prove to us that the Hearing Examiner’s demeanor credibility determinations are clearly wrong.

We have reviewed the Appellants’ arguments set forth in their Appeal, their Response to the Motion for Summary Affirmance, and in their Supplemental Memorandum of Law. The issue of credibility is addressed only in Appellants’ Response where they assert that the Hearing Officer “summarily ignored” the Appellants’ testimony, their supporting witnesses’ testimony and other evidence. (Response at 18). But we do not find that to be the case. The Hearing Officer painstakingly set forth the testimony of Ms. Messick, Ms. Moses, Mr. David White, the Superintendent Fredericksen, Ms. Vail, Ms. Wright, Mr. Reeve, Ms. Riggs, and Mr. Cain. (Hearing Officer’s Decision 6-40). He then explained the evidence concerning insubordination that he found to be relevant. For example, the hearing examiner wrote:

“the evidence in this case disclosed that both Ms. Messick and Ms. Moses had discussions relating to Dr. Fredericksen’s appointment. Ms. Messick had concerns relating to the direction of the school system. (T2.226:4-5). She also had specific candidates whom she believed would be a better Superintendent. (T2.227:1-4). Ms. Moses testified that she and Ms. Messick could have expressed a desire to the other that Dr. Fredericksen not be reappointed as Superintendent of Schools. (T2.334:7-10). Ms. Moses also testified that, although she couldn’t recall specific conversations, she could have had discussions with individuals within her level in which she expressed a desire that Dr. Fredericksen not be reappointed as Superintendent.” (T2.336:11-13).

(Hearing Officer's Decision at 40).

The central credibility issue here is between Messick and Moses and Mr. David White who reported conversations to the Superintendent that White said he had with Messick and Moses. Ms. Messick and Ms. Moses deny that the specific conversation with Mr. White about the superintendent's reappointment ever occurred. (Appeal at 1). The Hearing Officer, however, compared the testimony of Messick, Moses, and David White. He explained:

I had the opportunity to see and hear Mr. White, Ms. Messick, and Ms. Moses as they testified. I evaluated their demeanor and judged the manner in which they responded to both direct and cross-examination. As to the issues, I find that Mr. White was more credible as to the discussion that occurred at the lunch meeting at the Café. *See, e.g., Gwin v. Baltimore County Board of School Commissioners*, Op. MSBE 12-19 (June 26, 2012). Ms. Moses was at the meeting but cannot recall conversations that both Ms. Messick and Mr. White testified as to occurring. As between Ms. Messick's and Mr. White's versions of what transpired at the lunch, I have concluded that Mr. White's recounting of those events is more consistent. When asked if the WCEA has a position regarding the non-renewal of the Superintendent's contract, Mr. White testified: "It was not something that we were going to get involved in. I can tell you that. Once again, our position is to be an advocate for education. It was not to get into – in the middle of any type of internal struggle that was happening at the board." (T3.50:19-21).

...

Likewise, Ms. Messick's testimony was she has no resentment or ill will towards the Superintendent during the period of September – November, but rather was "hurt," "frustrated" and "helpless." (T2.224:18-T2.225:5). This testimony is belied by the tone and tenor of the correspondence directed at and to the Superintendent in response to his memoranda to Appellants at the end of September, 2011. Her testimony regarding comments to Mr. White reflect her attitude toward the Superintendent.

(*Id.* at 46-47).

Based on the evidence and testimony, the Hearing Officer concluded:

The standard applicable to this matter requires only that there be substantial evidence and that a reasoning mind could arrive at the same conclusion as Superintendent Fredericksen did in this matter. It was reasonable for the Superintendent to conclude Appellants were challenging his authority in the manner in which they responded in October and November, 2011 to his initial memos to

them dated September 28 and 29, 2011. Losing confidence in Appellants as contributing members of his administrative staff was exacerbated by the disclosure that Mr. White made in his meeting with the Superintendent and Ms. White in late November regarding his lunch meeting at the Café with Appellants.

(*Id.* at 49).

Based on our review of the record in this case, we conclude that the Hearing Officer's credibility determinations were not contradicted by independent or extrinsic evidence and thus were not clearly erroneous. The local board could rely on them to uphold the Superintendent's decision to terminate the Appellants.

Sexual Discrimination/Retaliation/Pretext Claim

The Appellants assert in each of their filings that they provided evidence of sexual discrimination/retaliation/pretext to the local board and that those issues should have been decided by the local board. Indeed, the Appellants sent to the local board numerous pieces of correspondence about their discrimination claims. (Response at 4-10). That correspondence is not at issue in this appeal. At issue is the legality of the local board's decision to terminate the Appellants. To judge the legality of that decision, we look to the record and the evidence presented at the hearing. The Appellants contend that they created a factual record that their termination was a pretext for or retaliation for their filing a discrimination charge against the superintendent. (Response at 10-13).

Claims of employment discrimination are evaluated under a burden-shifting analysis. The Supreme Court established the burden-shifting paradigm in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that paradigm, the plaintiff is initially required to prove a *prima facie* case by showing that she belongs to a protected class and suffered an adverse action. She must present sufficient evidence to give rise to an inference of unlawful discrimination. *Id.* at 802. If the plaintiff presents a *prima facie* case, the burden then shifts to the employer to present evidence of a non-discriminatory reason for the termination. *Id.*; *see also Williams v. Maryland Department of Human Resources*, 136 Md. App. 153, 164 (2000). If the employer meets that burden, the employee "must show that the employer's stated reason for the decision was a pretext for discrimination." *Williams*, 136 Md. App. at 165.

We note that in his opening statement, Appellants' counsel said, "So I believe that this case is only about whether the statements allegedly made by Ms. Moses and Messick to David White are insubordinate." (TR II, 14-15). Despite that statement, Appellants contend that they presented evidence of pretext. Thus, we review the evidence of discrimination Appellants contended they presented. Appellants say:

The Appellants contend that they testified to their concerns regarding the disparate treatment to which they had been subjected. Mrs. Messick testified:

“I expressed my concern for the process that had taken place, the lack of due process that I was afforded. You know, certainly having done this, I know that we offered every other employee due process, and I was just concerned by the process that took place with me.”

(Response at 11).

Their counsel later asked Ms. Messick about the discrimination complaint filed, “And you made some allegation about a hostile work environment, etcetera?...Can you explain why you decided to make those allegations?”

Mrs. Messick responded:

“Well, there had been concerns previously. And I think I stated in one of my correspondences to the board that I never really said anything. However, based on the communication I received and the - - and some of the treatment subsequent to that, I felt I had no other option, nowhere else to go, but to ask the board to do an investigation.”

(Response at 12).

The complaint filed by Mrs. Messick with the EEOC was admitted as an exhibit. (*Id.*)

Ms. Moses later testified regarding a meeting the Superintendent wanted to have with her on December 5, 2011:

“Based on the tenor of what was happening when I got a message from Doctor Fredericksen’s secretary earlier that day saying that he wanted to have a meeting, I emailed back and said, what is this in reference to? I then emailed Doctor Fredericksen and said, you know, out of courtesy, based on the current circumstances with the appeals and everything that was going on, I was not comfortable for either one of us to meet alone together, so I was bringing a third party.”

(Response at 12).

Ms. Moses’ complaint filed with the EEOC was also admitted as an exhibit. [*Id.*].

Their counsel argued that the terminations were pretextual.

“Doctor Fredericksen chose to believe David White. And my argument will be, and always has been, is that that’s a very convenient measure for Doctor Fredericksen to do. He simply

took a conversation, did no investigation, took it point blank, took it lock, stock, and barrel, and said, okay, now I have enough to terminate. Perhaps Doctor Fredericksen, you know, believed that he wanted to get rid of Ms. Moses and Ms. Messick at some other time, but this provided a convenient fodder. And in that instance, the whole termination and the whole aspect of this conversation is purely pretextual, that he simply used that as a method to say, okay, now I've got a reason, I've got a witness, he said this, and that's it, and I don't have to justify or defend my decision any further. You've got to remember that there was an entire controversy between the Superintendent and these two employees. It came in the form of a letter. And then that letter followed up with a response. After the response, the Superintendent said, you know what; we'll have further discussion before I take final action. This letter was not a counseling letter. This letter was not, hey, this is a - - you know, let's talk about some things. This letter was a prelude to termination. He recognized that he did not have enough for termination and looked for the next convenient moment. And the next convenient moment happened to have a gestated 32-day conversation from Dave White who said, yeah, I think I had this - - or there's this allegation. And that's what the Superintendent is standing on. I would proffer that this witness would say that Doctor Fredericksen has an innate belief that, if he's going to be criticized at the board and it involves another employee or it involves someone that he supervises, it's going to be that employee who gets hit with the responsibility, not him. And I think in this instance that ties well with pretextual nature of this termination."

(Response at 11).

We analyze that evidence in light of the burdens allocated in the *McDonnell-Douglas* paradigm.

***Prima Facie* Case of Discrimination: Appellants' Burden**

Appellants established the first two elements of a *prima facie* case. The Appellants belong to a protected class and suffered an adverse action. Reviewing Appellants' testimony about discrimination leaves us with some doubts as to its sufficiency to establish the third element: to present evidence that "gives rise to an inference of unlawful discrimination." They state, however, that their EEOC complaints were admitted into the record. We have reviewed Appellants' Exs. 24 & 25, the EEOC complaints. The Moses EEOC complaint states that she received a "reprimand" but male employees did not. The complaint also alleges that the superintendent "makes inappropriate comments towards females and it is observed by other employees that he treats females differently than males." (Appeal, Ex. 24). The Messick EEOC complaint says that the superintendent criticized her about her age and sex. She was

reprimanded but no male employee was. She makes the same comment as Moses about the superintendent making inappropriate comments towards females. (Appeal, Ex. 25).

Those statements are attested under the penalty of perjury. We consider them sufficient to raise an inference of discrimination.

Evidence of Non-Discriminatory Reason: Local Board's Burden

We have reviewed the evidence of insubordination the local board presented. In the context of *McDonnell-Douglas* paradigm, we find that the local board proved a non-discriminatory reason for the termination.


Employer's Decision a Pretext for Termination: Appellants' Burden


We have searched the record, read the Appellants' Closing Brief and Rebuttal Closing Brief submitted to the Hearing Examiner, and all the briefs they submitted here. We find no direct evidence offered that the decision to terminate was a pretext for discrimination. There are conclusory assertions and arguments about pretext, but no fully developed argument that would convince us of the pretextual nature of the termination. We conclude that the Appellants did not meet their burden to show that their termination was a pretext.

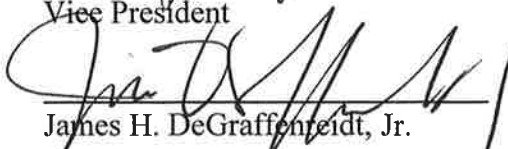
We note that Messick and Moses have sexual discrimination claims pending before the EEOC (Appeal, Ex. 27), and just recently the local board has initiated its own investigation into those matters. (*See* Response, discussing Post-Hearing Investigation). We express no view of the ultimate merits of the Appellant's discrimination claims. They are working their way through other forums. We decide here only that in the case under review, the Appellants failed to present a case of pretext or retaliation to the hearing examiner and thus it was not reviewable by the local board.

CONCLUSION

For these reasons, we affirm the decision of the local board.


Charlene M. Dukes
President


Mary Kay Finan
Vice President


James H. DeGraffenreidt, Jr.

Linda Eberhart

Linda Eberhart

Absent

S. James Gates, Jr.

Absent

JM

Luisa Montero-Diaz

[Signature]

Sayed M. Naved

Madhu Sidhu

Madhu Sidhu

Donna Hill Staton

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Guffie M. Smith, Jr.

Guffie M. Smith, Jr.

September 24, 2013