

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF:)

JACKIE HAYES,)

Complainant,)

and)

TATE & LYLE NORTH AMERICA, INC.)
D/B/A TLNA,)

Respondent.)

CHARGE NO(S): 2004SF3549
EEOC NO(S): 21BA42223
ALS NO(S): S06-041

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 9th day of February 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

consideration for the position on grounds unrelated to his race. It similarly submits that Complainant cannot establish a *prima facie* case of race discrimination with respect to his claim that he was denied desirable job assignments and maintains that Complainant had similar opportunities to obtain desirable job assignments.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. At all times pertinent to the instant case, Respondent was an agricultural processing business having multiple offices in the United States and Europe that used an Internal Information Systems and Information Technology Group to assist it with its computer needs. Within said Group was the Infrastructure Unit, which was located in Decatur, Illinois and was responsible for Respondent's computer hardware and software programs, systems support and engineering.

2. At all times pertinent to the instant case, Respondent's Infrastructure Unit had three subunits that consisted of the Help Desk, employing Infrastructural Specialists, who received calls from Respondent's employees and attempted to solve the computer-related problem over the telephone, a Second Level, employing Infrastructural Analysts, who went out into the field to address computer hardware and software problems that could not be resolved by the Help Desk, and a Third Level, consisting of engineers, who addressed computer-related problems that could not be resolved by personnel in the Second Level subunit.

3. At all times pertinent to the instant case, an Infrastructural Analyst position required an individual to have a higher level of computer technical expertise and troubleshooting ability than an individual employed at the Help Desk. Both Infrastructural Specialists and Infrastructural Analysts were required to exhibit good oral and written communication skills.

4. In April of 2000, Complainant, an African-American, was hired by Steve Bowman to work as an Infrastructural Specialist Intern at Respondent's Help Desk. At the time of his hire, Complainant had already received a business degree from Richland Community College and had received an associate's degree in applied science in networking and computer science. At all times pertinent to the instant case, Intern positions at Respondent's Help Desk were givens to students, and Complainant was working on another associate degree in business management at the time of his hire. While Complainant and other Interns at the Help Desk were students, they still performed the same job duties as full-time Infrastructural Specialists.

5. At some point in 2001, Complainant's Internship ended and he became a full-time Infrastructural Specialist at Respondent's Help Desk. In November of 2001, Complainant received his first evaluation, in which his immediate supervisor, Jim Slade, indicated that Complainant possessed good phone skills, was a good team member, and made end-users feel confident that their problems would be resolved. The evaluation also noted as an "area of concentration," Complainant's need to expand his "knowledge of the Tate & Lyle organization and technology along with improvement in oral and written communication."

6. On February 7, 2002, Complainant went to Lafayette, Indiana to work on a project.

7. On March 19, 2002, Complainant went to Richland Community College where he was asked to sit in on a project to devise a curriculum credited class for the Help Desk.

8. On June 16, 2002 through July 2, 2002, Complainant was sent to Aalst Belgium to work at the Help Desk at that location.

9. On February 28, 2003, Complainant received another performance evaluation drafted by Slade and initialed by Bowman. In the evaluation, Slade indicated

that Complainant: (1) possessed pleasant phone skills and gave end-users confidence that their problems were considered important and would be resolved; (2) followed up and documented problems well to the benefit of others in the infrastructure group; (3) was a good team player by offering to work additional shifts; and (4) made a good start in the creation of a Help Desk procedures manual. The evaluation also mentioned Complainant's need to "expand his knowledge of the Tate & Lyle organization and technology...[and to] improve oral and written communication." The evaluation further contained the notation that "there is a perception within the IS/IT group for [Complainant's] need to be more professional, direct and concise in oral and written communication."

10. On February 28, 2003, Slade drafted a performance evaluation for Tony Speis, a Caucasian employee working in the Help Desk who had been employed at Respondent since 1999. Bowman also initialed this evaluation. In the evaluation, Slade observed that Speis "consistently handles himself very professionally and takes the time to insure the end[-]user is comfortable that their [sic] problem is important and will be resolved[, and that his] follow up is very good." Slade also noted that Speis' "lead on third shift (prime time for the UK and Amylum) has enabled a relatively smooth support transition for the TLEU users." In the "areas of concentration" section of the evaluation, Slade made no observation regarding a need to improve oral or written communication skills.

11. At some point 2003, Tony Speis was sent over to Aalst, Belgium to work four weeks at the Help Desk at that location. At the conclusion of his assignment in Aalst, Speis was then sent to London, England to work on a project at that location. The decision to send Speis to the London assignment, as opposed to anyone else at the Decatur, Illinois Help Desk, was made as a cost saving function to avoid additional expenses of sending someone from Decatur, Illinois to London, England.

12. In November of 2003, Bowman sought applicants for an Infrastructure Analyst position in the Infrastructure Group. At that time, Bowman consulted with an individual in Respondent's Human Resources Department about the selection process and decided to invite the full-time Infrastructural Specialists and the Interns at the Help Desk to apply for the position. At the conclusion of the meeting, criteria for selection of the successful candidate were developed, which included above-average technical skills, oral and written communication skills and an ability to be a team player.

13. On November 14, 2003, Bowman sent an e-mail to members of the Help Desk, including Interns with more than six months experience, that solicited applications for an open Infrastructural Analyst position. The e-mail informed the recipients that there would be a formal interviewing process involving Bowman, as well as a member of the Human Resources Department and a group of current Infrastructural Analysts.

14. On November 19, 20 and 21, 2003, Bowman and the other members of the committee conducted formal interviews of eight candidates for the Infrastructural Analyst position. During the interviewing process, each candidate, including Complainant, was given separate, 30-minute interviews by Lori Donley of the Human Resources Department, Bowman, and a group of three Infrastructural Analysts.

15. On November 25, 2003, and before any announcement had been made with respect to filling the open Infrastructural Analyst position, Complainant wrote the following e-mail to Bowman:

"Hello Steve. Every [sic] since I read the email conceding [sic] the "Tech Support Position Opening" and interviews were opened to the Interns at the HD [Help Desk], it gave me great concerns and questions, why? Why was the position opened to the Interns? I didn't mention this during the interview, for a couple of reasons, but mainly to get a feel for where this process was leading and heading. It's obvious some of us have talked about this at the HD and I'm in an agreement that as a full time person, I'm waiting patiently for a chance to advance in the company. But I believe the position should have only been opened up to the Full Time People [capitals in original]. I don't feel a real threat of the other interviewers, because I believe the weight of my merits matches most if not all of them. I just don't have a gift for gab. I have my moments when I do pretty good in

an interview, but I'm not a public speaker and I have do [sic] have a speech problem."

16. At some point prior to December 3, 2003, Bowman, Donley and the three Infrastructural Analysts who interviewed the applicants met and rated each of the eight candidates. During this process, Complainant was ranked among the bottom two candidates based on the perception that while Complainant did an acceptable job as an Infrastructural Specialist, his technical and interpersonal/communication skills were not as strong as the top two candidates, Dan White and Tony Speis.

17. At some point prior to December 3, 2003, Bowman called Complainant into his office and informed Complainant that Bowman was going to rotate Speis and White into the Infrastructural Analyst position.

18. On December 3, 2003, Bowman sent an e-mail to the eight applicants for the Infrastructural Analyst position, indicating that no candidate had been selected for the position but that: (1) White, who had heretofore been an Intern at the Help Desk for almost three years, had accepted a full-time Infrastructural Specialist position at the Help Desk; and (2) both White and Speis would be rotating between the Help Desk and the Second Level positions for the foreseeable future, and that Bowman would reevaluate the permanent Infrastructural Analyst position at a later date.

19. At some point in late 2003 and early 2004, Complainant orally or by e-mail mentioned to his immediate supervisor, J.T. Slade an interest in being available for assignments to projects at local and remote worksites. The record is unclear as to the existence of any specific project, and Complainant did not identify whether any assignments were actually made.

20. On February 28, 2004, Complainant received an evaluation, drafted by Slade and initialed by Bowman, which again noted that he possessed "telephone skills [that] are pleasant and reassuring to the user that their problem is being heard and will

be resolved.” The evaluation contained further observations that Complainant: (1) willingly gave time to work extra shifts; (2) used his time in a professional manner with only a few errors; and (3) employed an “approach to problem solving [that] can on occasion be perceived as argumentative.” Slade also listed as an area of concentration Complainant’s need for improvement in his “overall written and oral communication with an emphasis on brevity and diplomacy.”

21. On February 28, 2004, Speis received an evaluation regarding his Infrastructural Specialist position that was drafted by Slade and initialed by Bowman. In the evaluation, Slade observed that Speis:

“has good interpersonal skills that result in a friendly approach to trouble calls. He handles himself professionally and takes the time to ensure the end user is comfortable that their [sic] problem is important and will be resolved. Third shift is prime time for Amylum and UK calls. He has developed a good working relationship with the TLAM and TLEU members of IS/IT while spending time in Aalst and London this year. As the lead on 3rd shift, this is important due to the preponderance of European interaction.”

There was no observation in this evaluation as to a need for improvement in Speis written or oral communications skills.

22. At some point in 2004, Speis and White began 30-day rotations working on Second Level projects. During this time frame, neither individual was paid as an Infrastructural Analyst.

23. In October of 2004, Respondent implemented a plan that allowed Complainant and another candidate (Lida Cook), who had also unsuccessfully applied for the Infrastructural Analyst position in November of 2003 and had previously filed a Charge of Discrimination alleging sex discrimination, to be included with both Speis and White in a new four-person rotation for assignments to Second Level projects. The plan originally called for two other Help Desk employees to be included in the rotation, but said employees declined the offer.

24. Beginning in October of 2004, Complainant completed two 3-month rotations. During Complainant's rotation to the Second Level subunit, both Speis and White spent a majority of their time doing Second Level subunit assignments.

25. In December of 2005, Bowman officially promoted White to the Infrastructural Analyst position. By that time, Speis had been promoted to a different position that was not supervised by Bowman.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant established a *prima facie* case of race discrimination when Respondent ruled out Complainant for further consideration for an open Infrastructural Analyst position in December of 2003.

4. Complainant failed to establish a *prima facie* case of race discrimination with respect to Respondent's assignment of special projects involving Second Level subunit work.

5. Respondent has articulated a legitimate, non-discriminatory reason for its decision to rule out Complainant from further consideration for the open Infrastructural Analyst position and for its decision regarding special assignments for Second Level subunit work.

6. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for its decision to rule out Complainant from further consideration for its Infrastructural Analyst position and for its assignment of Second Level subunit work was a pretext for race discrimination.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when it ruled out Complainant from further consideration for its Infrastructural Analyst position and for its assignment of Second Level subunit work.

Discussion

Failure to promote claim.

This case presents an interesting question as to when and whether a viable failure to promote claim arises under the Human Rights Act when the employer delays a final decision on the matter for some two years after some of the candidates had been rejected for the job. In the instant case, Respondent posits that Complainant cannot establish a *prima facie* case of race discrimination based on a failure to promote claim since no one, including Speis and White, was promoted to the Second Level position at the time alleged in Complainant's Charge of Discrimination, and since Complainant failed to allege that Bowman continued to seek applicants for the position who had skills similar to those that Complainant possessed, but who were outside his protected classification. Complainant, however, argues that an actionable event occurred in December of 2003 when Bowman essentially ruled him out for further consideration for the Infrastructural Analyst position and essentially awarded the position at that time to both Speis and White. This is so, Complainant concludes, because beginning in February of 2004 both Speis and White spent most of their time performing duties at the Second Level subunit, and because the record shows that both Speis and White advanced their careers at Respondent, with White eventually being formally awarded the Infrastructural Analyst position in December of 2005.

After reviewing the record, I find that Complainant has the better of the argument. Specifically, I agree with Complainant that after Bowman drafted his December 3, 2003

e-mail to the candidates indicating that only White and Speis would be allowed to rotate to the Second Level subunit, Complainant could reasonably conclude that he had been rejected for the position, and that two of his co-workers were still being considered for the position. Indeed, Complainant's perception in this regard was not off the mark since Bowman conceded in his testimony both that the purpose of the duo rotation of White and Speis was to determine which of the two would be the best candidate to fill the position, and that he ultimately hired White for the position. (Tr at p 266, 271.) Thus, this is not the circumstance where all of the candidates were eliminated from further consideration for a position that was never filled.

True enough, Respondent suggests elsewhere in its brief that December of 2005 was the operative date (as opposed to December of 2003) for filing any failure to promote claim since it was only at that time that Bowman formally offered the position to White. Respondent's argument makes sense if Speis had been the complainant in the instant case, since it was only at that time when Speis would have known for sure that he had not obtained the Infrastructural Analyst position. However, by December of 2003, Complainant was aware of all of the elements of a potential claim for race discrimination with respect to his application for a promotion to the Infrastructural Analyst position, and thus his statutory period for filing a cause of action under the Human Rights Act began no later than December 3, 2003, when Bowman informed him both that he was no longer in the running for the position, and that others outside his protected classification were still being considered for the position. See, for example, *Williamson v Indiana University*, 345 F3d 459 (7th Cir 2003).

So Complainant was correct in asserting that the December 3, 2003 e-mail from Bowman, announcing that Complainant, among others, was no longer in the running for the Infrastructural Analyst position, constituted a potentially actionable adverse act. The remaining aspects of Complainant's failure to promote claim, though, are not so

convincing. During the public hearing, Bowman testified that the reason Complainant was not selected for the position was because he had a relatively low score in the area of technical expertise, and that there was a perception that other candidates had better communication skills. On its face, Respondent's explanation for why Complainant was not promoted provides me with a neutral, non-discriminatory reason for Complainant's treatment, and I note that Complainant does not seriously argue that this articulation, if it actually motivated Respondent, is insufficient to meet its burden under *Texas Department of Community Affairs v Burdine*, 450 US 248, 101 SCt 1089, 67 LED2d 207 (1981). As a result, any presumption of unlawful discrimination evaporated from the case, and Complainant was required to establish that Bowman's explanation for why he did not receive the promotion was a pretext for race discrimination. See, for example, *Village of Oak Lawn v. Human Rights Commission*, 113 IllApp3d 221, 478 NE2d 1115, 88 IllDec 507 (1st Dist, 4th Div 1985).

To this end, Complainant contends that the stated deficiencies in technical expertise and oral and written communications skills either did not exist or were greatly exaggerated since his supervisor consistently made positive comments about Complainant's communications skills in two of his job performance evaluations immediately preceding the interview for the Infrastructural Analyst position. True enough, an examination of these evaluations indicates that Slade had some positive things to say about Complainant's ability to respond to telephone calls made by Respondent's employees. However, these same evaluations also contain other observations by Slade regarding Complainant's need to improve his oral and written communication skills, which do not appear in the job performance evaluations for Tony Speis. Indeed, Complainant's February 28, 2004 job evaluation, which was written at a time before Complainant had filed his Charge of Discrimination and included negative observations about Complainant's communication and "argumentative" problem solving

skills, only bolster Respondent's claim that race had nothing to do with why Complainant did not receive the subject promotion. As such, as I cannot say that Speis is an appropriate comparative to support Complainant's race discrimination claim where the record reflects that management did not perceive Speis to have similar areas of concern.

The same finding applies with greater force with respect to Complainant's other comparative, i.e., Dan White, who actually received the subject Infrastructural Analyst position, since the record does not contain any job performance evaluations or any other sort of objective evidence that would call into question Bowman's observation that White possessed more technical expertise or better communications skills for the Infrastructural Analyst position than Complainant. True enough, Complainant objected to the inclusion of White and other Interns from the application process in his November 25, 2003 e-mail to Bowman. However, where Interns were expected to perform the same job as full-time Infrastructural Specialists at the Help Desk, and where the record shows that White had three years of experience at the Help Desk, I cannot say that Complainant has established on this Spartan record with respect to White that Bowman and the others on the committee could not have honestly believed that White was the better applicant for the open Infrastructural Analyst position. Indeed, Complainant's concession in his November 25, 2003 e-mail that he had a "speech problem," and ironically enough, the November 25, 2003 e-mail itself, which contained several grammatical errors, only highlight the huge hurdle that Complainant faced when attempting to establish that communication skills and technical expertise were not the true reasons for Respondent's failure to promote him to the Infrastructural Analyst position.

Two more matters on Complainant's failure to promote claim, and then we are done. Complainant cited to certain statistics regarding the number of African-Americans in the workplace apparently as evidence suggesting a racial bias on the part of

Respondent. Specifically, Complainant noted that: (1) at the time of his hire, there was only one African-American working full-time at the Help Desk among the approximately seven individuals working full-time at the Help Desk; (2) there were two other African-American Interns (out of approximately six Interns) at the Help Desk while he was working at the Help Desk as an Intern; and (3) there was only one African-American working in a Second Level subunit position from 2000 to 2004. However, these statistics, standing alone, really do not tell me much about what was occurring in Respondent's workplace in the absence of any evidence regarding the number of available positions that came open during the relevant time frame, the number and race of the candidates applying for those positions and the candidates' relative qualifications for the subject positions. (See, *Hague v Thompson Distribution Co*, 436 F3d 816, 829 (7th Cir 2006).) As such, I have not found the statistics to be material with respect to Complainant's discrimination claim.

Next, Complainant makes much of the fact that Bowman selected Speis for additional consideration for the Infrastructural Analyst position even though at the time of his selection, Speis was an individual who had not earned any degree. While it is true that Speis's failure to have a degree appears to be at odds with the minimum 2-year computer science or related degree requirement set forth in the Infrastructural Analyst job description, I am not too sure what effect said failure had on the selection committee where Bowman opened up the application pool to student Interns having only six-months experience at the Help Desk. Moreover, where the record reflects that Speis had more actual experience at the Help Desk than Complainant, Complainant has failed to present any evidence to show how the lack of a degree translated to a required finding that the interviewing committee could not have honestly believed that Speis did not have better technical expertise and communications skills. More important, though, any comparison to Speis is really besides the point where the record shows that someone else (i.e. Dan

White) actually received the Infrastructural Analyst position in December of 2005. As such, and for all of the reasons mentioned above, I find that Complainant has failed to establish that Respondent's reason for not promoting him to the Infrastructural Analyst position in 2003 was a pretext for race discrimination.

Terms and conditions claim.

Complainant contends that Respondent discriminated against him on account of his race by denying him his requests for business travel to other job sites. Specifically, Complainant asserts that Speis was permitted to travel to Aalst, Belgium twice, and to London, England and Toronto, Canada, while Complainant was only permitted single trips to Aalst, Belgium and Lafayette, Indiana, as well as single trips to two remote sites in Decatur, Illinois. Additionally, Complainant maintains that he made several requests for other travel opportunities, but never received them. However, in view of the fact that Complainant had received certain travel opportunities, I agree with Respondent that Complainant has not established a *prima facie* case with respect to his terms and conditions of employment since Complainant failed to provide any specific details regarding either the identity of additional job assignments involving travel that actually occurred, his actual availability for said assignments in light of his existing assignments, or the identity of individuals who actually performed said assignments. Moreover, while Complainant did point to Speis's travel opportunities as a comparison, Complainant did not claim that he made a specific request for any of Speis's travel opportunities other than perhaps the London, England trip. In that regard, Bowman explained that Speis was sent to London as a cost saving measure since Speis was already in Europe at the time. Inasmuch as Complainant has not provided any evidence to counter Bowman's explanation in this regard, I cannot say that Bowman's explanation for this assignment was a pretext for race discrimination.

Recommendation

For all of the above reasons, I recommend that the instant Complaint and the underlying Charge of Discrimination of Jackie Hayes be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 6TH DAY OF MAY, 2009