

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0051011246:

SHAWN AKANE,)	Case No. 276-2006
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
CITY OF MISSOULA,)	
)	
Respondent.)	

* * * * *

I. Procedure and Preliminary Matters

Shawn Akane filed a human rights complaint alleging that The City of Missoula (Missoula) discriminated against him on the basis of his race (Asian) in not hiring him for the position of full-time traffic maintenance worker position. The contested case hearing in this matter was held on February 28 and March 1, 2006 in Missoula, Montana. Richard Buley, attorney at law, represented Akane. Susan Firth, Missoula Deputy City Attorney, represented Missoula. Akane, Kelly Shepard, and Steve Schnurr testified on behalf of Akane. Gail Verlanic, Carl Thompson, Bruce Bender, Pat Brook, Anne Guest, Jack Stuckey, Dale Clark, Rick Larsen, Melissa Bache, Steve King, Joelene Ellerton, Julie Chaffin, Larry Connell, and Eric Dickson testified on behalf of Missoula. Akane's Exhibit 1 and Missoula's Exhibits 101 through 129 and 131 through 167 were admitted into evidence by stipulation of the parties.

Counsel for each party requested time to submit post-hearing briefs. These requests were granted and the last brief was submitted on April 17, 2006, at which time the record closed. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefing, the hearing examiner finds that Akane has failed to make a prima facie case of discrimination and that in any event Missoula's hiring decision in this case was not based on race but rather was based on legitimate business needs. Based on the following findings of fact and conclusions of law, the hearing examiner recommends that Akane's claim be dismissed.

II. Issue

Did Missoula discriminate against Akane on the basis of race in violation of Title 49, Chapter 2, Montana Code Annotated and in violation of the Montana Governmental Code of Fair Practices by failing to hire him as a full-time traffic maintenance worker?

III. Findings of Fact

1. Missoula is a governmental agency within the meaning of Mont. Code Ann. § 49-3-201.

2. Missoula hired Akane as a summer seasonal employee with the Missoula Traffic Services Division in 1991, a part of the Missoula Public Works Department. Carl Thompson was the head of the Missoula Traffic Services Division at all times relative to this complaint. Akane has worked as a seasonal worker since that time. In his job, he is primarily responsible for painting messages on the roadways (e.g., turn arrows in turn lanes) and curbs.

3. In 1993, a full-time Traffic Maintenance Worker position came open. The City of Missoula utilized an in-house (open only to present full-time, part-time and seasonal employees of Missoula) and out of house (open to present employees and non employees) recruitment process to fill the position. Akane, along with several other persons, applied for the position. Akane got an interview, even though he did not fit all of the requirements for the position (that he have a GED). Wayne Gravett was selected to fill the position. Promotion was not used to fill this position.

4. In 2003, Thompson issued a written reprimand to Akane for his unprofessional behavior during a performance evaluation. As part of the evaluation, Thompson suggested that Akane should “learn to work with his co-workers in a congenial manner and control his temper.” Exhibit 105, p. 3. Before the interview got started, Akane became so enraged that he repeatedly told Thompson “fuck you” a number of times and apparently referred to Thompson as an “asshole.” Because of Akane’s animosity toward Thompson, Thompson stopped the evaluation. Thompson then issued a written reprimand to Akane. Akane is rather “hot-tempered.”

5. It was not until July, 2004 that another full-time Traffic Maintenance Worker position came open. This vacancy was only advertised “in-house.” The requirements of the position, as demonstrated through testimony and the position announcement, show that the position was more involved than those of a seasonal

employee. In addition to carrying out the painting functions, a full-time traffic maintenance worker was required to fabricate (which included welding), install, repair, and set traffic and street signs and to paint curbs, cross walks and parking areas. The position required the use of the striping truck, painting tractor and other hand tools. In addition, the incumbent had to plot vehicle accidents on the city map and file accident reports and maintain a computerized inventory of all traffic and street signs. The knowledge and skills necessary included knowledge of federal and state requirements for placement of signs and knowledge of safety policies and practices for working in the right of way (i.e., in traffic). The position also required considerable knowledge to trouble shoot painting and other equipment.

6. Missoula has very explicit recruitment and promotion guidelines that it utilizes in its hiring processes. Exhibit 156. The recruitment and selection policy requires that hiring be done “in accordance with sound human resources practices.” Exhibit 156, page 15. Missoula is “dedicated to Affirmative Action, non-discrimination, and Equal Employment Opportunity Guidelines.” *Id.* Recruitment must be designed to ensure “that selection is made from the best qualified candidates who have applied.” *Id.*

7. Missoula recruitment policy favors “in-house” recruitment processes, although out-of-house hiring can take place if the in-house applicant pool is not adequate. Exhibit 156, pp. 17 and 18. Seasonal employees are eligible to apply for “in-house” recruitment positions. With respect to promotion, the policy manual very explicitly provides that only those departments with “approved promotion policies or ladders may use promotion as a method for advancing human resources to new positions.” Exhibit 156, p. 23. There is no evidence in this case that the Traffic Services Division had an approved promotion policy or ladder in place at the time Akane applied for the 2004 position that came open. Moreover, Missoula would always use an interview process to fill a position such as the Traffic Maintenance Worker position, even if there was only one candidate seeking the job.

8. Akane, Brian Boot, Scot Colwell, Robert Howe, Dod Ireland, Chad Pancake, Victor Rice, and Richard Zientek all applied for the full-time position. As with other positions within the City of Missoula Government, the selection process for hiring the full-time traffic maintenance worker involved an initial screening of applications by Missoula’s human resources department (human resources) to narrow the candidates who would be interviewed. In July, 2004, all applicants were initially screened and five of them, including Akane, were selected to complete the interview and welding test which was part of the application process. The human resources

department's scores for the initial rating of the applications are not provided to the interviewers.

9. After the screening process, the applicants are interviewed by an interview panel and rated. The interview panel then recommends which of the applicants to hire.

10. In assembling the interview panel, the human resources department includes people who have knowledge of the position for which the applicant is being interviewed, persons outside the department which is doing the hiring, and typically one representative from the human resources department. In this case, Thompson, Ann Guest of the Missoula Parking Commission, Pat Brook, the Wastewater Supervisor for Missoula, and Gordon Spunich, the Missoula Human Resources director at the time, comprised the interview panel. Each of the candidates was asked the identical questions in the identical manner in their respective interviews.

11. The questions for interviewing of the five candidates were developed by Thompson, Laurie Pfau and Gordon Spunich of the human resources department some time prior to the actual interview taking place. Many of the questions pertained to the candidates' education and experience in using certain painting equipment. Two of the questions also asked the candidate to relate how he would respond to irate citizens in two different situations.

12. A couple of days before the interview took place, the human resources department sent out packets to each of the interviewers consisting of the candidates resumes, the questions to be asked, and rules (proper etiquette in the interviewing process) for interviewing candidates. The interview panel met and agreed that the candidate's answers to the questions would be graded upon a system whereby 5 was the highest rating, 3 was the middle, and 0 to 1 the lowest rating. Each one of the questions would be rated in this manner and the candidate with the highest overall score would be recommended to the human resources department for hiring.

13. During the interview, the interviewers individually graded each of the candidates on their answers to each of the questions. Each interviewer then separately recorded the grade he or she ascribed to the candidate's answer. At the conclusion of the process, the interviewers individual grades for each candidate's responses to the questions were tallied. Other than to discuss the scores of the candidates, there was no other discussion of the candidates before, during or after the interviews. No one made any disparaging or racially derogatory remarks about Akane

or any of the candidates. Thompson never suggested that any of the panel members should favor any particular candidate.

14. Thompson, Brook, and Spunich rated Richard Zientek as the number one candidate in the interviews and Chad Pancake as the number two candidate. Guest rated Pancake as the number one candidate and Zientek as the number two candidate. None of the interviewers rated Akane as the first or second candidate.

15. Right after the interview, the candidates also completed a welding test. The test was rated by Jack Stuckey, Missoula Vehicle Maintenance Supervisor and Tri Arc Welding of Missoula. Both raters found Akane's and Zientek's welds to be unsatisfactory. Pancake's welds were found to be very good.

16. As a result of the interviews and the welding test, Thompson recommended that Pancake be hired. Akane was not pleased with this result and, through his union representative, filed a grievance with the City of Missoula. At step two of the grievance, a Missoula administrative hearing officer sustained the grievance on the sole basis that the welding test was given too much weight in determining the outcome of the hiring process. Exhibit 128.

17. After the step two grievance was sustained, Missoula readvertised the position and began the application and hiring process over again. The position was readvertised in the same manner as it had previously been. Akane, Richard Zientek, and Chad Pancake reapplied for the position. Since the application required some knowledge of uniform traffic control standards, Human Resources made copies of the Uniform Traffic Control Manual (UTCM)¹ available to all applicants, including Akane. Akane had his own UTCM and did not avail himself of a copy from Human Resources.

18. With the exception of Thompson, a new interview panel was named. In addition to Thompson, Melissa Bache, Missoula Human resources, Dale Clark, Missoula Street Maintenance Supervisor, and Rick Larson, a Missoula City Employee, were also selected to be on the interview panel. Questions were prepared that covered the technical aspects of a paint delivery system, troubleshooting a paint system that is not performing properly, the technical aspects and safety reasons for signing roads, and the applicant's training and experience with each of these areas. Exhibit 136. The interview questions also contained a hypothetical scenario, similar

¹The Uniform Traffic Control Manual contains standardized regulations relating to road signage and other traffic control devices.

to the question asked during the first interview process, but relating to an angry citizen whose car had been over-sprayed. *Id.*

19. Like the first interview panel, the second interview panel met a couple of days before the interviews to discuss the method of scoring that the interviewers would utilize. Like the first panel, the second panel received the candidates resumes, the questions to be asked, rules (proper etiquette in the interviewing process) for interviewing candidates, and also reviewed the job description. The second panel settled on a “+”, check, and “-” system, whereby better answers would be accorded a “+” score, average answers a “check,” and poorer answers a “-” score.

20. Melissa Bache prepared an interview schedule. Each of the candidates was given a specific time slot and each candidate was contacted by telephone regarding his time slot for the interview. Akane was not home at the time Bache called, so she left a message indicating the time of the interview. There was confusion among the panel members as to Akane’s time slot for his interview and apparently Akane was given two different times for the interview.

21. All three candidates were scheduled to be interviewed on February 10, 2005. All three interviews were conducted in the same way. Thompson called in the candidate, and explained to each candidate how the interview would go. The interview panel then asked the prepared questions of each candidate.

22. Akane arrived on time for his interview. He was not seated in the hallway near the interview room but was seated out of sight of the interview room. Unfortunately, because of confusion on the part of the panel regarding Akane’s interview time, the panel mistakenly believed that Akane had not appeared for the interview. Pancake was interviewed first. Thinking that Akane had failed to appear for the interview, the panel then went ahead and interviewed Zientak. The interview panel then discussed the two candidates who had been interviewed.

23. As the panel was preparing to leave, Dale Clark noticed Akane sitting out of sight in another part of the hallway. Clark notified the panel and the panel reconvened to interview Akane. Akane came into the interview room. As with the other candidates, Thompson explained to Akane what would happen during the interview. Thompson then posed the first interview question to Akane which asked the candidate to explain why he was interested in the position and how he saw himself “becoming a team member.” Exhibit 136(B). Instead of answering the question, Akane repeatedly asked the panel for a definition of the term “team

member.” When Bache tried to explain what “team member” meant, Akane told her “Melissa, I don’t want it from you, I want it from Carl.” Akane then jumped, up, banged his fist on the table and, pointing at Thompson, stated that he should be promoted into the job and that he was the only person who had not been promoted in 14 years. Akane then told the interview panel that he did not want the job and he walked out of the interview.

24. Not surprisingly, the panel took Akane at his word and offered the job to Chad Pancake. The rationale for choosing Pancake was straightforward. Pancake gave the best answers in the interview. Furthermore, the panel felt that Pancake’s lack of experience in actual traffic control was more than offset by his knowledge of traffic control and signing principles. Exhibit 141, p. 1. Other than to discuss the scores of the candidates, there was no other discussion of the candidates before, during or after the interviews. No one made any disparaging or racially derogatory remarks about Akane or any of the candidates at any time during the process. Thompson never suggested that any of the panel members should favor any particular candidate.

25. Akane grieved the second hiring process through the Missoula employee grievance process as well. The grievance was sustained at the Step 2 portion of the process on the basis that Akane was confused about the time of his interview and was “upset and unable to continue with an interview process he perceived was unfair.” Exhibit 146, p. 3.

26. The human resources department then began the hiring process for the position a third time. This time, an entirely new interview panel was composed. The panel consisted of Eric Dickson, a Missoula County Department of Transportation engineer, Larry Connell, a State of Montana Department of Transportation Section Man who is well versed in traffic signage principals, Julie Chaffin of the human resources department, Steve King, the Missoula City Engineer, and Jolene Ellerton, a Missoula permit analyst.

27. The format for preparing the interviewers was essentially the same as it was during the previous two attempts to hire. The interviewers were provided with the candidates’ applications, the questions to be asked during the interview, and the “do’s and don’t’s of conducting interviews. The interviewers reviewed these documents before the interviews were conducted and also reviewed the job description. The interviewers also agreed on a grading system, “+”, check, and “-” system utilized by the second interview panel. The questions covered the same issues, though perhaps in less detail, and were appropriately geared toward probing the

candidates' fitness for the position. Exhibit 148 (a). Akane, Pancake and Zientek reapplied for the position.

28. Each interview was conducted in the same fashion. The interview started with one of the interviewers making preliminary remarks about the course the interview would take. The interviewers then asked the same questions of each of the candidates. The interviewers then graded each of the candidates responses. At the conclusion of all of the interviews, the interviewers met to discuss their individual grading of each of the candidates. The interviewers agreed that there was a clear first choice among the of applicants-Chad Pancake. Akane was consistently ranked last of the three persons interviewed.

29. Akane had difficulty communicating his answers to the interview panel. Reviewing each of the interviewer's written comments on the candidates' answers to the question, it is apparent that Akane's technical knowledge of the position was not as good as Pancake's. For example, some of the panel members felt that Akane's answer to the question number 11, the question about responding to the angry citizen, simply was not appropriate. The question specifically asked the candidate how he would deal with an angry citizen who claimed that his car had been over-sprayed. Akane responded that he would not deal with the citizen but would give the citizen his supervisor's name and then leave the area. *See, e.g.*, Exhibit 151 (A), Akane's interview responses as recorded by Jolene Ellerton.. In contrast, Pancake stated that he would calm the citizen down, he would assure the citizen that the city would take proper action, he would call his supervisor, and would explain to the citizen what he was doing. *See, e.g.*, Exhibit 152 (A), Pancake's interview responses as recorded by Jolene Ellerton. Akane also failed to give an adequate response to question number 5 which specifically asked the candidate the minimum number of cones to be used in a traffic taper and the factors used to calculate taper length. The correct answer was that the minimum number of cones in any taper was five. Exhibit 148 (A). Akane answered it depended on the length of the taper. *See, e.g.*, Exhibit 151 (A), Akane's interview responses as recorded by Jolene Ellerton.. Pancake correctly answered that five was the minimum number of cones to use. *See, e.g.*, Exhibit 152 (A), Pancake's interview responses as recorded by Jolene Ellerton.

IV. Opinion²

Akane contends that he was not appointed to the position of Traffic Maintenance Worker because of alleged race discrimination which manifested itself in the hiring process. Akane claims that Thompson was the motivating force behind the discrimination. He contends the hiring process was a sham and draws all sorts of inferences from the evidence which the hearing examiner does not agree with. In fact, the hiring process in this case was not discriminatory and Thompson was not bias against Akane because of race.

Mont. Code Ann. § 49-2-303(1) provides that an employer who refuses employment to a person or who discriminates against a person in compensation or in a term, condition, or privilege of employment because of race commits an unlawful discriminatory practice. When there is no direct evidence of discrimination, the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) standard applies. *Heiat v. Eastern Montana College* (1996), 275 Mont. 322, 912 P.2d 787. *McDonnell Douglas* applies a 3-tier burden-shifting analysis to each case. *Laudert v. Richland County Sheriff's Off.*, 218 MT 2000, ¶22, 301 Mont. 114, ¶ 22, 7 P.3d 386, ¶ 22. Title VII, Federal Civil Rights Act 1964, 42 U.S.C. § 2000e, *et seq.*, mirrors the Montana Human Rights Act prohibitions against discrimination. *E.g., Has The Pipe v. Park County*, 2005 ML 1044, ¶ 66. The principals articulated in federal cases applying Title VII cases are useful in interpreting and applying the Montana Human Rights Act.

Akane must first produce evidence that is sufficient to convince a reasonable fact finder that all of the elements of a *prima facie* case exist in this matter. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). He must show (1) that he is a member of a protected class; (2) that he was qualified for the traffic Maintenance Worker position which he was denied; and (3) that he was denied the appointment to the position in circumstances "which give rise to a reasonable inference that [he] was treated differently because of [his] membership in the protected class." *Id.*; Admin. R. Mont. 24.9.610(2)(a). If Akane proves a *prima facie* case of discrimination by a preponderance of the evidence, the burden shifts to Missoula which must then offer evidence that is sufficient, if believed, to support a finding that its failure to appoint Akane was based on a factor other than race. *St. Mary's Honor Center*, 509 U.S. at 506-07; *Heiat*, 275 Mont. at 328, 912 P.2d at 791 (quoting *Tx. Dpt. Comm. Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981)). Should Missoula carry that burden,

² Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Akane must then “prove by a preponderance of the evidence that the legitimate reasons offered by [Missoula] were not its true reasons, but were a pretext for discrimination.” *Id.*; Admin. R. Mont. 24.9.610(3). Akane, however, at all times retains the ultimate burden of persuading the trier of fact that he has been the victim of discrimination. *St. Mary’s Honor Center*, 509 U.S. at 507; *Heiat*, 912 P.2d at 792.

It is true that Akane was a member of a protected class. It is not at all clear that he was the most qualified candidate or that he was not hired under circumstances that give rise to reasonable inference that his race was the basis for the denial. His contention that he was the only person subjected to an interviewing process is wrong. The 1993 process for selection of the traffic maintenance worker position was undertaken by an application and interview process as demonstrated by Verlanic’s testimony. Not surprisingly, when the next opening came up in 2004, the interview and selection process was used again.

Akane’s assertion that Thompson skewed the entire hiring process is nothing but wildest conjecture. His contention that Thompson rigged the first hiring by inserting a welding test that Thompson knew only Pancake would pass is pure speculation. Welding was obviously a component of the position, as clearly stated in the job description. Furthermore, it was not just the welding that resulted in Akane’s not being chosen in that instance. Akane’s answer to the interview questions were not the best ones given. Akane asserts that his experience was vastly superior to the other candidates and that alone is enough to find that he was the most qualified candidate. The credible testimony reveals that his experience as a seasonal traffic worker was not tantamount to the requirements of the position nor was it necessarily true that his experience made him the best candidate. Akane has cited no authority or persuasive rationale for his proposition that an employer may not rely heavily on the results of an interviewing process in determining the best employee for a position. The interview questions themselves were properly geared toward assessing appropriate qualities for the job.

Providing Pancake with a copy of the UTCM before the second interview is not proof of discriminatory intent under the facts of this case. Human Resources made the manual available to anyone, including Akane, in order to provide the applicants the best opportunity for success in their applications. Akane did not avail himself of that opportunity because he already had a UTCM and in any event he felt he was familiar with it. And there is no credible evidence that Thompson gave Pancake the answers to the interview questions as Akane has asserted.

The confusion relating to the time of Akane's second interview was simply a mistake. There were no machinations designed to ensure Akane's failure.

Akane's supposition that the third interview process was a sham because the city had already hired Pancake and would not unseat him is equally unconvincing. There is no evidence that any of the interviewers took the process less seriously because Pancake was already in the position. Considered rationally, the circumstances surrounding the three interviews do not give rise to a reasonable inference that Akane was treated differently in the interview process because of this race.

Moreover, Thompson had no influence on either the first or second interview panel and he did not attempt to exert any undue influence on those panels. He could not and did not influence the third panel because he was not in any way, shape or form involved in third interview process. The questions prepared by Thompson, and indeed the questions utilized at all three interviews, were rationally related to testing the candidates for qualities that were legitimately important to the position. These only serve to reinforce the conclusion that there is no reasonable inference that Akane's race played a factor in the hiring decision.

Akane's testimony in this matter is not credible. He asserted at hearing that during 1991, Thompson referred to Akane as a "nigger." In light of Missoula's witnesses' testimony, it is unlikely that Thompson would have made such a crude and base remark to Akane. Furthermore, having had the opportunity to see Mr. Akane in person, it strains credulity to suggest that someone would ever use such a derogatory remark against him. Akane may have been attempting to embellish his case by making this assertion, but it simply is not credible. Moreover, Akane's obviously hot temper (as demonstrated by his conduct toward Thompson during the 2003 performance review and Akane's storming out of the second interview) calls into question his ability to accurately perceive and recall the events of this case. Akane's testimony has been accorded no weight in assessing the facts of this case.

Akane's two other witnesses, Shepard and Schnurr, do not provide sufficient evidence to overcome the conclusion that no reasonable inference of improper motive exists in this case. Thompson's testimony that he never told anyone that Akane needed to be more Americanized is credible and directly contradicts Shepard's testimony. Shepard himself testified that the seasonal worker duties are different than the full-time position. In addition, Shepard's testimony is not completely credible in light of the fact that his testimony at the hearing differed from his statement to the Human Rights Bureau with respect to what he observed about

different treatment of Akane. Schnurr's testimony, when boiled to its essence, does not suggest anything more than that Thompson did not have the best relations with any of his employees. It does not suggest that Thompson had it in for Akane because of Akane's race.

Akane's reliance on the initial screening to support his position that he was clearly the most qualified candidate is misplaced. Akane has provided no authority for his proposition that an employer must take an applicant's application at face value without testing the applicant's underlying basis for his statements in the crucible of an interview. According great weight to the in-person interview in this case was particularly important in light of the fact that Akane simply cut the qualifications out of the job description and pasted those qualifications into his application. The employer had every right to go beyond the paper application in a face to face interview with the candidate to ensure that the best candidate was being hired for the job and the fact that the initial review of Akane's resume scored him highest does nothing to undermine the integrity of the interview process in this case.

Even if Akane had made out his prima facie case, he has failed in his ultimate burden of persuasion to demonstrate that the proffered legitimate reasons for the appointment of someone else to the position were not legitimate but were mere pretext. To the contrary, Missoula has proffered legitimate business reasons for hiring someone other than Akane and, as demonstrated by the substantial evidence adduced at the hearing, those reasons were not mere pretext for perpetrating discrimination. Missoula could have legitimately concluded that Akane was not the most qualified person for the position. His experience as a seasonal worker did not automatically qualify him as the best candidate. His answers to the various interview questions, when measured against the criteria of the job requirements, did not make him the best or most qualified candidate for the position during any of the three interviews. The candidate selected arguably had superior abilities to Akane in light of the stated job requirements. Thus, even if Akane had made a prima facie showing of discrimination, he has not carried his ultimate burden of persuasion to convince the trier of fact that race discrimination played any part in the hiring process in this case.

V. Conclusions of Law

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Missoula's decision to not hire Akane for the Traffic Maintenance Worker position was not motivated in whole or in part by race discrimination.

3. Because there has been no showing that Missoula discriminated against Akane, there has been no showing that Missoula violated either the Montana Human Rights Act or the Governmental Code of Fair Practices Act.

4. Because Akane has failed to prevail in his claim of discrimination, this matter must be dismissed. Mont. Code Ann. §49-2-507.

VI. Order

Based upon the foregoing, judgment is entered in favor of Respondent City of Missoula and Shawn Akane's complaint is dismissed.

Dated: May 19, 2006

/s/ GREGORY L. HANCHETT

Gregory L. Hanchett, Hearing Examiner
Montana Department of Labor and Industry