

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Leland Bruce Peden

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INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Attorney in private practice – Moore & Peden P.C., Columbia, Tennessee

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1976 BPR 000245

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; BPR 000245; licensed September 11, 1976; active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1977 -1981: Deputy Staff Judge Advocate, 4TH Marine Division, U.S. Marine Corps

1981 – present: private law practice with Cain, Moore & Peden P.C. / Moore & Peden P.C.

Musician on a part-time basis from 1974 to present

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

At present, I would characterize my practice as a general, small town, civil practice. Civil litigation includes family law (20%); personal injury (20%); trust and probate litigation (05%); commercial and business (10%); real estate and land use litigation (10%); and other miscellaneous (05%). Probate practice approximates 15% and bankruptcy (creditor) 15%. I practice in state court at all levels, U.S. District Court, and U.S. Bankruptcy Courts.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I cut my lawyer teeth as the Deputy Staff Judge Advocate for the 4TH Marine Division. While those early years gave me some immediate exposure to trial work, both prosecution and defense, I also had responsibility for reviewing and advising the division commander on a wide range of investigative and disciplinary matters. I did not appreciate it then, but now know that having a Marine Lieutenant General for a client is good preparation and training for any young lawyer.

In 1981 I returned to Middle Tennessee, and had the good fortune of beginning private law practice under the tutelage of Bill Cain. Judge William B. Cain, as he was later known, taught me not only how to practice law, but how to love the law. Over the ensuing thirty-three years I have been blessed to be able to make a living and support a family doing something I love. I have never tried to settle into any so-called specialty.

I have practiced in state court at all levels; U.S. District Court; and the U.S. Bankruptcy Court. My administrative practice has been generally limited to municipal and county planning and regulatory boards.

My past trial experience includes personal injury cases, both large and small; governmental tort liability; eminent domain and inverse condemnation; commercial and banking; consumer protection; divorce; zoning and land use; boundary and easement cases; discrimination; and civil rights. Although I once accepted and handled criminal matters, I have

not done so over the past twenty years or so. I do not have any securities, tax, or intellectual property practice whatsoever.

Like most small town lawyers, I engage in some office practice for wills; POA's; leases, etc. Although quite rare today, in the past I have conducted scores of title examinations. I handle bankruptcy matters for creditors. As I have aged, I have seen my probate practice increase.

I believe I have a reputation for reasonably good intellect; diligent preparation; and high ethical standards. I work hard, and I give every case, large or small, my very best effort.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have always enjoyed taking on interesting and challenging cases.

For example, early in my career I enjoyed appellate success in *Keeton v. Maury County Hospital*, 713 S.W.2d 314 (Tenn. Ct. App. 1986) (expert testimony to prove physical necessity not required).

In *Scribner v. City of Columbia, et al.*, Maury Chancery No. 89-066, I filed and successfully represented the plaintiff-class in a case involving developmental impact fees that had been exacted by local municipal entities from approximately 1600 class members. I believe the case to have been the first in the state litigating that type of monetary exaction. I also think it was the first class action administered from start to finish in this circuit.

In *Gray v. Freeman, et al.*, Maury Circuit No. 4163 I was co-counsel for the plaintiff in what was one of the larger personal injury jury verdicts in this circuit. (\$5,000,000.00)

In *McLain v. State of Tennessee*, No. 1:01-cv-00043, U.S. District Court M.D. Tenn., I filed and successfully represented the plaintiff in a reverse race discrimination case against the State of Tennessee.

In *Harris, et al. v. Maury County*, Maury Circuit 9505, No. M2008-00859-COA-R3-CV, COURT OF APPEALS OF TENNESSEE, AT NASHVILLE, 2010 Tenn. App. LEXIS 201, I represented the plaintiff class in a case involving the county's retirement plan.

I have litigated cases in a broad range of areas.

Distributorship: *Sun-Drop Bottling Co. v. Helton*, 2006 Tenn. App. LEXIS 157

Conservatorship: *Estate of Miller v. Rice*, 2012 Tenn. App. LEXIS 589

Divorce: *Miller v. Davidson*, 2006 Tenn. App. LEXIS 649; *McCray v. McCray*, 1997 Tenn. App. LEXIS 534

Eminent Domain: *Giles County v. Wakefield*, 1994 Tenn. App. LEXIS 362; *State Ex Rel. Commissioner of DOT v. Rummage*, 1991 Tenn. App. LEXIS 533

Zoning and Planning: *Rutherford Creek Planning Comm. v. Smith*, 1988 Tenn. LEXIS 97

Real Estate Litigation: *Baxter v. Carvell*, 1990 Tenn. App. LEXIS 185

Estate and Probate: *Andrews v. Sprinkle*, 2013 Tenn. App. LEXIS 658

Products Liability: *Woodward v. Ford Motor Co.*, No. 1:94-cv-00121, U.S. Dist Ct.
M.D. Tenn.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

From 1977 to 1981, I was periodically detailed to and designated as the Summary Court Martial Officer for the 4TH Marine Air Wing. Summary Court Martial was essentially a bench trial utilized for minor offenses under the Uniform Code of Military Justice. I heard evidence, made an adjudication, and imposed sentence. This was a periodic activity.

In 1995 I presided as Chancellor Pro Tempore in *Smithson, et al. v. Mullins*, Maury Chancery No. 92-637, a Chancery jury case

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

In Re: A.G. O'Neal dba Butler Brothers, No. 187-04900, U.S. Bankruptcy Court, M.D. Tenn. – appointed as Chapter 11 Trustee, continuing as Chapter 7 trustee upon conversion.

In Re: Estate of Glenna F. Griffith – executor

In Re: Estate of Doris F. Peden – administrator

In Re: Estate of Mahlon R. Peden – executor

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

For many years I have served on the Investigating Committee for bar applicants.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

In 1998 I applied through the Judicial Selection Committee for Circuit Judge, 22nd Judicial District. I was one of three names submitted to the Governor who selected Judge Holloway for the appointment.

In 2014 I applied through the Governor's Commission for Judicial Appointments for Circuit Judge, 22nd Judicial District. The meeting was held on October 15, 2014. I was not selected as a nominee by that Commission.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of the South (Sewanee) – B.A. Magna Cum Laude 1973; Georgia M. Wilkins Scholar; Phi Beta Kappa

University of Tennessee College of Law – J.D. 1976

United States Naval Justice School – 1977; Honor Graduate

PERSONAL INFORMATION

15. State your age and date of birth.

63; April 16, 1951

16. How long have you lived continuously in the State of Tennessee?

33 years

17. How long have you lived continuously in the county where you are now living?

33 years

18. State the county in which you are registered to vote.

Maury

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

U.S. Marine Corps; active duty from January 3, 1977 until June 30, 1981; Captain; Honorable Discharge

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

Yes. In 1969 I pled guilty to possession of an alcoholic beverage (beer) in a dry county, Limestone County, Alabama. As I recall I paid a fine and costs. In 2013 I pled guilty to speeding in the City of Columbia Municipal Court. That ticket was dismissed upon payment of costs.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Peden v. Melton – personal injury and property damage arising out of auto accident; 1983; Maury Circuit No. 1468; settled

Peden v. Peden – divorce; October 5, 1993; Davidson Circuit No. 93D-2778. This was an uncontested divorce.

State Ex. Rel. Comm. v. Peden – eminent domain for highway right-of-way; 1994; Maury Circuit No. 1643; settled.

Underwood v. Moore & Peden P.C., et al. – *pro se* suit by former client alleging professional negligence against myself and William B. Cain, a former partner in the firm who had participated in representation of the plaintiff; Maury Chancery No. 98-349; The case was dormant for years and eventually voluntarily dismissed in 2006.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

St. Peter's Episcopal Church

Phi Beta Kappa

Post 19 American Legion

Maury County Republican Party

Dixie Youth Baseball, Mt. Pleasant, TN 38474

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association

Maury County Bar Association

For many years, I have served on the local investigatory committee for the Board of Law Examiners. My duties included the review of bar admission applications and the conduct of personal interviews of applicants for purposes of submitting a report and recommendation to the Board.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I do not recall any public honors, prizes, awards or other forms of public recognition. I have been called upon by lawyers several times to represent them which I consider to be the highest honor I could ever receive.

30. List the citations of any legal articles or books you have published.

None

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In 1998 I applied for nomination for appointment to judicial office (Circuit Judge, 22nd Judicial District). In August of 1998 I was a candidate for election to that same position.

In 2014 I applied for nomination to appointment to judicial office (Circuit Judge, 22nd Judicial District).

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached as appendices 1-3 three examples, all of which are exclusively my personal effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

I think I have the intellect, the experience, and the temperament to be a good judge. I love the law.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro

bono service throughout your time as a licensed attorney. *(150 words or less)*

I have never declined representation of a client based upon the cause being politically incorrect. On numerous occasions, I have been on the unpopular side of a case.

In *State v Armstrong*, Maury Circuit, I defended *pro bono* an African-American man charged with the attempted murder of a white man. The jury trial received substantial local publicity.

In *Patterson v. Maury County et al.*, U.S. District Court No. 00-cv- 0035, I represented the plaintiff, an African-American female, in a civil rights case against local governmental entities and personnel relating to a drug task force that broke into the wrong address.

In 2010 republican State Senator Ketron sued his democratic opponent in *Ketron v. Matthews, et al.*, Maury Chancery No. 10-597. Although a lifelong republican and former county party chairman, I represented Ms. Matthews. In my view, her political beliefs had nothing to do with the legal issues in the case.

I have always, and still do, accept cases (typically child support or divorce) either for nothing or at a greatly reduced rate. I recently accepted and devoted in excess of thirty hours in a very unpleasant child custody / support case on a *pro bono* basis. The client's former attorney had withdrawn from the practice of law, and the client simply had no disposable funds. Although having aged into the status as one of the senior practicing attorneys at the local bar, I believe everyone should be served by the legal profession, and that includes me.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

The 22nd Judicial District includes the counties of Wayne, Giles, Lawrence, and Maury. The four (4) circuit judges in this district preside over civil (circuit and chancery) and criminal cases. Except for Lawrence County (by private act the General Sessions Judge has jurisdiction), the circuit judges also preside over probate matters.

My selection should not materially have any negative impact on the court. Except for cases requiring my recusal due to me or my firm being involved, I would expect to be fully functional immediately.

I believe I would have a positive impact on the overall functionality and operation of the court system. I have a strong breadth of experience. I work hard. I think I enjoy a good reputation at the bar.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

In recent years my primary community activities have related to youth sports. I have coached flag football (Columbia Pop Warner); basketball (YMCA); and baseball (Mt. Pleasant

Dixie Youth) for kids ranging from ages 5 or 6 to 14.

Additionally, from time to time I have volunteered for local charitable or civic events usually via my musical group.

I do not expect any significant change in community involvement should I be selected.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I grew up on Pigeon Roost Creek in Giles County, just north of Pulaski. My dad, a heavy equipment operator in the phosphate mining industry, never attended college but was the most well-read person I have ever known. My mother was a homemaker. I have one older brother.

I was very lucky to inherit some pretty good genes, both mental and physical, so in school I excelled academically and athletically. I managed to be valedictorian of my high school class. I was blessed to receive a full ride scholarship to Sewanee where I majored in English. While there I became interested in serving in the Marines and accepted a commission upon graduation in 1973.

Following law school at UT, I went on active duty from 1977 until 1981. Since then, I have practiced law in Columbia.

I have been married twice and have one child; a son aged 18 who is a freshman at MTSU.

I am a self-taught musician. I work out almost every day with brisk morning walks and weights. I no longer smoke, and I very rarely drink.

My father was a true, southern, yellow-dog democrat. I consider myself a republican, primarily for fiscal and national defense reasons. Despite my preference for the color, red, during the past election cycle, I vocally supported retention of the Supreme Court Justices. I also supported an incumbent (democrat) Circuit Judge in an election with his republican challenger.

I believe in hard work and fair play.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Duty pervades every aspect of our system of law. Duty is an essential element of substantive law – whether imposed by statute, by contract, or by the common law. The duty of a trial judge is to uphold and apply the substantive and procedural laws impartially and without regard to any personal disagreement he or she might have with either: (1) a

particular rule or point of law; or (2) the result of applying the law.

Some decisions are not pleasant to make. Some orders are gut-wrenching to give. Nevertheless one must do their duty and make the decision or give the order.

I recall an occasion when my biggest and best client was sued in a commercial case. As I worked my way through the file, I eventually came to the original Purchase Agreement. To my dismay, the plaintiffs' signatures had been cut from some other document and taped over the signature lines. I knew that the lender required a signed contract (sent by fax), and my client's salesperson had taken a shortcut.

Although not an issue in the case, I knew that at deposition, one of my witnesses likely would be questioned about "the purchase agreement." I summoned a meeting and informed my client that if the purchase agreement came up during depositions, I was going to produce and disclose the original document.

My client was not happy, but I did what the law required me to do. At trial I managed to keep the bogus contract out of evidence under Rule 403.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Mr. George C. Jones, Mr. Jones is a former mayor of Spring Hill, Tennessee and business man. He is a longtime client.
B. Mr. Robert D. Massey, 211 West Madison St., Pulaski, TN 38478; (931) 424-8655. Mr. Massey is a practicing attorney.
C. Mr. J. Robert Harlan, 39 Public Square, Columbia, TN 38401; (931) 381-0660. Mr. Harlan is a practicing attorney.
D. Mr. Walter (Pete) Frierson, Legal Aid Society of Middle Tennessee and the Cumberland; 104 W. 7 th St., Columbia, TN 38401; (931) 381-5533. Mr. Frierson is a non-lawyer case manager for our local legal services office. He has known me, worked with me, and referred me matters for many years.
E. Mr. Don Parr, Parr Industries, 500 11 th St., Pulaski, TN 38478; (931) 703-5379. Mr. Parr is a Giles County businessman and currently serves on the state Motor Vehicle Commission.

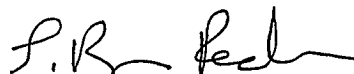
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] 22ND JUDICIAL DISTRICT of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: FEB. 23, 20 15.



Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

LELAND BRUCE PEDEN
Type or Print Name

J. B. Peden
Signature

FEB. 23, 2015
Date

000245
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE**

IN RE: MAINSTREAM DEVELOPMENT, LLC)	
)	CASE NO. 3:09-bk-12315
Debtor-In- Possession.)	CHAPTER 11
)	JUDGE HARRISON
<hr/>)	
BANK OF FRANKEWING,)	
)	
Movant,)	
)	
vs.)	
)	
MAINSTREAM DEVELOPMENT, LLC,)	
)	
Respondent.)	

**MEMORANDUM OF MOVANT IN SUPPORT OF
MOTION FOR RELIEF FROM STAY**

Bank of Frankewing (herein "Movant"), through counsel of record in this proceeding, respectfully submits this memorandum in support of its request for relief from the automatic stay.

Summary of Facts

The Bank of Frankewing (herein "Bank") holds a claim in the amount of \$ 1,599,233.64, the claim being secured by a deed of trust upon certain real property owned by the debtor-in-possession (herein "Mainstream") and located in Lincoln County, Tennessee. (Claim No. 2-1 filed 11/03/09). The real property securing the Bank's claim consists of approximately 58 acres and is planned to be a residential real estate development commonly known as "Bailey Park." The Bank's loan to Mainstream

matured in May of 2009, and foreclosure proceedings had initiated prior to the voluntary Chapter 11 petition being filed on October 26, 2009.

Mainstream purchased the real property in 2007 for \$800,000.00.¹ Initially planned as an 86 lot residential subdivision, the project as presently designed consists of 59 lots. Mainstream has not completed the physical development of the project. In order to bring the project to a point at which individual building lots may be sold, an additional estimated \$200,000.00 to \$350,000.00 of costs must be incurred. These estimated additional costs are derived from Mainstream's original contractor, Braden, who in 2009 estimated additional costs of \$203,995.00, just to get the subdivision to the point at which lots might be sold. Joe Smith is expected to estimate an additional \$353,995.00 of costs to be required to fully complete the project.

Only a preliminary plat has been submitted to and approved by the local planning commission. In order for individual lots to be lawfully sold, a final subdivision plat must be submitted and approved by the local planning commission.²

Mainstream, in Schedule A of its petition and schedules, values the real estate at \$1,400,000.00 (**Schedule A, Petition and Schedules**) The Bank expects to present expert appraisal testimony (**Mr. Joe D. Smith**) estimating a present fair market value of

¹ The land purchase price was funded with proceeds from the Bank's loan. The remaining portion of the Bank's claim represents development costs; interest; and legal expense accrued as the petition filing date.

² See T.C.A. § 13-3-401 *et seq.*

\$1,158,000.00. This appraisal assumes additional expenditures of \$353,000.00 to complete the project.

In addition to the Bank's deed of trust lien upon the real property, the original contractor, Braden, has filed a contractor's lien against the property.

Mainstream is owned solely by William S. Carman, Sr., an attorney. The company was formed in 2005 for the purpose of real estate development. As of the petition filing date, Mainstream owned only two (2) material assets, both being real estate development projects: (1) the Bailey Park residential lot project; and (2) the Robert E. Lee project, a townhome development also located in Lincoln County.

The Robert E. Lee project has been foreclosed by its secured lender, Green Bank, following an Agreed Order For Stay Relief. **(Document No. 34 filed 1/27/10)** At foreclosure this property, estimated by Mainstream to have equity of \$227,000.00 **(Schedule A, petition and schedules)**, was bid at \$425,000.00 **(Trustee's Deed at Book P14, Page 226 Register's Office of Lincoln County, Tennessee)**, leaving a potential deficiency of \$900,000.00 to \$1,000,000.00. The foreclosed Robert E. Lee project included eight (8) completed and built town homes that were ready to sale.

Mainstream has no assets remaining other than the incomplete Bailey Park property. The initial capitalization of Mainstream by Mr. Carman consisted only of a few hundred dollars for administrative start up costs. Mainstream has no source of revenue

whatsoever. Mr. Carman, the sole member and owner of Mainstream, is either unwilling or unable to make any capital contribution to Mainstream for purposes of completing Bailey Park.

Memorandum of Law

Pursuant to 11 U.S. Code § 362(d)(2) the Bank is entitled to relief from the automatic stay as concerns the Bailey Park real property if (1) there is no equity in the property; and (2) such property is not necessary to an effective reorganization. The Bank has the burden of proving a lack of equity in the property. Mainstream has the burden of proving that the property is necessary to an effective reorganization. 11 U.S. Code § 362 (g).

In considering whether the property is necessary to an effective reorganization the appropriate analysis and test is not whether the property is necessary for a possible reorganization – the standard is whether there is a “reasonable possibility of a successful reorganization within a reasonable time.” *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 375-76, 108 S. Ct. 626, 632, 98 L. Ed. 2d 740, 750-51, 17 C.B.C.2d 1368, 1373-74 (1988).

Relief from stay should be granted if the debtor has no reasonable likelihood of reorganization, i.e. a successful reorganization is not feasible. See generally *Collier Bankruptcy Manual*, 3RD Edition Revised P. 362.07 [3][B]; *In re Sun Valley Ranches*,

823 F.2d 1373, 17 C.B.C.2d 449 (9th Cir. 1987) ; *Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436, 1440, 12 C.B.C.2d 264, 269 (4th Cir. 1985) ; *In re Albany Partners, Ltd.*, 749 F.2d 670, 673, 12 C.B.C.2d 244, 248 (11th Cir. 1984) ; *In re 8th Street Village Ltd. Partnership*, 94 B.R. 993 (N.D. Ill. 1988). The debtor's plan must be supported by credible assumptions and projections that offer some basis for confidence in a successful plan. *In re Pegasus Agency, Inc.*, 101 F.3d 882 (2d Cir. 1996).

Argument

Mainstream by agreement permitted and did not oppose the grant of relief from stay to Green Bank as to the only possible source for it to realize relatively immediate revenue, i.e. the eight (8) completed town homes it owned in the Robert E. Lee project. Having agreed to grant stay relief as to the Robert E. Lee project, Mainstream is now a single asset debtor.

Clearly there is no equity in the property. The project will take in excess of \$200,000.00 to get it to the point at which the first lot can be sold. Total completion costs are estimated at \$350,000.00 plus.

Mainstream has no funds; has no revenue; and has no mean for acquiring either at any time in the reasonably near future. Other than the incomplete Bailey Park project, Mainstream has no other assets. Its sole owner and member, Mr. Carman, either cannot or will not contribute any capital funding to the project.

There is no reasonable prospect for a successful reorganization within a reasonable time, and the Bank should be granted relief from stay.

Respectfully submitted,

/s/ L. Bruce Peden
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Attorney for Bank of Frankewing

Certificate of Service

I hereby certify that on this 13th day of April, 2010, I served a true and complete copy of the forgoing by United States mail, sufficient postage prepaid, or by electronic notice / ECF to the following persons:

UNITED STATES TRUSTEE
701 Broadway, Suite 318
Nashville, TN 37203

ELLIOTT WARNER JONES
ATTORNEY FOR DEBTOR
1720 West End Avenue
Suite 300
Nashville, TN 37203

/s/ L. Bruce Peden
L. Bruce Peden

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION**

PEGGY J. MCLAIN,
Plaintiff,

vs.

**STATE OF TENNESSEE, and
TENNESSEE DEPARTMENT OF
LABOR / WORKFORCE
DEVELOPMENT,**
Defendant.

)
)
)
) **NO. 1:01-0043**
)

) **JUDGE HIGGINS**
)
)
)
)

**MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This is a "reverse discrimination" case in which the Plaintiff, McLain, a white employee of the Defendant, seeks relief pursuant to 42 U.S.C 2000e-2, the claim being based upon allegations and evidence of intentional and unlawful racial discrimination in Defendant's selection of a lesser qualified black employee for promotion to the position of manager of Defendant's Lawrenceburg, Tennessee office.

The Complaint (Count 2) includes a claim for unlawful gender discrimination. Plaintiff acknowledges (as noted at page 1 of Defendant's Memorandum) that the claim for gender discrimination is not viable in light of the evidence adduced in discovery, and Plaintiff does not oppose the dismissal of the claim stated in Count 2 of the Complaint.

The Defendant has moved for Summary Judgment as to the claim of unlawful racial discrimination (Count 1 of the Complaint). Based upon the evidence in the record and the authorities set forth herein, Defendant's Motion should be denied.

II. THE PLAINTIFF'S EVIDENCE

In April of 1999 a Ms. Thomas, the manager of the Department's Lawrenceburg office, retired, and effective May 1, 1999, Plaintiff, the "Interviewer Supervisor" for the office was named as acting manager. (McLain depo. P.17, L.9 – P.18, L.23) Crosier, the Department's District Manager for lower Middle Tennessee (Crosier depo. P.7, L. 18), was responsible for planning the replacing of Ms. Thomas (Crosier depo. P.15, L. 22). She spoke with Plaintiff very soon after learning of Ms. Thomas' retirement regarding Plaintiff's interest in the position (Crosier depo. P.16, L. 1-17).

Q. And what did Ms. McLain tell you when you inquired about her interest?

A. She was not sure at that point that she wanted to apply. She indicated if I remember correctly she would think about it, but she had some concerns.

Crosier depo. P.16, L. 18-23

The Lawrenceburg office was a short-staffed busy office (Crosier depo. P.21, L.18) beset with personnel issues (Crosier depo. P.17, L.6-11) and conflict unrelated to Plaintiff. (Johns depo. P.18, L.6-23) Plaintiff, despite short notice of the retirement, (McLain depo. P.17, L.13) and despite having to cancel a planned trip with the loss of

her paid airfare (**McLain depo. P.18, L.4-7**) had agreed to serve as acting manager. Plaintiff's reservations about taking the job on a permanent basis included the pending merger of departments and rumors of layoffs, her husband's considering retirement and the possibility that she might also, the low morale of the staff, and the heavy workload and understaffing of the office. (**McLain depo. P.20, L.13 – P.22, L.12**)

Crosier, perceiving Plaintiff's concerns or reservations as reasonable (**Crosier Depo. P.22, L. 4-9**), and considering that Plaintiff was willing to take the job on an acting basis, concluded to assign Plaintiff to the job on an acting basis, give her a chance to perform, and perhaps change her mind. (**Crosier depo. P.20, L. 17-25.**)

On August 13, 1999 the Department requested a hiring freeze exception to fill the vacancy created by the retirement (**Crosier depo. Exhibit 2**), and in September obtained from the State Department of Personnel a "register" or list of employees eligible for promotion to the vacant Employment Security Manager 2 position. (**Crosier depo. Exhibits 4 and 5**). The register lists all employees who have submitted applications for the job classification and scores the individuals based upon education and experience. (**Crosier depo. Exhibit 5**;) Crosier and Johns (Crosier's supervisor) determined to send vacancy letters through the score of 93. (**Crosier depo. P.31, L.3-4**)

Plaintiff, whose score for the job classification was 97 (**Crosier depo. Exhibit 5**) was notified of the vacancy by Department letter dated September 21, 1999. (**Par. 9 and Ex. 1 of Complaint admitted by par. 9 of Answer**) Plaintiff contacted Crosier and expressed her interest. (**Par. 10 Complaint admitted at Par. 10, Answer.**)

On or about October 4, 1999 Mr. Sam Outlaw, a black male employee of the Department assigned to the Lawrenceburg office, contacted Evelyn Gaines, a black

female employee of the Department who held the position of the Department's statewide Equal Employment Opportunity Officer, regarding the fact that he (Outlaw) had not received the September 21, 1999 notification. **(Par. 11 Complaint admitted at Par. 11, Answer.)** Outlaw's score for the job classification was 89. **(Par. 15 Complaint admitted at Par. 15, Answer.)** On October 4, 1999 the department issued a vacancy letter to Outlaw. **(Par. 16 Complaint admitted at Par. 16, Answer.)**

After conducting interviews on October 6 and 7, Crosier on October 8, 1999 recommended Plaintiff for the promotion. Ms. Crosier's recommendation for the selection of Plaintiff for promotion and appointment to the position was approved up through the next three levels of the chain of command within the Department of Labor and was submitted to the office of the Department's Director of Personnel on or about October 13, 1999. **(Pars. 17, 18, 19, and 20 of Complaint admitted by Answer)**

On or about October 20, 1999, in consultation with Jimmy Huckaba, the Director of Personnel for the Department, Commissioner Michael E. Magill, the Commissioner of the Department, made the decision to select Outlaw for the promotion. **(Par. 25 of Complaint admitted by Answer)**

The Relative Qualifications

Plaintiff was first employed by the Department in 1978, starting as an Interviewing Clerk, becoming an Interviewer after four years, and eventually being promoted to Interviewer Supervisor in 1991. **(McLain depo. P.13, L.9-20)** An

Interviewer Supervisor directly supervises the office interviewing staff and serves in the capacity of assistant manager. **(Crosier depo. P.14, L.19 – P.15, L.7)**

Outlaw was first employed by the Department in 1991 on a part-time basis and first became a full-time employee in November of 1997, having transferred from Columbia to the Lawrenceburg office in 1993. **(Outlaw depo. P.4, L.5-18)** Plaintiff had been Outlaw's immediate supervisor since 1993. **(Outlaw depo. P.46, L.14-16)**

Outlaw was the receptionist at the Lawrenceburg office, his duties being primarily the front desk and telephone functions, providing forms and calling for the appropriate office interviewer personnel. **(McLain depo. P.73, L.3-22)** His claim handling was limited, and his limited counselling functions began only after Plaintiff became acting manager of the office. **(McLain depo. P.73, L.13 – P.74, L.6)**

Plaintiff served as acting manager of the office from May through October of 1999 **(Crosier depo. P.21, L.1-7)** and had "taken care of all three offices in an exceptional manner." **(Crosier depo. P.24, L.18-20)**

A. She had proven herself. She was very knowledgeable of all of the programs that we administer. She is good at managing people. She is a very technical, very detailed person, well organized. She had a relationship with the employers there in the community which is very important to a manager. She understood the Workforce Investment Act and the Career Center concept and supported it which is something we were getting ready to transition into. She had been a board member with the Private Industry Counsel in that area. She knew those people. That was key. She had proven herself and that's what I based my recommendation on.

Q. Was it your conclusion that she was the better qualified applicant?

A. When you look, when you look at experience and everything, absolutely.

(Crosier depo. P.65, L.10 – P.66, L.2)

Outlaw's Contact With Gaines.

Gaines, a black female, is the Department's statewide Affirmative Action Officer, a position equivalent to Director of a Division. **(Gaines depo. P.6, L. 14-23)** Her duties and responsibilities are in the areas of affirmative action, nondiscrimination, civil rights, and ADA. **(Gaines depo. P.12, L. 18-22)** She does not routinely have involvement in personnel decisions such as hiring, promotion, or transfers of employees. **(Gaines depo. P.13, L. 7-13)** Routine promotions are outside the scope of her responsibilities as she ordinarily deals with issues that involve some question regarding employment law matters such as sexual harrasment or discrimination. **(Huckaba depo. P.12, L. 18; P.13, L. 11-20)**

The Department routinely instructs and trains its employees on personnel policies and practices, and a potential manager of an office would be expected to know and understand how a routine promotional personnel transaction would work. **(Huckaba depo. P.15, L. 8-15)** Registers are pulled and vacancy letters are sent by the Department's personnel office. The personnel office is the appropriate division of the department for inquiries regarding registers and vacancy letters. **(McNeese depo. P.34, L.17-22; Edwards depo. P.26, L.1-3)**

Gaines denies knowing or having met Outlaw prior to his calling her regarding this matter. **(Gaines depo. P.18, L.19; Gaines depo. Ex.1)** Outlaw contradicts this with testimony that in 1995 or 1996 he had contacted Gaines regarding an earlier problem with

his name not being on a register; that she was able to answer his question at that time; that she got him an audience in Nashville with supervisory persons; and that he had met her while in Nashville. (**Outlaw depo. P.8, L.1-12; P.15, L.1-23; P.33, L. 4-25**) Outlaw testifies that he introduced himself and told her about her earlier assistance to him.

(Outlaw depo. P.38, L.1-18)

After being contacted by Outlaw on October 4, Gaines contacted Crosier. Thereupon, Crosier conferred with Johns; the two of them met with Huckaba who brought Bill Edwards, the Employee Relations Officer into the meeting; and Outlaw was issued a vacancy letter that same day. (**Gaines depo. P.25, L. 7-10; Crosier depo. P.37, L. 21- P.38, L.9; Crosier depo. P.44, L.16 – P.45, L. 6; Huckaba depo. P.9, L. 9; Pars. 11 and 16 of Complaint admitted by Answer**)

Q. During the course of your conversation with Mr. Huckaba, when you and Ms. Johns approached him, did anyone express any concern about the fact that Mr. Outlaw was black and had brought this to your attention through Ms. Gaines?

A. Not that I can recall.

Q. Were you concerned about that fact?

A. Was I concerned about it?

Q. Yes, ma'am.

A. Yes.

(Crosier depo. P.47, L. 15-25.)

Q. Was there any concern on your part, Ms. Johns, that Mr. Outlaw with his race and the fact that he had questioned his not getting a

letter from the equal employment officer of the department?

- A. Yes. In all fairness, I didn't want anything questioned. I didn't want a personnel transaction questioned. I wanted to give everyone who was in a competitive position, the opportunity to interview. I didn't want any transaction that we recommended – I guess it's kind of a joke now – to be questioned later on. I was trying to be fair to everyone, I guess, is what I was doing.

(Johns depo. P.24, L.18 – P.25, L. 4)

The Decision Process

After interviews on October 6 and 7, Crosier initially recommended Plaintiff, the recommendation being approved up through the chain of command and submitted to Department personnel on October 13. **(Pars. 17, 18, 19, and 20 of Complaint admitted by Answer)** Normal procedures within the personnel office at that time were for recommendations for promotions to be logged in when received at the personnel office. **(McNeese depo. P.13, L. 1-7)** The log is paper and contains the date the personnel transaction is received, the type of transaction, the employee's name, and other data regarding the paperwork. **(McNeese depo. P.26, L.12 – P. 27, L.19)** Plaintiff's recommendation was never logged in by the personnel office. **(Huckaba depo. P. 66, L.1)** According to Huckaba, the paperwork regarding Plaintiff's recommendation was not logged in because he removed it from the inbox. **(Huckaba depo. P.29, L. 13)**

Huckaba testifies under oath that within a day or two after reviewing Plaintiff's paperwork he went and spoke with Crosier. **(Huckaba depo. P. 34, L.15)** He says that he asked Crosier about Plaintiff's hesitance to be manager. **(Huckaba depo. P. 35, L.14)** He

says that he told Crosier that he had some concerns about her recommendation of Plaintiff and that he would share those with the Commissioner. (**Huckaba depo. P. 36, L.8**) He testified that he expressed to Crosier his concern about Plaintiff not having an interest in the manager's position. (**Huckaba depo. P.37, L. 19**)

Crosier at deposition materially and directly contradicts Huckaba's account by testifying that: (1) she first learned of a problem with her recommendation for Plaintiff several days after it was submitted to personnel when Huckaba called and asked her to come to his office; (2) Huckaba explained that there was a problem with the recommendation, that "it wasn't going to go"; and (3) she asked what the problem was and was responded to with "it wasn't going to go." (**Crosier depo. P.52, L. 1-25**) Crosier inquired as to whether delaying the decision might clear up the problem, whatever it was, and was told no. (**Crosier depo. P.53, L. 1-5**)

No, I remember questioning, trying to find out specifically what was the problem, and for whatever reason, I wasn't privy to that.

(**Crosier depo. P.53, L.15-17**)

According to Crosier, Huckaba did not express to her any concerns about Plaintiff's initial reservations in taking on the manager's job. (**Crosier depo. P.56, L. 8-12**)

Johns' testimony likewise contradicts Huckaba's account. At deposition Johns, Crosier's immediate superior, testified that she learned of the Plaintiff's recommendation being disapproved upon being called into Huckaba's office and told it was not going to be approved. (**Johns depo. P.14, L.7 – 25**) Johns asked Huckaba the reason, and Huckaba told her that he couldn't tell her; he didn't know. (**Johns depo. P.15, L.1 – 5**) According to Johns, Huckaba asked who the second choice would have

been or what they thought of Outlaw. **(Johns depo. P.16, L.8 – 10)** Johns testified that Huckaba never gave her any reason why the recommendation for Plaintiff would not be approved. **(Johns depo. P.17, L.23 – P. 18, L. 2)**

Huckaba spoke with Magill on October 20, 1999. **(Huckaba depo. P.41, L.20)** At that time Huckaba had not reviewed Outlaw's application, had not reviewed Outlaw's personnel file, did not know Outlaw, and knew nothing about Outlaw other than the fact that he was on the register and had given the best interview. **(Huckaba depo. P.42, L.19 – P.44, L.12)** At deposition Huckaba initially indicated that he was absolutely aware of Outlaw's race on the 20th **(Huckaba depo. P.44, L.13-17)**; subsequently indicating that race is noted on the form 1050 or 636, then noting that he would not have seen that form for Outlaw as of October 20, and then modifying his earlier testimony to indicate that he was uncertain whether he knew Outlaw's race at the time he spoke with Huckaba. **(Huckaba depo. P.44, L.13 – P.45, L.1)**

Discussion of Race By The Decision Makers

Huckaba denies discussing the race of the candidates with Commissioner Magill. **(Huckaba depo. P.45, L.2-6)** Magill directly and unambiguously contradicts Huckaba as to this fact by his deposition testimony that Huckaba told him the race of both individuals.

Q. What did he tell you about that?

A. I mean, he just mentioned to me the race of both individuals.

Q. Did he tell you how he obtained that information?

A. No.

Q. Did he tell you that Mr. Outlaw was a black male?

A. He did not. He said he was an African American.

(Magill depo. P.24, L.25- P.25, L.12)

The Articulated Non-discriminatory Reason

The defendant's articulated reason in its response to the EEOC charge of discrimination was: "Ms. McLain was not promoted to the vacant Manager II position because a better-qualified candidate was selected for the position." (Magill depo. Ex. 1, p.1) Magill, the Commissioner for the Department, confirmed that position at his sworn deposition. (Magill depo. P.16, L.7-18)

Defendant, at page 10 of its Memorandum, now asserts, "Defendants did not promote Plaintiff to the permanent Manager position because she did not want the job." (Defendant's Memorandum, P.10)

III. ARGUMENT

A. Standard of Review

Summary judgment is appropriate where there exists no genuine issue of material fact and the moving party is entitled to summary judgment as matter of law. Fed. R. Civ. P. 56(c). As the moving party, Defendant in this case bears the burden of showing the absence of a genuine issue of material fact as to at least one essential element on each of Plaintiff's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Plaintiff, as the non-moving party, must then present sufficient evidence from which a jury could reasonably find for him. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). This test requires the Court to determine "whether the evidence presents sufficient disagreement to require submission

to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. In making this determination, the court should view the factual evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986), and should accept all of Plaintiff's evidence as true and draw reasonable inferences in her favor. *National Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997).

B. The Prima Facie Case

The undersigned respectfully submits that the Defendant misconstrues the Sixth Circuit's opinions and reasoning in *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796 (6th Cir. 1994) and *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63 (6th Cir. 1985) in concluding that a plaintiff in a reverse discrimination case must prove an "unusual history of a racial bias against whites" in order to prove a prima facie case (See page 9 of Defendant's Memorandum).

As the court noted in *Murray*:

Title VII, of course, prohibits racial discrimination against all groups. As with the minority plaintiff, the majority plaintiff who asserts a claim of racial discrimination in employment does so within the historical context of the Act. "Reverse discrimination claims require application of a McDonnell Douglas standard modified to reflect this context as well as the factual situation of the claim.

In our view, the "reverse discrimination" complainant bears the burden of demonstrating that he was intentionally discriminated against "despite his majority status." We agree with the district court that a prima facie case of "reverse discrimination" is established upon a showing that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority,"; and upon a showing that the employer treated differently employees who were similarly situated but not members of the protected group.

Murray at p. 67 (citations omitted)

In *Pierce* the court noted this modified McDonnell Douglas framework for a reverse discrimination claim but observed by footnote:

The first prong of this test has been criticized by some courts as impermissibly imposing a “heightened standard” upon reverse discrimination plaintiffs. See *Ulrich v. Exxon Co.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993) (and cases cited therein). **We have serious misgivings about the soundness of a test which imposes a more onerous standard for plaintiffs who are white or male than for their non-white or female counterparts. However, our doubts concerning this issue do not effect the disposition of the case since Pierce cannot meet the second required prong of his prima facie case.**

Pierce at p..801, footnote 7. (emphasis added)

The ultimate factual issue is whether the Plaintiff has been subjected to disparate treatment by reason of race. The motivation of the decision-maker is the critical factual issue. Defendant concludes that the Sixth Circuit requires a white plaintiff to prove an “unusual history” of discrimination against whites as a critical element of a prima facie case. The Sixth Circuit did not say that in *Murray*, and such a reading or interpretation of “background circumstances”, even if arguably made in light of *Murray*, has no validity after the serious misgivings expressed in *Pierce*.

Does an employer get at least one free racially-motivated and discriminatory employment decision against a white employee? What if the white employee has persuasive circumstantial evidence of racial discrimination, yet is unable to show an unusual history of discrimination against whites?

The “serious misgivings” expressed in *Pierce* regarding a more onerous standard for white plaintiffs are perhaps best explained by reference to the Tenth Circuit’s

reasoning and opinion in *Notari v. Denver Water Department*, 971 F. 2d 585 (10th Cir. 1992). The court in *Notari* clearly illustrated the untenable result of such a more onerous standard in hypothesizing identical persuasive circumstantial claims, one for a minority claimant and the other for a majority claimant. The court in *Notari* noted:

A given employer may discriminate against an individual white worker even when no evidence demonstrates that the employer generally favors workers who belong to historically disadvantaged groups. An employee who is the victim of intentional discrimination in such circumstances and who adduces sufficient evidence of that discrimination, should be permitted to proceed beyond the prima facie case stage of litigation.

Notari at p. 590.

The court in *Notari* goes on to adopt the Fourth Circuit's articulation of a standard whereby the plaintiff may establish a prima facie case of disparate treatment by direct evidence of discrimination or by indirect evidence sufficient to support a reasonable probability that, but for the plaintiff's status, the challenged employment decision would have favored plaintiff. *See Notari, supra, at p. 590.*

The question presented by Defendant's Motion for Summary Judgment is whether the Plaintiff has come forward with evidence from which a rational trier of fact could find in her favor on the issue of intentional racial discrimination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

This record presents such persuasive evidence, and the undersigned respectfully calls the court's attention to same as follows:

1. Race was discussed during the final decision-making.

Paragraph 30 of the Complaint avers that the racial status of Plaintiff and Outlaw were discussed during the final selection and decision making process. Despite

Defendant's denial of this averment at paragraph 30 of its Answer, **it is clear from the sworn deposition testimony of the decision-maker, Magill, that race was discussed during the final decision making process.**(Magill depo. P. 24, L.25 –P.25, L.12)

Huckaba denies this fact. **(Huckaba depo. P.45, L.2-6)** There was no discussion of education, employment history, or job performance of either candidate, but there was a discussion of race.

2. The unusual course of events leading up to the selection.

Outlaw did not receive a vacancy letter because his score of 89 was four points below the determined cut-off score of 93. Upon learning that letters had gone out, he does not contact either: (1) Crosier, the person responsible for interviews and recommendation **(Crosier depo. P.40, L.7-9)**; or (2) the Department personnel office, the office responsible for registers and sending the letters **(Outlaw depo. P.33, L.1-3)**. Instead, he contacts Gaines, the department's affirmative action officer, who has absolutely no responsibility over routine personnel transactions. Within hours of Gaines contacting Crosier, a meeting of four management personnel (Crosier, Johns, Edwards, and Huckaba) is assembled to address this unusual situation and the unusual step of additional vacancy letters being mailed is executed. **(Crosier depo. P.47, L.10-14)**

Interviews are conducted on October 6 and 7, plaintiff is highly recommended by Crosier on October 8, and on October 13 the recommendation for plaintiff goes to the personnel office. Huckaba has put in place a system to log in personnel transactions, yet this usual logging in does not occur for plaintiff's paperwork because Huckaba removes it from the inbox.

Crosier is summoned to Huckaba's office and informed of the unusual development that her recommendation is not "going to go." She is offered no explanation and her attempts to find out the reason are futile. Huckaba claims that he discussed Plaintiff's initial disinterest with Crosier as a disqualifying consideration. Both Crosier and Johns flatly contradict this claim.

3. The relative objective qualifications of Plaintiff and Outlaw.

One need only refer to Exhibits 2 and 3 to the Complaint for a sense of the relative qualifications as viewed through the eyes of Crosier. Peggy McLain scored 97 in the eyes of the State Department of Personnel whereas Outlaw scored 89, including 3 points for veteran's status. Plaintiff had 19 years of full-time experience with the Department, Outlaw having only 8 total years, six of which were in part-time status. Plaintiff was the acting office manager. Outlaw was the office receptionist.

4. The pretext of the articulated reasons for the decision.

The decision makers did not know nor did they discuss either candidate's education, work experience, performance evaluations, or details as to current jobs held. (Huckaba depo. P.23, L.17 – P.24, L.3) Yet, when called upon to explain and articulate a reason for the decision to reject Plaintiff and promote Outlaw to Manager, the Defendant asserted unequivocally that "a better-qualified candidate was selected."

(Magill depo. Ex. 1)

Apparently at this juncture, Defendant has modified or shifted its articulation of a reason to "she did not want the job." (Defendant's Memorandum at P.10) Huckaba's

account of his claimed multiple discussions with Crosier regarding this alleged reason, and his concerns about it, are directly and clearly disputed by the sworn testimony of both Crosier and her supervisor, Johns. Crosier's testimony about discussions with Huckaba regarding Plaintiff's reservations are limited to recalling one conversation in which she told Huckaba of her interest in Plaintiff getting on the register and probably talking to him about some of her reservations, but not recalling much contact with him about the position.

The defendant's asserted non-discriminatory reason of "she did not want the job" is absolutely incredible. The Department itself did not take action to fill the job on a permanent basis until August 13, 1999. (**Crosier depo. Ex.2**), six weeks after Plaintiff signed the application for the manager job classification. (**McLain depo. Ex. 4**) Plaintiff's expression of "reasonable concerns" to Crosier in April of 1999 is now "she did not want the job."

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133; 120 S. Ct. 2097; 147 L. Ed. 2d 105 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502; 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993).

Pretext may be shown in one of three ways: either (1) the proffered reasons have no basis in fact; or (2) the proffered reasons did not actually motivate the adverse employment action; or (3) that they were insufficient to motivate the adverse employment action. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994) Plaintiff submits that the record contains persuasive evidence of all three bases for a

finding of pretext. It is clear, contrary to Defendant's position stated to the EEOC, that qualifications played virtually no part in the decision. Defendant (specifically Huckaba and Magill) has exaggerated and amplified an expression of some reservations in April of 1999 into unsubstantiated claims that Plaintiff repeatedly had to be encouraged and talked into applying for the job. This assertion is not supported by the evidence in this record, and in fact is contradicted by the one or two people who would know, those being Crosier and Johns. (Crosier depo. P.22, L.4-9; P.16, L. 18-23; P.20, L.17-25; P.23, L.14- P.24, L.5) An employee quitting the department for more money, then returning six months later, is not disqualified as management potential; yet Plaintiff, due to some "reasonable" concerns and some brief thought of retirement, is. (Huckaba depo. P. 71, L.4 – P.74, L.19)

IV. CONCLUSION

There is ample persuasive circumstantial evidence in this record from which a reasonable trier of fact might infer and find that Defendant intentionally discriminated against Plaintiff.

The decision makers were Huckaba and Magill. Huckaba's account of his decision making processes and interactions with Crosier are flatly contradicted by her. Both asserted reasons for Peggy McLain's rejection and Outlaw's selection are patently incredible.

Mr. Outlaw played "the race card" by contacting Evelyn Gaines, and it worked. Race winds up being discussed during the final decision-making process, and the black office receptionist is selected over a much more qualified white manager.

Defendant's Motion for Summary Judgment should be denied.

Respectfully submitted,

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Certificate of Service

I certify that on the _____ day of _____ I served a true and complete copy of the foregoing by regular mail postage prepaid to:

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L. Bruce Peden