

Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Kathryn Ann Stephenson

Office Address: 10 Burton Hills Blvd
(including county) Nashville TN 37215 (Davidson County)

Office Phone: 615-263-3907 Facsimile: 615-263-3020

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission'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 Commission 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 <http://www.tncourts.gov>). The Commission 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 word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant General Counsel, Labor and Employment
Corrections Corporation of America

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

1988, BPR # 13430

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, 13430, 1988, 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).

Corrections Corporation of America, 2010- present. Assistant General Counsel, Labor and Employment

Trauger & Tuke, 2000-2010. Managing Partner.

Tuke, Yopp & Sweeney, 1994-2000. Partner as of 1997.

Farris, Warfield & Kanaday, 1988-1994. Associate.

Prior to law school, I was engaged in businesses other than the practice of law. I taught high school history for four years at the Webb School of Knoxville. I worked as a camp counselor in the summers during those years. Before that, I worked on a part time basis as a production assistant and administrative assistant in public broadcasting.

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

I have been continuously employed.

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.

As Assistant General Counsel for Labor and Employment, I provide advice to management on a variety of employment law issues, such as wage & hour, FMLA, ADA, ADEA, and Title VII. I draft and assist in drafting policies. I prepare position statements for submission to the EEOC and state-level agencies. I manage approximately half of the company's employment law litigation. I am the corporate representative in employment-related mediations before the EEOC, in judicial settlement conferences, during private mediations, and at trial. I participate on teams charged with developing solutions to a variety of company challenges. I provide training on employment law matters to management, to human resources personnel, and to employees in general. The percentage of time devoted to each of these activities varies from month to month.

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 Commission 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 Commission. Please provide detailed information that will

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

I have worked in a variety of settings over 25 years, including large firms and small firms, in private practice and as in-house counsel. Early in my career I was primarily an estate and estate planning attorney, which provided an opportunity to work closely with individuals on highly personal and sometimes very sad business. In addition to estate work, I was asked to assist two senior partners on contested adoption and divorce cases, which were often painfully heart-rending.

While I was an associate, the partners in my firm discovered my talent for analyzing legal issues, distilling facts, and then developing and articulating cogent and convincing arguments. I was asked to become involved in and write briefs for highly complex bankruptcy, state tax, contract, and franchising cases. I gave the oral arguments for many of these cases at the trial and appellate levels. When I was a senior associate, my firm sponsored a three-day NITA program, during which my partners realized that I also had a talent for trial presentation, and I was then asked to take small cases to trial, both bench and jury. These cases were mostly personal injury and bank lending cases.

When I became a partner in my next firm, the firm's litigation consisted primarily of complex commercial litigation, including RICO and antitrust litigation, and one memorable complex Title VII case. I worked on teams, conducting discovery and writing briefs. Only one of these cases ever went to trial. Several of the others settled or were dismissed at the very last minute, so we had fully prepared for trial. The others settled or were dismissed after extensive discovery and briefing.

In my last 10 years of private practice at my third firm, I had my own caseload. I conducted discovery, negotiated settlements, had an active motion practice, and took a number of cases to trial. Because I was in a small firm, the types of cases I handled were more varied than in earlier years. I had contract, product liability, employment, construction, and health care cases. I represented the State of Tennessee in TennCare litigation. I served as Special Counsel to the Special Deputy Receiver for American National Lawyer's Insurance Reciprocal. I represented health care clients before the Health Services and Development Agency, and in appeals of those cases before administrative law judges. For 10 years I was employment counsel to the Metropolitan Development and Housing Agency, providing advice and training, representing the Agency before independent hearing officers, and handling all employment litigation. I was proud that during those years MDHA's employment practices rarely resulted in litigation, and we prevailed in every lawsuit that was filed.

For close to three years, I have been Assistant General Counsel for Labor and Employment at CCA. The nature of that practice is described above.

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

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.

I have not served in this capacity, although I graduated from Lipscomb University's Institute for Conflict Management Rule 31 Civil Mediation Training in 2009. I then participated as an observer in several General Sessions mediations.

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.

I served in the LAW Early Truancy Program. For nine years I sat once a month on a Juvenile Court Foster Care Review Board charged with ensuring that children in foster care were getting the services they needed and making progress toward permanency. I have for 15 years been a Trustee of the Joanne W. Stephenson Foundation, a private foundation primarily dedicated to providing education to children in the developing world.

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

Until I left private practice, I regularly represented clients on a pro bono basis. I often chose to do this in areas of estates and conservatorships, since there was always a need for representation in those areas and I had some experience with them. I have also regularly served on the personnel committees for various non-profits, providing them with advice in that area.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission 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.

I have not previously submitted an application.

EDUCATION

14. List each college, law school, and other graduate school which 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.

Kenyon College, Gambier OH. A.B. in philosophy, magna cum laude, 1978.

University of North Carolina, Chapel Hill NC. M.A. in American History, 1981.

University of Tennessee College of Law, Knoxville, TN. J.D. 1988. Summa Cum Laude, with Highest Honors. Valedictorian. Named Graduate of the Year by the faculty. Order of the Coif. Phi Beta Kappa. National Moot Court regional champion and national quarter-finalist.

PERSONAL INFORMATION

15. State your age and date of birth.

56; June 1956

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

31 years

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

25 years

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

Davidson County

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.

I do not have military service.

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.

No.

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. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

No.

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.

Uncontested divorce in Davidson County Third Circuit Court filed 2009 and granted 2010. I will locate and provide the docket number as a supplement.

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 which you have held in such organizations.

Breakfast Club of Nashville, founder and initial President in 2005, now Board Member Emeritus

Second Presbyterian Church

Metro Council Board of Ethical Conduct, 2003-2010; Chair 2007-2010

Monroe Harding Inc Board of Directors 2005- present; Chair 2012- present

Family and Children's Service personnel committee 2005-2010

Juvenile Court Foster Care Review Board 2001-2010

Humanities Tennessee Board of Directors 2005-present; Chair 2007-2010

Federation of State Humanities Councils Board of Directors 2010-present

27. Have you ever belonged to any organization, association, club or society which 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.

- a. If so, list such organizations and describe the basis of the membership limitation.
- b. 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 which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

American Bar Association, 1988-2008
Fellow, American Bar Foundation
Tennessee Bar Association, 1988-present
Nashville Bar Association, Board of Directors 2001-2003
Fellow, Nashville Bar Foundation
Lawyers' Association for Women, 1988-present; President 1999-2000
Tennessee Lawyers' Association for Women
Life Member, Sixth Circuit Judicial Conference

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

Nominated by LAW for Athena Award 2011

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

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.

Corporate Counsel Perspective presented by Nashville Bar Association 2011
Employment Law Update presented by CCA 2011, 2012, and 2013

Certificates of Need in Tennessee presented by Southeastern Health Planning Symposium, November 2008 and March 2010

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.

I have not held public office.

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

I have not.

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

I will provide this as a supplement as soon as possible.

ESSAYS/PERSONAL STATEMENTS

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

I believe this position is an excellent fit for my talents, training, and experience. I am a quick study and am particularly good at grasping legal issues, distilling facts to the most salient, and crafting concise compelling arguments. I have a broad civil practice background. This position will allow me to grasp and wrestle with problems on higher ground, but nevertheless familiar territory. I have been searching for a way to be of continued service to my community.

Throughout my career I have been proud to practice before the Courts in Middle Tennessee. We have excellent judges at every level. I have been able to confidently assure clients that they will get a fair hearing from a judge who has taken the time to prepare and to understand the issues. I would like very much to contribute to that excellence.

36. State any achievements or activities in which you have been involved which 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 learned through my service in pro bono, the legal clinic, foster care review boards, and LAW's Early Truancy and Order of Protection programs that equal access to justice has to be fought for, not by those who need it, but by those who have the knowledge to unlock it. Through LAW I represented women who had little hope of escaping physical abuse without the protection of the law. Being unfamiliar with court proceedings, without the assistance of a lawyer they also had little hope of knowing what facts and arguments would most likely convince a judge to protect them. Through pro bono I represented heirs who could not on their own have untangled the small but complicated estates that were their inheritance.

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)*

I seek to serve the people, litigants, lawyers, and court system of Middle Tennessee by joining with the other three judges on the Court of Appeals, Middle Section. I have not personally met one of the judges, but I have known and respected the other two throughout my career, and I have had excellent working relationships with them in other contexts. I have extensive experience with teamwork in the legal context. I have a good sense of when it is appropriate to listen and defer, or necessary to persuade. I now regularly deliberate with management about the desired outcome of particular employment scenarios, and I have learned that deliberation is indispensable to achieving a reasoned outcome. I have my own talents to contribute, including my talents with analysis and writing, but also my drive to accomplish the task at hand and my efficiency at making sure it gets done.

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)*

Early in my career, my community service was mostly limited to bar associations and pro bono work. Since 2005, I have been on the Board of Directors (I am now chair) of Monroe Harding, Inc., which endeavors to change the lives of young people in state custody. Also in 2005, I was elected to the Board of Humanities Tennessee, the state counterpart to the NEH. Later, I chaired that Board. I am now on the Board of the Federation of State Humanities Councils, a national organization. I have been asked to consider chairing that Board. I have served on personnel committees for Miriam's Promise, Family and Children's Service, and Second Presbyterian Church. I recently signed up to become a CASA volunteer, and am scheduled to take training in August.

I have for 15 years been a trustee of the Joanne W. Stephenson foundation. The foundation was established to provide educational opportunities to young people from a remote mountain village in Nepal. A few years ago, I created a lecture about that experience and extensive research into the importance of educating girls. I presented the talk to book clubs, women's organizations, and schools. The reaction from the audiences was rewarding.

Of all of these, the humanities and children in need of mentoring speak the most strongly to me. To the extent consistent with my position as a judge, I would like to continue these.

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

I was a teacher for four years. I have been a mother for 20. Cumulatively, I have spent seven years chairing boards of non-profits. I have had clients with problems for whom the law provides no solution. I now regularly deliberate with different members of management, who come to the deliberations with sometimes conflicting priorities. These experiences have taught me the importance of listening, with a truly sympathetic ear, to be sure I really understand and respect the viewpoints of others. They have also taught me to be creative in crafting solutions.

For almost three years I have worked for a corporation in a tough industry. My job is to protect the company by being sure it does the right thing. I have to balance looking at things from the perspective of the corporation (my client) and the employees, whose needs and rights impact the company. I have learned that there is rarely a clear correct answer to any legal question, but that the answer usually involves balancing competing interests.

Clients, partners, and colleagues have consistently described me as a quick study, with a strong talent for legal analysis and cogent writing.

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)*

I will uphold the law under all circumstances, as I do in my legal practice. As an advocate and an adviser I do not make the law and it is not my role to change it.

An advocate's job is to uphold the law. We have all advocated for clients whose positions were legally defensible, but not righteously attractive. Often we become so caught in the advocacy that we come to believe in that righteousness. A judge's role is of course different. A judge does not need to become righteous in defense of a disagreeable law, but can state disagreement with it even while applying it appropriately.

As the lawyer for an employer, I often encounter instances where the law makes it difficult for my client to manage workplace issues. For instance, an employee might exhibit major attendance problems in this industry where staffing is vital. Occasionally, an employee will commit more serious policy infractions that implicate security concerns. But sometimes there might also, for example, be coincidental medical documentation, or the employee might have recently reported that he or she is feeling harassed at work. In these instances, the law makes it difficult or impossible for the employer to address policy infractions with discipline. Sometimes I have to advise my client that management's plan for discipline is not an acceptable solution and we will have to develop a different approach.

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 Commission or someone on its behalf may contact these persons regarding your application.

A. Aleta Trauger, U.S. District Judge for the Middle District of Tennessee

615-736-7143, Aleta_Trauger@tnmd.uscourts.gov

B. Robert Brandt, retired Davidson County Chancellor, of counsel with Trauger & Tuke

615-256-8585, rsbrandt@tntlw.net

C. Lauren Anderson, partner, Baker Donelson

615-726-7308, landerson@bakerdonelson.com

D. Robert Cheatham, retired President of Humanities Tennessee

E. Mary Baker, CEO, Monroe Harding, Inc.

615-298-5573, marybaker@monroeharding.org

AFFIRMATION CONCERNING APPLICATION

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

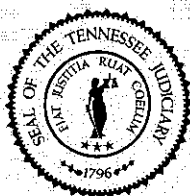
I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Middle Section Court of Appeals of Tennessee, and if appointed by the Governor, 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 Commission 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 Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 12, 2013.


Signature

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



TENNESSEE JUDICIAL NOMINATING COMMISSION

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 which 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 Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Kathryn A. Stephenson
Type or Printed Name

Kathryn A. Stephenson
Signature

June 12, 2013
Date

13430
BPR #

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

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

MICHAEL B. WOODS

Petitioner,

v.

**METROPOLITAN DEVELOPMENT
AND HOUSING AUTHORITY BOARD
OF COMMISSIONERS**

Respondent.

No. 09-288-I

**BRIEF IN SUPPORT OF MOTION TO DISMISS,
OR, IN THE ALTERNATIVE, TO DENY WRIT**

Michael Woods claims that the Board of Commissioners of the Metropolitan Development and Housing Agency exceeded its jurisdiction and acted arbitrarily when it agreed with management's recommendation that he be terminated, thereby rejecting a hearing officer's recommendation that he be reinstated and demoted. As the sole factual basis for this claim, he alleges that the Board was motivated by his refusal to waive his right to appeal the recommended demotion. The Petition fails to meet the requirements of T.C.A. § 27-8-106, and this Court therefore lacks subject matter jurisdiction. The Petition also fails to state a claim upon which relief can be granted because:

- Any offer by MDHA to reinstate and demote in exchange for an agreement not to appeal the demotion constitutes an inadmissible offer to compromise;
- Mr. Woods was an at-will employee, and MDHA's Board of Commissioners has the final authority to hire, fire, and demote MDHA's at-will employees;
- Even if the Board was motivated by a desire to avoid litigation, the Board's action was not arbitrary and capricious.

In the alternative, this Court should decline to exercise its discretion to grant the writ, since the Petition does not allege a "substantial wrong."

Factual Allegations

Michael Woods worked as a property manager for MDHA. (Petition ¶ 5). In 2002 and again in 2008, MDHA received several allegations that Mr. Woods had engaged in unlawful sexual harassment of residents. (Petition, Exhibit A p. 3). An independent investigator was retained to investigate the most recent allegations. (Petition, Exhibit A p.3). The investigator concluded in a written report that it was more likely than not that Mr. Woods sexually harassed one of the complainants. (Petition, Exhibit A p. 14). The investigator also concluded that statements made to him about Mr. Woods by a police officer were “very damning.” (Petition, Exhibit A p. 14). Based on this, MDHA’s management terminated Mr. Woods’ employment. (Petition, Exhibit A p. 1). Mr. Woods had also consistently failed to file accurate monthly reports required by his supervisor and, if this had been the sole basis for discipline, would at least have been demoted. (Petition, Exhibit A pp. 19-20). Mr. Woods appealed the termination to MDHA’s Board of Commissioners, who appointed a Hearing Officer to conduct an evidentiary hearing. (Petition ¶¶ 8, 9; Exhibit A p. 1). After the hearing, the Hearing Officer disagreed with management and recommended that Mr. Woods be reinstated and demoted. (Petition ¶¶ 10-12; Exhibit A pp. 20-21).

When the Board reviewed the recommendation of the Hearing Officer, the Board disagreed with the Hearing Officer and concluded that Mr. Woods should not be reinstated and that the termination should be upheld. (Petition ¶ 13). Mr. Woods alleges that “the Board voted to terminate the Petitioner because the Petitioner refused to waive his rights to appeal the recommendation of demotion.” (Petition ¶ 14). Based solely on

this last allegation, Mr. Woods contends that the Board exceeded its jurisdiction and, because it had “ulterior” motives, acted arbitrarily. (Petition ¶¶ 16, 17).

Discussion

I. This Court lacks subject matter jurisdiction because Mr. Woods failed to comply with the requirements of T.C.A. § 27-8-106.

Tennessee Code Annotated § 27-8-106 requires that a petition for writ of certiorari “shall state that it is the first application for the writ.” Mr. Woods’ Petition does not so state. The statutory requirements are mandatory. *Jackson v. Tennessee Dept. of Correction*, 240 S.W.3d 241, 246 (Tenn. Ct. App. 2006) (affirming dismissal of petition for failure to verify contents and, independently, for failure to state in the petition that it was petitioner’s first application for relief: “[a]s this statement is required by statute to be in the petition ... we find that the trial court did not err when it dismissed the petition for this reason as well.”). This Court therefore lacks subject matter jurisdiction. *Id.*

II. The Petition fails to state a claim on which relief can be granted.

This Court’s review on writ of certiorari is limited.

A common-law writ of certiorari limits the scope of review to a determination of whether the disciplinary board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily. The petition does not empower the courts to inquire into the intrinsic correctness of the board’s decision. Previously, we have specifically approved the use of a common-law writ of certiorari to remedy (1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal’s authority; and (5) plain and palpable abuses of discretion.

Willis v. Tennessee Dept. of Correction, 113 S.W.3d 706, 712 (Tenn. 2003) (emphasis added); *see also Polite v. Metropolitan Development and Housing Agency*, 2008 WL

3982915, *3 (Tenn. Ct. App.) (copy attached) (“a challenge to the intrinsic correctness of the administrative decision, without more, fails to state a claim for which relief can be granted.”). This Court is not, therefore, in a position to second-guess MDHA’s personnel decisions. The Writ may be used only to determine whether “an administrative body acted within its jurisdiction, or acted arbitrarily, capriciously, or illegally.” *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176, 179 (Tenn. 1987).

A. The factual allegation on which Mr. Woods bases his claim is inadmissible.

Mr. Woods makes only one factual allegation in support of his claim: “the Board voted to terminate the Petitioner because the Petitioner refused to waive his rights to appeal the recommendation of demotion.” The necessary premise to this allegation is that MDHA offered to accept the Hearing Officer’s recommendation to reinstate and demote, if in exchange Mr. Woods would agree not to appeal the demotion. Any such offer by MDHA is inadmissible under Tennessee Rule of Evidence 408. Mr. Woods can therefore prove no set of facts in support of his claim, and his Petition should be dismissed.

Tennessee Rule of Evidence 408 states:

Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. ...

According to Mr. Woods, MDHA offered to compromise its termination of his employment if he would agree not to contest a demotion. This was clearly an effort to settle a disputed disciplinary action and is not therefore admissible.

Employers often make offers to employees, seeking a release of litigation rights in exchange for more favorable treatment. For example, when a company terminates an employee, the company might offer her a severance package of several months of salary in exchange for her release of any existing claims against the company. If she refuses to sign the release, she will be terminated without severance pay. She will, of course, have lost the severance package because she refused to sign the release. It would make no sense to allow her then to drag her employer to court, claiming she was denied severance pay because she refused to sign the release. Any such evidence would have a chilling effect on the willingness of employers to offer the cushion of a severance package to terminated employees. This is precisely the sort of chilling effect Rule 408 was designed to remove in order to encourage settlement of disputed claims.

Mr. Woods and MDHA clearly disputed whether termination was the appropriate discipline. They conducted a two-day evidentiary hearing on that question. MDHA offered a demotion in exchange for an agreement not to appeal, which would have ended the dispute. Mr. Woods rejected that offer. Because the offer and rejection are not admissible, Mr. Woods can prove no set of facts in support of his claim that the Board was motivated by the rejection. The Petition should therefore be dismissed.

B. The Board did not exceed its jurisdiction.

Mr. Woods claims that the Board exceeded its jurisdiction by refusing to reinstate him. (Petition ¶ 15). This is a legal conclusion that this Court is not required to accept. *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997). Mr. Woods does not allege any facts on which to base this legal conclusion. Instead, he attempts to remove jurisdiction from the Board by quoting only part of Section 7.10(D) of MDHA's Personnel Policy,

suggesting that the Board abdicated its final authority to the Hearing Officer. (Petition ¶ 8). That section of the Policy (copy attached to Motion to Dismiss)¹ goes on to say, “If the Board does not approve the hearing officer’s decision it may modify or reverse it. The judgement [sic] and findings of the Board will be final and binding.” The Board had full jurisdiction to determine whether to accept the Hearing Officer’s recommendation or come to a different conclusion.

Mr. Woods’ allegation about the Board’s motivation does not change this fact. Mr. Woods was an at-will employee. The Board had the right to terminate him for any reason or no reason, as long as the reason was not illegal. There is nothing illegal about terminating an employee who refuses to compromise an ongoing dispute by promising not to sue. The outcome might be different if the underlying dispute involved protected activity. If, for example, Mr. Woods had been disciplined for making a charge of racial discrimination, and was terminated solely for refusing to release his right to pursue that charge, then termination might exceed the Board’s lawful jurisdiction. That is not the case here. Mr. Woods was disciplined for being the subject of numerous sexual harassment complaints and for consistent failure to file accurate monthly reports. This was not protected activity.

Furthermore, the Board’s jurisdiction clearly cannot be limited by MDHA’s personnel policy. The Board might be required as a matter of policy to follow the personnel policy, but it is not required to do so as a matter of jurisdiction. The Board’s

¹ When a document is referred to in the complaint and is central to the plaintiff’s claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court’s consideration of the document does not require conversion of the motion to one for summary judgment. *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507 (6th Cir. 1999). *See also Pension Ben. Guar. Corp. v. White Consol. Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1991) (“a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document. ... Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.”).

jurisdiction derives from statute. T.C.A. § 13-13-101 *et. seq.* The personnel policy derives from the Board and may be amended by the Board at any time.

C. The Board did not act arbitrarily or capriciously.

Mr. Woods contends that the Board's alleged motivation renders its action arbitrary and capricious. (Petition ¶¶ 16, 17). This contention ignores the substantial factual evidence on which the Board's decision could have been based. The Hearing Officer's Decision and Recommendation demonstrates the extent of the allegations of sexual harassment and other wrongdoing by Mr. Woods, as well as his consistent failure to prepare reliable monthly reports. (Petition, Exhibit A). The Decision and Recommendation also notes management's concern that MDHA could face sexual harassment liability in the future. (Petition, Exhibit A p. 2, 20-21). Finally, the hearing itself demonstrates management's belief that the termination should be upheld.

Even if the Board ignored all these grounds for agreeing with management rather than with the Hearing Officer, and instead was motivated solely by Mr. Woods' refusal to waive his appeal rights, the action of the Board was not arbitrary and capricious. Mr. Woods was an at-will employee, without a "right" to reinstatement. He was offered reinstatement with a demotion on condition that he release his right to appeal the demotion. He refused that offer. The Board then did what it had a right to do in the first place: it refused to reinstate. The offer to Mr. Woods represented sound business judgment in seeking to avoid litigation by Mr. Woods. The Board's final action was the logical outcome of Mr. Woods' refusal, and was not therefore arbitrary and capricious.

III. The Court should decline to exercise its discretion to issue the writ.

The writ of certiorari is a discretionary writ, to be granted only when necessary to prevent substantial wrong. *Biggs v. Memphis Loan & Thrift Co.*, 385 S.W.2d 118, 122 (Tenn. 1964). This Court therefore has the discretion to deny the writ if it appears that the facts and circumstances upon which the writ is sought do not constitute a substantial wrong.

It appears from the Petition and the attached Hearing Officer's Decision and Recommendation that it was, at best, a close call as to whether Mr. Woods should be terminated or demoted. Management decided to terminate. Although the Hearing Officer recommended reinstatement and demotion, he noted that "[b]alancing the property interest² of the employee in his job and good name against the interest of MDHA in protecting itself against litigation and damages is difficult and imprecise." (Petition, Exhibit A p. 3). Further, the Hearing Officer concluded that "I do believe ... that MDHA is subject to a claim of negligent retention." (Petition, Exhibit A pp. 20-21). That the Board came down on the other side of a "difficult and imprecise" question does not constitute a substantial wrong. The Hearing Officer also stated that a mere demotion for the failure to file monthly reports was "very generous" to Mr. Woods. (Petition, Exhibit A p. 20). That the Board decided to be less than generous to an employee who refused to settle an ongoing dispute also is not a substantial wrong.

Moreover, the Hearing Officer's Decision and Recommendation demonstrates a strong business reason for terminating Mr. Woods. MDHA had received "persistent and consistent" sexual harassment allegations against Mr. Woods. (Petition, Exhibit A p. 2).

² In this statement, the Hearing Officer was incorrect. Mr. Woods was an at-will employee with no property interest in his job.

MDHA hired an “independent and experienced investigator,” who prepared a written report regarding the most recent allegations. (*Id.*). Among other things, this report concluded “that it was more likely than not that Mr. Woods sexual (*sic*) harassed Ms. Davis” and that a police officer’s comments about Mr. Woods were “very damning.” (Petition, Exhibit A p. 14). The existence of these written conclusions, along with the persistent and consistent allegations of sexual harassment, clearly exposed MDHA to liability should another resident file suit alleging sexual harassment by Mr. Woods. Although the Hearing Officer concluded that “MDHA can reasonably mount a successful defense” (Petitioner, Exhibit A p. 21), this conclusion would do nothing to assure MDHA a favorable outcome in such a suit, or to avoid the cost of litigation. There is nothing substantially wrong about a Board seeking to avoid future liability by terminating an at-will employee who attracts persistent and consistent allegations of wrongdoing.

Even if the Board acted solely because Mr. Woods refused to waive his right to appeal a demotion, there was no “substantial wrong.” According to the Petition, the Board was unwilling to reinstate an employee who refused to release claims against MDHA. This represents sound business judgment, not a “substantial wrong.”

Conclusion

MDHA respectfully submits that the Petition should be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. In the alternative, this Court should decline to exercise its discretion to issue a writ of certiorari in this case, since the facts as alleged do not demonstrate a substantial wrong.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed,
postage prepaid to:

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This the _____ day of March, 2009.

Kathryn A. Stephenson

**IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE**

HARRY THOMAS TRIPP,)	
)	
Plaintiff,)	
)	
v.)	Case No. 01-3322-I
)	
METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,)	
)	
Defendant.)	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

This is an employment discrimination case brought under the Tennessee Human Rights Act. Plaintiff Harry Thomas Tripp is an employee of the Metropolitan Development and Housing Agency (“MDHA”). He is Caucasian. His supervisor is Jerry Seay, who is African-American. Mr. Tripp contends that Mr. Seay discriminated against him on the basis of race by suspending him for two weeks without pay after Mr. Tripp failed to perform his duties. Defendant respectfully submits that the undisputed facts demonstrate that there was no racial discrimination. First, Mr. Tripp was not treated differently from similarly situated African American employees. Second, Mr. Seay had a legitimate non-discriminatory reason for recommending that Mr. Tripp be suspended. Third, Mr. Seay did not have final authority over the discipline given to Mr. Tripp; that authority rested in the hands of the Executive Director of MDHA, who was Caucasian, a Caucasian hearing officer, and the MDHA Board of Trustees, four out of seven of whom were Caucasian.

FACTS

Mr. Tripp has been a Maintenance Supervisor for MDHA for 17 years. (Stmt. ¶ 1)¹.

Maintenance Supervisors work under the supervision of MDHA's Director of Housing Management, who since 1995 has been Jerry Seay. (Stmt. ¶ 2). Until the incident that is the subject of this lawsuit, Mr. Seay and Mr. Tripp never had any significant conflicts or disagreements, and Mr. Tripp believed that Mr. Seay had always been fair with him. (Stmt. ¶ 3). In fact, Mr. Seay promoted Mr. Tripp from Maintenance Supervisor I to Maintenance Supervisor IV in 1999. (Stmt. ¶ 4).

As a Maintenance Supervisor, Mr. Tripp supervises maintenance workers, whose work includes grounds cleanup, completion of work orders, and preparing vacated apartments for re-occupancy. (Stmt. ¶ 6). Mr. Tripp is responsible for properly assigning work to his subordinates and for being sure that the work is completed. (Stmt. ¶ 6). At the time of the events leading up to Mr. Tripp's discipline, he was the Maintenance Supervisor for John Henry Hale Homes and Andrew Jackson Homes, which are two of the twenty housing developments directly managed by MDHA. (Stmt. ¶ 7).

In July 2001, Mr. Tripp injured his back in an accident.² (Stmt. ¶ 15). He was off from work for two weeks. (Stmt. ¶ 15). On July 30, he returned to work for half days and remained on half days up until his suspension. (Stmt. ¶ 15). When Mr. Tripp was not on site, the most high-ranking maintenance workers, known as Maintenance Worker IV, were in charge of assigning work to the other maintenance workers. At the relevant time and place, that worker was Richard Boyd. (Stmt. ¶ 16).

¹ References are to Defendant's Statement of Undisputed Facts in Support of Motion for Summary Judgment, which is filed with this Brief.

² The accident was not work-related.

A large part of MDHA's funding comes from the federal Department of Housing and Urban Development ("HUD"). (Stmt. ¶ 8). To qualify for this funding, MDHA has to meet certain HUD requirements. One such requirement is that life-threatening maintenance needs be corrected within 24 hours of coming to the attention of MDHA. (Stmt. ¶ 8). Whenever MDHA becomes aware of a life-threatening maintenance need, an "Emergency Correction Notice," called an "ECN," is prepared. (Stmt. ¶ 10). ECN's are delivered to the appropriate Maintenance Supervisor, who assigns a maintenance worker to correct the documented problem within 24 hours. (Stmt ¶ 11).

Another HUD requirement is that all residences be inspected once a year to identify maintenance needs. (Stmt. ¶ 8). MDHA has an inspection crew that inspects each of MDHA's housing developments on a rotating basis, getting to each development approximately once a year. (Stmt. ¶ 9). The inspectors look at each apartment for routine maintenance needs and for life-threatening maintenance needs such as smoke alarms that don't work. (Stmt. ¶ 9). When they find a life-threatening maintenance need, they prepare an ECN. (Stmt. ¶ 10). These ECNs are delivered daily to the Maintenance Supervisor for the development, and it is the Maintenance Supervisor's responsibility to be sure that a maintenance worker is assigned to and completes the ECN within 24 hours. (Stmt. ¶ 11).

Of course, during inspection time, ECNs are generated much more rapidly than at other times. Mr. Tripp, like all Maintenance Supervisors, knew ahead of time when the inspectors were coming. (Stmt. ¶ 17). He therefore knew to expect an influx of ECNs. In addition, to assist the maintenance workers in completing ECNs, the Department of Housing Management has a PCS crew, which is headed by Jim Kohagen. The crew moves from development to development, helping out with maintenance as needed. (Stmt. ¶ 13). Even when the crew is helping at a development, however, the primary responsibility for timely completion of the ECNs remains with

the Maintenance Supervisor for that development. (Stmt. ¶ 14). The Maintenance Supervisor is also responsible for being aware of the status of all ECNs within that development. (Stmt. ¶ 23).

Annual inspections at John Henry Hale Homes began in July 2001 and took about six weeks to complete. (Stmt. ¶ 17). By September 5, more than a month after Mr. Tripp returned to work, Mr. Kohagen, who was head of the PCS crew, had received no request for assistance in completing ECNs at John Henry Hale Homes. He was concerned about whether the ECNs were being completed on time. (Stmt. ¶ 18). He asked Mr. Tripp how the ECNs were going. (Stmt. ¶ 18). Although Mr. Tripp had been back at work for five weeks, he apparently did not know himself what was happening with the ECNs. Mr. Tripp told Mr. Kohagen that he would ask Mr. Boyd, the Maintenance Worker IV who was in charge when Mr. Tripp was not on site. (Stmt. ¶ 18). Mr. Tripp asked Mr. Boyd, who said everything was fine. Mr. Tripp did not ask to see any ECNs or ask whether any ECNs were not completed or ask how many ECNs were not completed. (Stmt. ¶ 19). Mr. Tripp then reported to Mr. Kohagen that everything was fine. (Stmt. ¶ 20).

The ECNs were not, however, being completed on time. As of September 5, there were 101 ECNs dating back to July that had never been completed. (Stmt. ¶ 21). In addition to leaving potentially life-threatening situations uncorrected, the uncompleted ECNs exposed MDHA to sanctions from HUD. (Stmt. ¶ 22). Mr. Kohagen discovered the uncompleted ECNs on Friday, September 7 or Monday, September 10. He immediately informed Mr. Seay about the uncompleted ECNs. Mr. Seay instructed him to correct the ECNs. (Stmt. ¶ 24). All ECNs were corrected by the PCS crew by the end of the day on Tuesday, September 11. (Stmt. ¶ 24). On September 11, Mr. Kohagen wrote a memo to Mr. Seay setting forth the facts of his discovery and completion of the ECNs. He gave a copy of that memo to Mr. Tripp. (Stmt. ¶ 25). Mr. Tripp contends that he did not

know about the uncompleted ECNs at John Henry Hale Homes until he received this memo on September 11. (Stmt. ¶ 26).

Mr. Seay believed that Mr. Tripp had failed to perform his official duties in that he had failed to be sure that the ECNs at John Henry Hale Homes were completed on time, and failed to keep track of the status of the ECNs. (Stmt. ¶ 28). In accordance with MDHA's personnel policy, Mr. Seay held a disciplinary conference on Mr. Tripp. During this conference, Mr. Tripp admitted that the ECNs had not been done, but he defended himself by saying he had not been aware the ECNs were uncompleted. (Stmt. ¶ 29). Mr. Seay believed that Mr. Tripp should have had a system in place that would have alerted him about the uncompleted ECNs, that he should have checked on the status of the ECNs when he returned to work at the end of July, that he should have followed up with Mr. Boyd on September 5 to confirm the status of the ECNs, and that he should have seen to it that the ECNs were completed immediately upon discovery. Instead, even after Mr. Kohagen's inquiry, five more days passed while the ECNs were left undone. (Stmt. ¶ 31). Mr. Kohagen's crew, not Mr. Tripp's, corrected the ECNs. (Stmt. ¶ 31). Mr. Seay also believed that Mr. Tripp should have disciplined Mr. Boyd for failing to complete the ECNs, but Mr. Tripp never sought to do so. (Stmt. ¶ 31).

Mr. Seay believed that Mr. Tripp had failed to perform his official duties and had neglected Mr. Seay's orders. (Stmt. ¶ 32). In accordance with the Personnel Policy, Mr. Seay recommended to Gerald Nicely, the Executive Director, that Mr. Tripp be suspended for ten working days without pay. Mr. Nicely, who is Caucasian, approved that recommendation. (Stmt. ¶¶ 35, 38). As permitted under MDHA's personnel policy, Mr. Tripp appealed his suspension to the MDHA Board of Commissioners. The Board of Commissioners appointed Jonathan Cole, a Caucasian attorney who is in private practice in Nashville, to serve as hearing officer. (Stmt. ¶ 40). Mr. Cole heard

testimony from Mr. Tripp, Mr. Seay, and four maintenance workers. In a written opinion, Mr. Cole determined that the ten-day suspension was justified. (Stmt. ¶ 42). The Board of Commissioners accepted and upheld the hearing officer's conclusions. (Stmt. ¶ 48). The Board had the final authority to determine the discipline Mr. Tripp would receive. (Stmt. ¶ 48). There are seven Board members. Four of those, including the Chairman, are Caucasian. (Stmt. ¶ 49).

LEGAL DISCUSSION

The ultimate issue in an employment discrimination case is whether the employee's membership in a protected class was a determining factor in the employer's decision to take action against the employee. *Loeffler v. Kjellgren*, 884 S.W.2d 463, 469 (Tenn. Ct. App. 1994); *Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). The ultimate question in this case, then, is whether Mr. Tripp's race was a determining factor in his suspension. The plaintiff's membership in the protected class is a determining factor if, *but for* the employer's motive to discriminate, the plaintiff would not have been disciplined. *Wright v. Lamar Advertising Co.*, 15 T.A.M. 20-5 (slip op. 89-251-II Tenn. App. 1990).

This case is brought under the Tennessee Human Rights Act. Tennessee courts construe the Tennessee Human Rights Act in accordance with federal law under Title VII. *Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). In doing so, Tennessee courts have adopted the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Loeffler v. Kjellgren*, 884 S.W.2d 463 (Tenn. Ct. App. 1994). *McDonnell Douglas* requires that a plaintiff first establish a prima facie case, which, in a claim of discriminatory discipline, means that the plaintiff must establish the following:

- 1) he was a member of a protected class; 2) he was subject to an adverse employment action; 3) he was qualified for the job; and 4) for the same or similar conduct, he was treated differently from similarly situated non-minority employees.

Perry v. McGinnis, 209 F.3d 597, 601 (6th Cir. 2000). For purposes of summary judgment, MDHA concedes that Mr. Tripp can establish the first three elements of a *prima facie* case. As set forth below, however, Mr. Tripp cannot establish that he was treated differently from similarly situated African American employees. For this reason, MDHA is entitled to summary judgment.

If Mr. Tripp could present a *prima facie* case, the burden would shift to MDHA to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for the ten-day suspension. *Loeffler v. Kjellgren*, 884 S.W.2d 463 (Tenn. Ct. App. 1994). If the MDHA does so, then Mr. Tripp must show “both that the employer’s proffered reason was false and that discrimination was the real reason.” *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 804-05 (6th Cir. 1994), quoting *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993) (emphasis added). Mr. Tripp’s burden of showing pretext requires that he “do more than simply impugn the legitimacy of the asserted [business judgment] justification” of MDHA. *Pierce*, 40 F.3d at 804-05. *See also Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1005-06 (7th Cir. 2001) (even if defendant’s proffered reasons were “mistaken, ill considered or foolish, so long as [the defendant] honestly believed those reasons, pretext has not been shown.”); *Bruce v. Western Auto Supply*, 669 S.W.2d at 97 (the purpose of the Tennessee statute is to prohibit discrimination in employment and not to restrict the employer’s right to make bona fide business decisions). In other words, even if the suspension was unfair or unwarranted, Mr. Tripp cannot establish a violation of the Tennessee Human Rights Act unless he can show that the motivation for his suspension was race, rather than his failure to perform his duties with respect to the ECNs. As set forth below, Mr. Tripp cannot demonstrate that MDHA’s legitimate nondiscriminatory reason

for disciplining him was a pretext. For this reason also, MDHA is entitled to summary judgment.

Even if Mr. Tripp could establish racial animus on the part of Mr. Seay, he cannot establish the required causal connection between any such animus and his suspension, because Mr. Seay was not the person with final authority to impose discipline on Mr. Tripp. For this third independent reason, MDHA is entitled to summary judgment.

I. Mr. Tripp cannot establish a prima facie case of race discrimination.

Mr. Tripp cannot establish a *prima facie* case of race discrimination because he cannot present any evidence that similarly situated employees engaged in the same conduct in which he engaged, and yet were treated more favorably than he was. The only employees that he has attempted to identify as having been treated more favorably are Anita Cooper and Robert Settles, both of whom are African-American. (Stmt. ¶ 50).

Ms. Cooper is not similarly situated to Mr. Tripp. She is a Housing Manager, not a Maintenance Supervisor. Her responsibilities are not the same as the responsibilities of a Maintenance Supervisor. In particular, she has no responsibility for making sure that ECNs are completed on time, and she did not therefore fail to be sure that ECNs were completed. (Stmt. ¶ 51).

Ms. Cooper did not engage in the same or similar conduct as Mr. Tripp. Mr. Tripp contends that Mr. Seay favored Ms. Cooper because he did not discipline her for allegedly falsifying her timesheets. (Stmt. ¶ 52). Mr. Tripp does he know, however, whether Mr. Seay has ever disciplined Ms. Cooper. (Stmt. ¶ 52). Mr. Seay was never aware of any falsification of timesheets by Ms. Cooper and so could not have been expected to impose any discipline on her for that offense. (Stmt. ¶ 53). He has been aware of other African American employees who

have falsified their timesheets, and he has recommended that those employees be dismissed. (Stmt. ¶ 53). And Mr. Seay was fully aware of Mr. Tripp's failure with respect to the ECNs, for which suspension was the appropriate response under MDHA's Personnel Policy.

Mr. Settles is similarly situated to Mr. Tripp only in that he is also a Maintenance Supervisor IV. (Stmt. ¶ 54). However, Mr. Settles has never failed to complete ECNs on time. (Stmt. ¶ 54). When ECNs are generated, all other maintenance work in his development stops until the ECNs are completed. (Stmt. ¶ 12). Mr. Tripp complains that Mr. Settles was not disciplined for taking an air conditioner from MDHA property. However, Mr. Tripp has no personal knowledge that an air conditioner was taken; his complaint is based on rumor. (Stmt. ¶ 58). Mr. Seay is not aware of an air conditioner having been taken. (Stmt. ¶ 58). Mr. Tripp also complains that Mr. Settles received only five days suspension when a master key turned up missing. (Stmt. ¶ 55). Mr. Tripp believes this might have cost MDHA \$60,000, although his belief is based on speculation. (Stmt. ¶ 55). Mr. Tripp does not know what factors Mr. Seay considered in deciding to suspend Mr. Settles for five days. (Stmt. ¶ 56). Mr. Seay considered the fact that Mr. Settles did not allow life-threatening situations, for which he was responsible, to go uncorrected for weeks. (Stmt. ¶ 57).

Mr. Tripp has presented no evidence that any similarly situated African American engaged in the same or similar conduct for which they were treated more favorably. He has therefore failed to establish a *prima facie* case and MDHA is entitled to summary judgment on that basis alone.

II. Mr. Seay had a legitimate non-discriminatory reason for recommending that Mr. Tripp be suspended.

Even if Mr. Tripp could establish a *prima facie* case, Mr. Seay had a legitimate nondiscriminatory reason for recommending that Mr. Tripp be suspended, and Mr. Tripp cannot establish that the reason was a pretext.

Mr. Tripp was suspended because he had failed to see to it that 101 ECNs were completed within the 24-hour period mandated by HUD. This failure allowed life-threatening situations to continue for almost two months, and exposed MDHA to the potential for HUD-imposed sanctions. It was Mr. Tripp's responsibility to be sure that the ECNs were completed. His responsibility was not limited to the ECNs that he happened to find out about, but extended to all ECNs generated at the developments he supervised. It was his job to know about every ECN generated and to be sure that all ECNs were completed. (Stmt. ¶ 23). He knew that Mr. Seay held him responsible. (Stmt. ¶ 23). The responsibility was not lessened by the fact that he was working half days. He had returned to his full responsibilities and was performing all of the functions of his position. (Stmt. ¶ 15). These were not just a few ECNs that had slipped through the cracks: one hundred and one ECNs stretching over a period of six weeks were incomplete.

Moreover, when Mr. Kohagen inquired about ECNs, Mr. Tripp did little to follow through and be sure that ECNs were in fact up to date. He merely asked Mr. Boyd how the ECNs were going and received an "OK" for an answer. He did not inquire into any specifics, even though ECNs were so important that a Maintenance Supervisor was expected to drop everything else to be sure that the ECNs were completed within 24 hours. (Stmt. ¶¶ 12, 19). As Supervisor, it was his responsibility to be sure that he knew what was going on with the ECNs, and he simply failed to do so.

Mr. Tripp cannot establish that the reason given for his suspension was a pretext. He has no evidence that the reason given for his suspension was false. To the contrary, he admits that Mr. Seay honestly believed that he had failed in his responsibility to complete ECNs. (Stmt. ¶ 30). Nor does Mr. Tripp have any evidence that the real reason for his suspension was discrimination on the basis of race. Mr. Seay had never previously made any comments or taken any actions that Mr. Tripp regarded as unfair. (Stmt. ¶¶ 3, 5).

In addition, in 1999 Mr. Seay promoted Mr. Tripp to Maintenance Supervisor IV, telling him that he thought Mr. Tripp was “the best man for the job.” (Stmt. ¶ 4). This fact leads to a strong presumption that Mr. Seay’s stated reason is not pretextual. *See Loeffler v. Kjellgren*, 884 S.W.2d 463 (Tenn. Ct. App. 1994) (approving jury instruction that “[i]n cases where the hirer and firer of the plaintiff are the same individual and the plaintiff’s termination of employment occurs with a relatively short timespan following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer, and that the employer’s stated reason for acting against the employee isn’t pretext.”); *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461 (6th Cir 1996) (approving jury instruction that “[w]hen the individual who hires a person is the same person who fires an employee, there is a strong inference that discrimination did not motivate the employment decision.”).

MDHA has articulated a legitimate nondiscriminatory reason for Mr. Tripp’s suspension. The burden has shifted to Mr. Tripp to prove that the real reason for his suspension was discriminatory animus by Mr. Seay against Caucasians. It is not enough that Mr. Tripp contend that Mr. Seay’s recommendation was unfair or bad judgment. He must also demonstrate that the real reason for the recommendation was discrimination. Mr. Tripp has not done so. For this reason, as well, MDHA is entitled to summary judgment.

III. Mr. Seay did not have final authority to impose discipline on Mr. Tripp.

Even if, as Mr. Tripp complains, Mr. Seay's recommendation of suspension was motivated by racial animus, Mr. Tripp cannot establish that any such racial animus caused his suspension. Mr. Seay did not have final authority to impose discipline on Mr. Tripp. The suspension was not final until the Executive Director, who was Caucasian, approved Mr. Seay's recommendation. (Stmt. ¶ 36, 38). Mr. Tripp has no basis for concluding that Mr. Seay's recommendations were rubber-stamped by the Executive Director. (Stmt. ¶ 37).

Moreover, the hearing officer to whom Mr. Tripp appealed could have overturned the Executive Director's decision. (Stmt. ¶ 43). The hearing officer was an attorney in private practice, not an employee of MDHA, and was an independent third party appointed by the Board of Commissioners. He was Caucasian. (Stmt. ¶ 40). Mr. Tripp had the opportunity to present his evidence. He testified and he had four maintenance workers testify. (Stmt. ¶ 42). He had the right to legal representation, although he did not choose to have a lawyer present. (Stmt. ¶ 41). The hearing officer made the independent decision that the suspension was warranted.

In *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), the defendant City had no power to unilaterally fire the plaintiff police officer. Instead, the City recommended termination to a Civil Service Board, before whom the plaintiff appeared, represented by counsel, and to whom she presented evidence. Reversing a jury verdict for the plaintiff, the court held that the necessary causal connection had been broken:

[A] discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. ... [T]his causation must be truly direct. When the biased recommender and the actual decisionmaker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the

underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee.

Id. at 1331. Mr. Tripp can present no evidence that any discriminatory animus on the part of Mr. Seay resulted in Mr. Nicely's acceptance of the recommendation, in the hearing officer's determination, or in the Board's decision to accept the hearing officer's conclusions. For this reason as well, MDHA is entitled to summary judgment.

CONCLUSION

MDHA is entitled to summary judgment on Mr. Tripp's claim of racial discrimination for three independent reasons: (1) Mr. Tripp cannot establish a *prima facie* case because he cannot establish that he was treated less favorably than similarly situated African American employees who engaged in the same or similar conduct; (2) Mr. Seay had a legitimate nondiscriminatory reason for recommending that Mr. Tripp be suspended, and Mr. Tripp cannot demonstrate that the reason was a pretext or that the real reason was discrimination; and (3) Mr. Seay did not have final authority to impose discipline on Mr. Tripp.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first class mail to:

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this _____ day of _____, 2002.

Kathryn A. Stephenson