STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 25, 2017)

CITY OF PROVIDENCE	:	
	:	
v.	:	**C.A. No. PC-13-5757**
	:	
RHODE ISLAND COMMISSION FOR HUMAN RIGHTS, and MATTHIEU YANGAMBI	:	
		Consolidated with
CITY OF PROVIDENCE	:	
	:	
v.	:	**C.A. No. PC-14-5223**
	:	
RHODE ISLAND COMMISSION FOR HUMAN RIGHTS, and MATTHIEU YANGAMBI	:	

DECISION

VAN COUYGHEN, J. The Appellant, the City of Providence (Providence or Appellant), appeals from a decision of the Rhode Island Commission for Human Rights (the Commission), which found that Appellant unlawfully retaliated against Matthieu Yangambi (Complainant) for engaging in conduct protected by G.L. 1956 § 28-5-7, the Fair Employment Practices Act (FEPA), by not appointing him to four acting assistant principal positions within the Providence school system. Jurisdiction in the instant matter is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

A

Factual Background

This case involves Complainant's claim that he was retaliated against when he was not appointed to four acting assistant principal positions allegedly because he had filed previous claims against Appellant with the Commission. The Complainant has worked for Appellant since 1992 and has been a science teacher at Mount Pleasant High School in Providence, Rhode Island since 1993. The Complainant, an African-American man, is originally from the Democratic Republic of the Congo where he began his educational journey. While there, Complainant received a B.S. Degree in Biomedical Sciences from the University of Kinshasa. Complainant later received a Master's Degree in Education, Secondary Administration from Providence College and a Doctorate Degree in Education from Johnson and Wales University concentrating in Educational Leadership, Curriculum and Instruction, Teacher Training, Secondary School Science, and Education for English Language Learners.

Over the course of his employment with Appellant, Complainant applied for a number of different administrative positions and did not receive them. As a result, and prior to the actions relevant here, Complainant filed a charge of discrimination with the Commission against Appellant. (Tr. 15-16, Jan. 9, 2013 (Tr. Vol. 1)). Furthermore, Complainant subsequently removed that charge to the Superior Court. Id.[1] However, pertinent to the appeal here, Complainant sought an additional nine positions with Appellant from 2009-2010. One of those

[1] The Court notes that there are no findings of fact that indicate when these previous actions by Complainant took place. See decision. Nor does the record indicate when such events took place.

positions was for the Director of English Language Learners, three were acting principal positions, and five were acting assistant principal positions. The Complainant was not selected for any of those positions.

On April 2, 2010, Complainant filed another complaint with the Commission alleging that Appellant discriminated against him by denying him the above-mentioned promotions because of his race, color, and ancestral origin and in retaliation for protected conduct, in violation of § 28-5-7. The April 2, 2010 complaint forms the factual basis for the within appeal.

The Complainant represented himself throughout the proceedings before the Commission. The Preliminary Investigating Commissioner—Camille Vella-Wilkinson—found that there was probable cause to believe that the Appellant violated the provisions of § 28-5-7. (Decision and Order 1, Oct. 16, 2013 (Decision)). Ultimately, hearings were held before Commissioner John B. Susa on January 9 and 10, 2013. After the hearings, the parties submitted memoranda for further consideration. The procedural regulations applicable to the Commission required that the Hearing Officer be joined by two other Commissioners. R.I. Admin. Code 38-1-17:12.02(a). All three Commissioners reviewed the record and post-hearing submissions in order to decide the case. On October 16, 2013, the three Commissioners unanimously concluded that Providence did not discriminate against Complainant regarding any of the positions in contention on the basis of race or national origin. However, by at 2-1 vote with the presiding Hearing Officer dissenting, the Commission concluded that Providence retaliated against Complainant for his previous pursuit of discrimination claims by failing to appoint him to four of the nine contested positions. The four positions—all acting assistant principal positions—were

> (1) Acting Assistant Principal, Oliver Hazard Perry Middle School, filled by Cynthia Robles, April 4, 2009.
> (2) Acting Assistant Principal, Mount Pleasant High School, filled by Paul Rao, March 1, 2010.

(3) Acting Assistant Principal, Mount Pleasant High School, filled by Dina Cerra, March 8, 2010.
(4) Acting Assistant Principal, Providence Academy of International Studies, filled by Charles Moreau, March 8, 2010.

Complainant did not appeal the Commission's decision regarding its finding that Appellant did not discriminate against him based upon race or national origin. Therefore, the only issues before this Court on appeal concern Complainant's claims of retaliation regarding the four above-referenced acting assistant principal positions.

B

The Hiring Process

According to the record and the Commission's findings, the process Appellant used to fill "acting" positions was ad hoc and designed to fill unexpected vacancies within the school department quickly.[2] (Decision 3-4.) There were no job postings for these positions nor was there an application process. Id. at 3.[3] Instead, Appellant considered various factors when filling an "acting" administrative position. The factors included eligibility, the needs of the position, the specifics of the school where the vacancy is located, familiarity with the building and students, recommendations, and taking care to not create other academic vacancies that are hard to fill. Id. at 5; (Tr. Vol. 1 at 141). With regard to acting assistant principal positions, Providence looked to individuals to fill the disciplinary needs of the position. (Tr. Vol. 1 at 103). This is because the primary role of an assistant principal is student discipline. Id. at 122. Therefore, Providence sought individuals for acting assistant principal positions who were respected in the school and

[2] The record reflects that the impetus to fill the acting positions in this setting arises when there is an immediate, temporary need to fill an unexpected vacancy in a permanent position. (Decision 3). For example, the person holding a permanent position may suddenly become ill or be temporarily filling another position necessitating the newly-formed vacancy to be filled. Id.

[3] Providence introduced evidence that this ad hoc system for filling unexpected vacancies was also used in Warwick and other municipalities in the country due to the necessity to fill these types of unexpected vacancies expeditiously. See Tr. Vol. 1 at 106, 139, 148.

had influence over student behavior. Id. at 104. Furthermore, as stated above, when filling these positions, Providence would seek to appoint someone that would be the least disruptive to academic continuity. Id. at 122.

During the time in which the acting positions at issue in this appeal were filled, Edmund Miley worked for Appellant to provide leadership support and development services.[4] (Decision 3). Mr. Miley testified during the hearing that when an assistant principal position unexpectedly becomes vacant, the principal calls his or her supervisor, the Executive Director, and asks that an acting assistant principal be appointed. (Tr. Vol. 1 at 148-49). According to Mr. Miley, the principal usually provides the name of someone who is qualified, interested in being an administrator, and "has some credibility" with the principal. Id.

In its Decision, the Commission found that Providence's description of the method used to appoint acting administrators was unclear and that "[Providence]'s process for filling Acting Assistant Principal positions, as set forth by [its] witnesses, has no objective guidelines and no clear line of authority." (Decision 18.) Namely, the Commission believed that it was "unclear who initiates the recommendations and who is under consideration for the positions" because the testimony on the subject was conflicting and imprecise. Id.

C

The Commission's Decision

With respect to the four acting assistant principal positions at issue on this appeal, two Commissioners found that Complainant established a prima facie case of retaliation. (Decision 12-13.) Additionally, the two Commissioners found that Appellant failed to meet its burden of presenting legitimate, non-retaliatory reasons for not appointing Complainant to three out of the

[4] It is unclear from the record what Mr. Miley's role was in the process.

four of those positions.[5] According to the majority of the Commission, such failure by Appellant to produce legitimate, non-retaliatory reasons for appointing individuals other than Complainant to the three above-mentioned positions necessitated the conclusion that Appellant was motivated by retaliation.[6] Id. at 16-17. However, the third Commissioner, the Hearing Officer, dissented and found that Complainant had not satisfied his burden of proof with regard to retaliation. Id. at 22.

However, the Commission found Appellant provided a non-retaliatory reason for its action for one of the four positions—the appointment of Paul Rao to acting assistant principal of Mount Pleasant High School. (Decision 18.) According to the Decision, Appellant showed that Mr. Rao was appointed acting assistant principal "because he had experience in the building, knew the school community, and was known and respected by the school community based in part on his leadership as a football coach." Id. However, the majority of the Commission ultimately found that the reasons given were "pretext for retaliation" based on the "strength of the Complainant's prima facie case of retaliation, the Complainant's clearly superior objective qualifications, the subjectivity of the [Appellant]'s process and the inconsistent and unclear testimony" of Providence's witnesses. Id. at 18-19. Accordingly, the majority of the Commissioners found that Appellant retaliated against Complainant "for opposing unlawful employment practices, filing charges of discrimination and filing and pursuing a court complaint

[5] The Commission found that Appellant failed to meet its burden of presenting legitimate, non-discriminatory reasons for appointing Cynthia Robles, Charles Moreau, and Dina Cerra to acting assistant principal positions rather than Complainant.

[6] With respect to the position filled by Dina Cerra, the Commission's Decision indicates that not only was the prima facie case not rebutted by Appellant, but also there was evidence that Appellant departed from its usual practice of selecting someone from within the school for acting assistant principal positions when Ms. Cerra was appointed. (Decision 17.)

alleging violation of the FEPA, with respect to the Acting Assistant Principal positions filled by Mr. Moreau, Mr. Rao, Ms. Robles and Ms. Cerra." Id. at 19.

Subsequent to the Commission's Decision, Appellant timely filed the present appeal with this Court. The Appellant contends that the Commission's Decision is contrary to law because it misapplies the burden-shifting paradigm in employment retaliation cases and is based on factual findings that are clearly erroneous. Specifically, Appellant avers that the Commission erred in finding Complainant established a prima facie case of retaliation, and that Appellant did not meet its burden of production. Additionally, Appellant claims that the Commission erred by not requiring Complainant to bear the ultimate burden of proof on his claims of retaliation. Finally, Appellant argues that the Commission abused its discretion by allowing an allegedly biased Commissioner to render judgment in this matter. The Court will address each of these contentions in sequentia.

II

Standard of Review

The Superior Court's review of a final administrative decision is governed by the Administrative Procedures Act. Sec. 42-35-15; Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1048 (R.I. 2008) (citing Rossi v. Emps.' Ret. Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006)). Section 42-35-15(g) delineates the applicable standard of review for administrative appeals to this Court:

> "(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;

> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

"In essence, if 'competent evidence exists in the record [to support the agency's conclusion], the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)). In reviewing the record, this Court may not substitute its own judgment for that of the agency as to the weight of evidence on questions of fact. Interstate Navigation Co. v. Div. of Pub. Utils. & Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003). However, when considering questions of law, the Court is not bound by the agency's decision, but instead may review the decision "to determine the relevant law and its applicability to the facts presented in the record." State Dep't of Envtl. Mgmt. v. State Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002). Therefore, the Superior Court's review of "questions of law—including statutory interpretation—[is] . . . de novo." Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008).

III

Applicable Law

In pertinent part, § 28-5-7(5), FEPA, makes it unlawful for any employer, employment agency, labor organization, training school or center, or any other employee referencing source "to discriminate in any manner against any individual because he or she has opposed any practice forbidden by [the] chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding, or hearing under [the] chapter." Sec. 28-5-7(5). "In construing FEPA with respect to this thorny allegation of discriminatory retaliation," this

Court must follow the Rhode Island Supreme Court's precedent and "look[] to the federal courts' interpretations of Title VII of the Civil Rights Act of 1964 for guidance" if our Supreme Court has not decided the issue. Shoucair v. Brown Univ., 917 A.2d 418, 426 (R.I. 2007) (citing Casey v. Town of Portsmouth, 861 A.2d 1032, 1036 (R.I. 2004)). Accordingly, a retaliation claim under FEPA must be analyzed pursuant to the framework set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), which our Supreme Court adopted in Shoucair, 917 A.2d at 426.

Under the McDonnell Douglas framework, the employee must first establish a prima facie case of retaliation. McDonnell Douglas Corp., 411 U.S. at 802; see also Shoucair, 917 A.2d at 427. A prima facie case of unlawful retaliation can be made by demonstrating that

> (1) the complainant engaged in protected conduct;
> (2) the complainant experienced an adverse employment action; and
> (3) there was a causal connection between the protected conduct and the adverse employment action.

Shoucair, 917 A.2d at 427; see also Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 25 (1st Cir. 2004). If the employee succeeds in establishing the prima facie case, "a presumption of [retaliation] results, and the burden of production, not persuasion, then falls to the employer, who must respond with some legitimate, nondiscriminatory reason for the act at issue." Shoucair, 917 A.2d at 427. If the employer carries that burden of production, the presumption of discrimination disappears, and the burden switches back to the employee to demonstrate that the employer's proffered reasons are pretext for discrimination. Id.; see also Ctr. for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998).

IV

Analysis

A

Complainant's Prima Facie Case

As discussed above, the McDonnell Douglas framework requires that a complainant first establish a prima facie case of retaliation. It is undisputed that Complainant in this case engaged in protected activity by filing previous complaints of discrimination[7] and that Complainant suffered an adverse employment action when he was not placed in the four acting administrator positions at issue in this appeal. However, on appeal, Appellant argues that the Commission erred in finding that Complainant established a prima facie case of retaliation because Complainant failed to establish the third element, causation.

In order for causation to be established for a complainant's prima facie case of retaliation, the employee must show a nexus between the conduct and the alleged retaliatory act. See Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003). In this case, the Commission cited the temporal proximity between the protected activity and the adverse employment action as the basis for its conclusion that a causal connection existed. (Decision 12.) Temporal proximity between the protected activity and the adverse employment action can create an inference of causation when there is proof that the decision maker knew of the protected activity when he or she decided to take the adverse employment action. Pomales v. Celulares Telefonica, Inc., 447 F.3d 79, 85 (1st Cir. 2006); see also Wyatt v. City of Boston, 35 F.3d 13, 16 (1st Cir. 1994)

[7] The Court again notes that the record does not contain any details with respect to when Complainant filed his previous complaints with the Commission and the Superior Court, or the specific travel of those complaints.

("One way of showing causation is by establishing that the employer's knowledge of the protected activity was close in time to the employer's adverse action.").

Here, both the Commission's Decision and the record fail to show that a causal connection existed between the protected conduct and the adverse employment actions. First, the Commission's Decision merely states that Appellant, as an organization, knew of Complainant's protected activity. (Decision 12) (emphasis added). To come to this conclusion, the Commission relied on Mr. Miley's testimony regarding his knowledge of Complainant's previous charge and on an inference that Ms. Onye knew of the charge given her position as Executive Director of High Schools. Id. However, such findings do not indicate that the ultimate decision makers—the Superintendent and School Board—knew of Complainant's activity; nor does it indicate that the ultimate decision makers merely rubber stamped the improper conduct of subordinates. Additionally, neither the record nor the Commission's Decision contains any evidence to support finding temporal proximity in this case. Instead, the Commission merely contends that it considered the entirety of Complainant's protected conduct—not just the filing of the previous charge—to find a causal connection between the protected conduct and the adverse employment action. Id. This Court will address each of these defects separately.

1

Knowledge of the Protected Conduct

As mentioned above, proof that the decision maker had knowledge of the protected activity when he or she took the adverse employment action can aid in finding a causal connection for a complainant's prima facie case. See Pomales, 447 F.3d at 85. Generally, when there is no evidence that the ultimate decision maker knew about the employee's protected

activity, the employee cannot establish his or her prima facie case. Flores v. Devry Univ., Inc., 573 F. App'x 833, 835-36 (11th Cir. 2014). However, it does not matter that the ultimate decision maker has no knowledge of a complainant's protected activity if the ultimate decision maker merely "rubber-stamps" the adverse action of subordinates with an improper motive. Shoucair, 917 A.2d at 429-30; see also Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226-27 (5th Cir. 2000) ("If the employee can demonstrate that others had influence or leverage over the official decisionmaker, . . . it is proper to impute their discriminatory [or retaliatory] attitudes to the formal decisionmaker.").

Here, while the Commission's Decision pointed to the testimonies of Mr. Miley and Ms. Onye to conclude that Appellant, as an organization, had knowledge of Complainant's previous charge, it nonetheless failed to find that the ultimate decision maker had knowledge of the protected activity.[8] See Decision. Instead, the Commission's Decision merely states that "[t]he Superintendent and School Board have [the] ultimate approval; but it is unclear who initiates the recommendations and who is under consideration for the positions." (Decision 18.) However, there is nothing in the Commission's Decision or the record that indicates that the ultimate decision makers—the Superintendent and School Board—had knowledge of the protected activity. See Decision. Likewise, neither the Commission's Decision nor the record indicates that the ultimate decision makers in this case merely rubber-stamped the adverse activity of subordinates with an improper, retaliatory motive. See Shoucair, 917 A.2d at 429-30. Thus, the

[8] Specifically, in its Decision, the Commission found, without citing to the record, that Mr. Miley knew of Complainant's previous charge. (Decision 12). Additionally, the Commission relied on an inference that Ms. Onye knew of Complainant's protected activity given her position as Executive Director of High Schools and that she had knowledge of complaints filed by other individuals. Id. Such a finding was made despite Ms. Onye's testimony indicating that she was not aware of Complainant's previous charge of discrimination. (Tr. 32, Jan. 10, 2013 (Tr. Vol. 2)).

Commission's finding of knowledge of the decision maker in this case—necessary for Complainant's prima facie case—is clearly erroneous. See Pomales, 447 F.3d at 84; Flores, 573 F. App'x at 835-36; Shoucair, 917 A.2d at 429-30.

2

Temporal Proximity Between Protected Conduct and Adverse Action

Even assuming the Commission properly found that the decision makers had knowledge of Complainant's protected activity, there has to be sufficient temporal proximity between the protected activity and the adverse action in order for there to be an inference of causation for the Complainant's prima facie case. See Shoucair, 917 A.2d at 429. In order for temporal proximity to create an inference of causation, "the adverse employment action" must come "swiftly on the heels of the protected activity." Id. Indeed, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close[.]'" Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001) (quoting O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001)); see also Shoucair, 917 A.2d at 429 ("an inference of causation is permissible when the adverse employment action comes so swiftly on the heels of the protected activity") (citing Clark Cty. Sch. Dist., 532 U.S. at 273); see e.g., Ramirez Rodriguez v. Boehringer Ingelheim Pharm., Inc., 425 F.3d 67, 85 (1st Cir. 2005) (holding that a two month gap between the protected activity and the adverse action was not sufficient temporal proximity to establish causation for a prima facie case of retaliation); Calero–Cerezo, 355 F.3d at 25 ("Three and four month periods have been held insufficient to establish a causal connection based on temporal proximity.").

With regard to temporal proximity, the Commission's Decision stated Complainant proved a causal connection between the adverse action and the protected activity by connecting the entirety of Complainant's continued protected activities—filing and pursuing the initial complaint—and the adverse actions by Appellant. (Decision 12). However, such a generalization by the Commission flaws its Decision. The Commission's Decision fails to articulate when Complainant's protected activity began, its course, or its status as of the alleged adverse employment action. See id. The Decision's only finding in this regard was that "[t]he Complainant filed previous charges of discrimination with the Commission against [Appellant] . . . relating to a time period before April 2009" and that the case was pending in the Rhode Island Superior Court Id. at 3. Other than that reference, the Commission's Decision is completely devoid of any indication of when the protected activity took place or the travel of the protected activity. See Decision. In fact, after a review of the entire record, the only reference of when this past protected activity took place is in Appellant's post-hearing memorandum which asserted that Complainant's most recent protected activity occurred on September 19, 2007 when he filed an amendment to his prior charge of discrimination. See Resp't's Post-Hr'g Mem. 31. Even assuming the 2007 amendment constituted the most recent protected activity by the Complainant, it would be considered inadequate to create an inference of causation for Complainant's prima facie case of retaliation because of the significant lapse in time between the conduct and the adverse action complained of here. See Ramirez Rodriguez, 425 F.3d at 85; Calero–Cerezo, 355 F.3d at 25. Thus, the record is devoid of any evidence to support the conclusion that Appellant's actions were retaliatory based upon the close temporal proximity to Complainant's protected activity. Therefore, the causal link between the protected activity and the alleged retaliatory action has not been established.

Furthermore, the Commission's reliance on Raposa v. Winter, No. C.A. 07-417, 2009 WL 2391675 (D.R.I. Aug. 4, 2009) is unavailing. The Commission cites Raposa for the proposition that it is not solely the initial filing of the complaint that can constitute the protected activity for a complainant's prima facie case, but other activity subsequent to filing the complaint may also be considered. See id., at *4 ("[F]or the purposes of the Defendant's Motion for Summary Judgment, this Court will consider the entirety of the [protected] activity . . . rather than the sole act of filing the complaint . . ."") (emphasis added). However, Raposa is distinguishable from the present case for a few reasons. First, Raposa was applicable to a defendant's summary judgment motion in which "the Court views the record and draws all reasonable inferences in the light most favorable to the nonmoving party." Id., at *2. Second, while Raposa contemplates considering the entirety of the protected activity rather than the sole act of filing the complaint, it does not hold that a mere pending claim, without any more specific details, qualifies as "activity" for purposes of establishing temporal proximity between protected conduct and adverse employment action. Id., at *3-4. Thus, the mere fact that Complainant had a court case pending against Appellant at the time of the Decision, without more, does not establish any additional and less remote protected conduct by Complainant to establish temporal proximity. See Jones v. Bernanke, 557 F.3d 670, 680 (D.C. Cir. 2009) ("[I]n some cases the nature of the protected activity and the full context (including the whole chain of events since the initial filing of a complaint) may [still] render evidence of temporal proximity insufficient to permit an ultimate inference of retaliation."); see also Holcomb v. Powell, 433 F.3d 889, 903 (D.C. Cir. 2006) (pointing to specific examples of protected activity after the initial complaint—such as sending letters contesting the practices of the employer and filing other complaints—for the purpose of establishing close temporal proximity between the protected conduct and adverse

employment action). Numerous or successive complaints without the temporal nexus between the complaints and the negative employment action cannot, standing alone, provide evidence of retaliatory conduct. If so, complainants would be encouraged to file unwarranted complaints for the sole purpose of supporting a retaliation claim. This is not to say that numerous or previous complaints may not be relevant in certain circumstances which clearly establish a temporal relationship between the protected activity and the unfair employment action. However, the evidence in this case fails to provide any temporal link between Complainant's protected action and the adverse employment action.

Indeed, the lack of evidence in the record plus the Commission's failure to include the precise timing of the protected activity renders this Court's review of the Commission's finding on temporal proximity impossible, and thus, the Decision is defective. See Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1260 (R.I. 1993) (Upholding a trial justice's order vacating a decision of the Rhode Island Commission for Human Rights that was not supported by evidence in the record.); see also Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council, 536 A.2d 893, 896 (R.I. 1988) ("An administrative decision that fails to include findings of fact required by statute cannot be upheld."); E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 568, 376 A.2d 682, 687 (1977) ("The absence of required findings makes judicial review impossible, clearly frustrating § 42-35-15, the statute for review under which the plaintiffs filed their complaints, and fails to satisfy the statutory requirements of § 42-35-12."). Thus, even if the Commission, as its Decision emphasizes, considered the entirety of the protected activity—filing charges and pressing the case in court—it still had to find—drawing upon evidence in the record—when those events occurred in order to accurately conclude that there was a sufficient causal connection between the protected activity and the adverse action for

Complainant's prima facie case. See Sakonnet Rogers, 536 A.2d at 896. The absence of such facts in the record and the Commission's Decision is especially damaging given that the Commission asserted that it relied on the "strength" of Complainant's prima facie case to ultimately conclude that Complainant was not chosen because of retaliatory animus. (Decision 16-19). As neither the Commission's Decision nor the record contains any evidence regarding the timing of the specific protected activity, the finding of a causal connection, and thus Complainant's establishment of a prima facie case, is clearly erroneous in view of the evidence on the whole record. See § 42-35-15(g)(5); see also Mine Safety Appliances Co., 620 A.2d at 1260.

These aforementioned errors—the Commission's finding of solely institutional knowledge as well as temporal proximity to create an inference of causation for Complainant's prima facie case of retaliation—each standing alone substantially prejudices the rights of Appellant as the Commission clearly relied upon the prima facie showing to reach its decision. Given that there is no evidence in the record from which the Commission could have found the requisite knowledge and sufficient temporal proximity, this Court reverses the Commission's Decision. See § 42-35-15(g); see also Mine Safety Appliances Co., 620 A.2d at 1260.

B

Appellant's Burden of Production

Even assuming arguendo that Complainant made out a prima facie case of retaliation, the Commission erred by finding Appellant failed to meet its burden of producing legitimate, non-retaliatory reasons for the adverse employment action affecting Complainant. It is well settled that once an employee succeeds in establishing a prima facie case of retaliation, "a presumption of [retaliation] results, and the burden of production, not persuasion, then falls to the employer

who must respond with some legitimate, nondiscriminatory reason for the act at issue." Shoucair, 917 A.2d at 427. To rebut this presumption, "the employer need only produce enough competent evidence, taken as true, to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the challenged employment action[.]" Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243, 248 (1st Cir. 1997) (emphasis in original); see also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (To satisfy the burden of production, "[i]t is sufficient if the [employer]'s evidence raises a genuine issue of fact as to whether it discriminated against the [employee.]"); Torrech-Hernandez v. Gen. Elec. Co., 519 F.3d 41, 48 (1st Cir. 2008) ("The employer's burden is minimal—it 'need do no more than articulate a reason which, on its face, would justify a conclusion that the [employee] was let go for a nondiscriminatory motive.'") (quoting Davila v. Corporacion De Puerto Rico Para La Difusion Publica, 498 F.3d 9, 16 (1st Cir. 2007)). Furthermore, the determination of whether or not the employer has met his or her burden of production "can involve no credibility assessment." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993). If the employer carries that burden of production, the presumption disappears, and the burden is back on the employee to demonstrate that the employer's proffered reasons are pretext. Shoucair, 917 A.2d at 427; see also Barros, 710 A.2d at 685.

While the record is devoid of any specific reasons why Appellant selected Ms. Robles, Mr. Moreau, and Ms. Cerra, the record is replete with reasons as to why Appellant did not consider Complainant for the acting positions. For example, the record indicates that Craig Bickley—the Senior Executive Director of Human Resources for Providence Public Schools—testified that Complainant's current principal indicated to Mr. Bickley that Complainant would

not be a good administrator. (Tr. Vol. 1 at 132). Mr. Bickley stated the following to Complainant at the hearing:

> "[The principal's] response to me about you was that you would best be an instructor at a university because you're currently failing the significant portion of your students. You do not interact with their parents. You don't reach out to them. You're a traditional stand up teacher and believe that students should come prepared to learn and you're going to teach one way and if they don't, that's their fault. That was his response to me. I asked him if he thought you would be a good administrator in the district, and he told me no." Id.

Additionally, during another part of the hearing, Mr. Bickley stated regarding the filling of acting positions that, "you also want to look at what's going to be the least disruptive within the organization. For instance, Mr. Yangambi is a science teacher. Science is one of those hard to fill areas within certification." Id. at 104. In response to a question by Complainant, Mr. Bickley again addressed this issue by stating,

> "when I'm looking to fill something of a temporary capacity, I would also look for something that would least impact my academics. If I were looking at someone in a science position which is a hard to fill position that I do not have - - I do not have a bank of substitutes that can go in and immediately be successful, I would look to somebody like a Phys. Ed. teacher with all those other skill sets and move them into that acting capacity to address that student discipline issue before I would take someone in a hard to fill job and create a vacancy that's going to impact academics." Id. at 122.

Furthermore, Mr. Miley testified that based on his participation in several interview committees in the past, the committees concluded Complainant was "not ready to be an administrator . . . ." (Tr. Vol. 1 at 165). Finally, Marc Catone, the Executive Director of Middle Schools in Providence, testified that when filling acting administrator positions at the middle school level, Providence typically looked "for people that traditionally have middle school experience" due to the fact that "middle school is [] unique." (Tr. Vol. 2. at 71).

Such testimony clearly indicates legitimate, non-discriminatory reasons why Complainant was not selected for the acting assistant principal appointments. See e.g., Casey, 861 A.2d at 1037 (Testimony that the complainant interviewed poorly and did not display the attributes favorable for a town employee were considered legitimate, non-discriminatory reasons for not hiring the complainant in an age discrimination action.); Barros, 710 A.2d at 686 (Employer "had rebutted the presumption . . . with evidence relating to [employee's] bad attitude, her habitual tardiness, [and] her failure in performance of duties . . ."). As the testimonies of Mr. Bickley and Mr. Miley indicate, Complainant generally was considered unsuited to serve in an administrative capacity. See Tr. Vol. 1 at 132, 165. Additionally, the testimony of Mr. Bickley demonstrates that science teachers commonly were not desired to fill acting positions due to the hard-to-fill vacancies they create. See id. at 122. Such evidence provides legitimate, non-discriminatory reasons why Complainant was not considered for any of the appointments. See Torrech-Hernandez, 519 F.3d at 48. Finally, Mr. Catone's testimony indicates that people with middle school experience are considered for the acting administrative appointments at the middle school level, and it is clear that Complainant did not have any middle school experience. See Tr. Vol. 1 at 71; see also Complainant's Ex. 9. Given that one of the contested positions was a middle school position, Mr. Catone's testimony clearly provides a legitimate, non-discriminatory reason for Complainant not being considered and appointed for that position. Such evidence is enough "to enable a rational factfinder to conclude that there existed a nondiscriminatory reason for the challenged employment action[.]" Ruiz, 124 F.3d at 248. Thus, the Commission's finding that Appellant failed to meet its burden of producing a legitimate, non-discriminatory reason for not appointing Complainant to the positions at issue is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

See § 42-35-15(g)(5). Such an error substantially prejudices the rights of Appellant and justifies this Court's reversal of the Commission's Decision. See § 42-35-15(g).

C

Alleged Bias of Commissioner Cardona

The Appellant asserts further error to the Commission's Decision. Specifically, Providence argues that one of the two Commissioners in the majority—Alberto Aponte Cardona—who found against Providence in the Decision has a bias against Providence. However, based on this Court's reversal of the Commission's Decision, the issue of Commissioner Cardona's alleged bias is now moot.[9]

As the Court's Decision as outlined above is dispositive of this case, there is no need to address the remaining issue addressed by Appellant.

V

Conclusion

After a review of the entire record, this Court concludes that the Commission's Decision prejudiced substantial rights of Appellant due to its findings that were contrary to law and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The Commission erred by concluding, without evidence, that the ultimate decision maker had knowledge of Complainant's protected activity. Additionally, the Commission erred by finding, without evidence, that sufficient temporal proximity existed for Complainant's prima facie case of retaliation. Finally, the Commission erred by finding that Appellant failed to produce legitimate, non-discriminatory reasons for its actions. Such errors, both individually and

[9] This Court notes that the allegation of bias was not raised until after the Commission rendered its decision, and it has not been factually developed. However, in the future, the Commission should strive to avoid even the appearance of impropriety in selecting Commissioners to decide cases.

collectively, substantially prejudice the rights of Appellant. Therefore, as the record does not support the Commission's conclusions, this Court reverses the Commission's Decision.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**City of Providence v. RI Commission for Human Rights and Matthieu Yangambi**
CASE NOS:	**PC-13-5757 consolidated with PC-14-5223**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 25, 2017**
JUSTICE/MAGISTRATE:	**Van Couyghen, J.**
ATTORNEYS:	
For Plaintiff:	**Charles A. Ruggerio, Esq.** **Megan K. DiSanto, Esq.** **Kathryn M. Sabatini, Esq.**
For Defendant:	**Francis A. Gaschen, Esq.** **Marissa Janton, Esq.**