

IN THE UTAH COURT OF APPEALS

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Mostafa (Jim) Tarkeshian,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 20040996-CA
v.)	
)	
Labor Commission and Salt Lake)	F I L E D
County Public Works,)	(October 14, 2005)
)	
Respondents.)	2005 UT App 439

Original Proceeding in this Court

Attorneys: Stephen W. Cook, Salt Lake City, for Petitioner
 Alan L. Hennebold, David E. Yocom, and Valerie Wilde,
 Salt Lake City, for Respondents

Before Judges Davis, McHugh, and Thorne.

THORNE, Judge:

Mostafa Tarkeshian appeals the Utah Labor Commission's (the Commission) decision denying his employment discrimination claim against Salt Lake County Public Works (the County). We affirm.

To establish a claim of unlawful employment discrimination, a claimant must show that he was (1) a member of a protected class, (2) qualified to perform the duties of the job, and (3) that the alleged discriminatory action was capable of supporting an inference of unlawful discrimination. See Sheikh v. Department of Pub. Safety, 904 P.2d 1103, 1106 (Utah Ct. App. 1995). In practice, this standard creates a series of shifting burdens, with the claimant bearing the initial burden of presenting a prima facie case of discrimination. If the claimant succeeds, the burden shifts to the employer who must show that the questioned action was undertaken for a legitimate, nondiscriminatory reason. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Should the employer succeed in this task, the claimant is then permitted an opportunity to demonstrate that "the employer's 'legitimate' reason is pretextual." Viktron/Lika Utah v. Labor Comm'n, 2001 UT App 394, ¶7, 38 P.3d 993.

On appeal, a party may successfully attack an administrative agency's factual finding only if that party can show that the challenged finding is not supported by "substantial evidence." Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997). We define substantial evidence in this context as nothing more than "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

Here, Tarkeshian does not dispute that the County's evidence was sufficient to shift the Commission's attention to the issue of whether or not the County's otherwise legitimate response to his claims was pretextual. However, Tarkeshian asserts that the Commission erred in finding that the reasons given were not pretextual. Although we are sympathetic to Tarkeshian's claims, and we do not condone the County's failure to properly document its hiring and advancement criteria, we ultimately conclude that the Commission's pretext finding is supported by substantial evidence.¹

Specifically, the Commission found that Tarkeshian had complained of the promotion of Mr. Mecham, but that Mecham had been promoted to a supervisory role, a position for which Tarkeshian was not qualified and one that did not require the engineering certification that is at the center of Tarkeshian's complaint. This finding was supported adequately by the County's evidence, including Mecham's qualifications as a manager, as well as the relevant job posting that did not require engineering certification as a necessary qualification for the position.²

¹Because Tarkeshian's discrimination claim was statutorily limited to the 180-day period preceding the filing of his petition, we review only those hiring and advancement decisions that occurred during that window of time. See Utah Code Ann. § 34A-5-107(1)(c) (2001).

²The job description for the position given to Mecham stated that the relevant minimum qualifications for the position included: a master's degree in business administration, public administration, or an equivalent field, and four years of experience in a sanitation-related field, two of which must have been supervisory in nature. As a substitute for most of these enumerated qualifications, the County also would have accepted some equivalent combination of education and experience, but the County allowed no substitution for the supervisory experience. Tarkeshian does not dispute that Mecham met the minimum qualifications for the position, and Tarkeshian cannot claim that
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Similarly, the Commission found that the County's explanation for the circumstances surrounding the hiring of Mr. Taggart, even though he did not possess the proper certification, was not pretextual because Mr. Taggart was hired on a temporary basis. The County presented evidence to that effect, showing that Taggart was a temporary hire, that he worked at-will and without benefits, for fewer hours and less compensation than others in the engineering department. These facts support the Commission's conclusion that the County's explanation concerning Taggart was not pretextual.

Finally, the Commission found that Tarkeshian failed to show pretext in the County's advancement of Mr. Knaphus. The County presented evidence that Knaphus worked in a different division within the engineering department. Knaphus's division is focused on surveying; thus, the County made a decision to allow employees within that division to substitute a surveyor's license for the aforementioned engineering certificate for the purpose of realizing a career ladder advancement. Although the County failed to accurately memorialize this decision, it is clear that all members of Knaphus's division who were advanced under the career ladder format possessed similar surveyor licenses. Moreover, the divisional job postings implicated by Tarkeshian's challenge clearly stated that either a surveyor's license or an engineering certificate was sufficient to qualify for the subject positions. Additionally, Tarkeshian never sought transfer to this particular division and thereby he failed to present the County with an opportunity to grant or deny him an advancement.

Following Tarkeshian's one failed application for promotion in 1979, he never again applied for a new position within the County engineering department. He failed to earn the applicable engineering certificate, or a surveyor's license, that would have qualified him automatically for advancement under the department's career ladder, and he indicated no interest in obtaining a supervisory or management position within the engineering department.

During Tarkeshian's tenure, the County crafted somewhat informal, and problematic, exceptions to the formally adopted career ladder. However, the County's evidence, which was admitted by the Commission, was sufficient to support the Commission's findings and the findings support the Commission's

²(...continued)

he met the minimum qualifications due to his own lack of both an advanced degree and supervisory experience.

conclusion that the County's explanations for its decisions, and the irregularities that were present in its hiring procedures, were not pretextual.

Accordingly, we affirm the Commission's decision.

William A. Thorne Jr., Judge

WE CONCUR:

James Z. Davis, Judge

Carolyn B. McHugh, Judge