SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-00930

RICKY L. HAGGARD

APPELLANT

VS.

CITY OF JACKSON, MISSISSIPPI

APPELLEE

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY ARGUMENT

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S BREACH OF CONTRACT CLAIM.

Appellee begins its response by arguing that there was no formal employment contract between Appellant and Appellee. While this is true, it is irrelevant as Appellant has only contended on appeal that he was a third party beneficiary to the contract between Appellee and the federal government. Appellee also claims that the contract was not adopted to benefit Appellant or any other employee of Appellee. However, it cannot explain why it provided a specific salary for the project manager position in the contract. The only reasonable interpretation for this provision in the contract is that Appellee and the federal government intended to provide a benefit to a third party so that the main goal of providing enhanced emergency services to the public could be accomplished. Appellee also raises a statute of limitations argument if this Court determines that a valid contract existed between Appellee and Appellant. This argument is improper as it was not properly appealed to this Court by Appellee for review. Had Appellant been aware such an issue were subject for review Appellant would have added the transcript of the hearing on the motion to dismiss to the record so the issue could be properly reviewed. Additionally, even if the statute of limitations argument were considered it would not be valid. This is because Appellee did not receive the additional

monies to pay Appellant until 2006, which was referenced in the hearing on the motion to dismiss. Moreover, even if it was determined Appellee first breached the contract in 2003, Appellant's breach of contract claim would not be completely outside the statute of limitations as Appellee breached the contract on numerous occasions. Appellee normally paid Appellant bi-weekly. Because of this every two weeks Appellee breached the contract by failing to properly pay Appellant his full salary. As such, at a minimum Appellant's breach of contract claim would be able to go back three years from when he filed his claim on April 10, 2007, to collect his lost wages.

II. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S RACE DISCRIMINATION CLAIM.

Appellee claims that Appellant has not identified the policy or custom that caused the deprivation of his rights. However, a clear review of the record shows that Appellant has alleged a common policy of race discrimination that was adopted by Appellee's Fire Chief. Appellee has offered no response to *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), where the United States Supreme Court declared that one act by a policy-making authority is enough. Based on Appellant's affidavit he has provided more evidence than is even required under *Pembaur.* Appellee claims Appellant's affidavit "contains hearsay, conclusory statements and unfounded inferences." However, it cannot identify one statement that is hearsay, conclusory or unfounded. Appellee complains that Appellant only has his affidavit as evidence to support his factual allegations, but Appellee has offered

absolutely no evidence to contradict these factual allegations. As such, they are undisputed.

Finally, Appellee again improperly argues issues on appeal that were not properly appealed to this Court. Appellee claims Appellant has not proven a *prima facie* case of race discrimination. Appellant proved a prima facie case of race discrimination because he is black, was qualified for the position as he performed it for three years, suffered an adverse employment decision as he was demoted, and was replaced by a white individual. Appellee argues that Appellant has not suffered an adverse employment action because his pay was never cut. This is not accurate. As the project manager Appellant was entitled to a salary of $70,000.00 per year. When Appellant was demoted he was only entitled to his normal salary, which was approximately $35,000.00. Moreover, a loss in pay or other job benefits is not required for an adverse employment action. *Brown v. Cox,* 286 F.3d 1040, 1045 (8th Cir. 2002) (reassignment of nurse from surgical duties to supply room for "health reasons" deemed adverse, even though it did not result in reduction in pay); *Chuang v. University of Cal. Davis, Bd. Of Trustees,* 225 F.3d 1115, 1125 (9th Cir. 2000) (moving employees from their existing laboratory in the middle of an ongoing research project to a less desirable and insufficient location may constitute adverse employment action); *Moore v. Kuka Welding Sys. & Robot Corp.,* 171 F.3d 1073, 1080 (6th Cir. 1999) (management directed co-workers to shun plaintiff and ordered janitor not to clean his area; jury found acts to be adverse); *Mondzelewski v. Pathmark Stores, Inc.,* 162 F.3d 778, 786-87 (3rd Cir. 1998) (plaintiff meat

cutter who complained about his treatment of being given "punishment shifts," leaving no free time and requiring Saturday work was considered adverse employment action); *DiIenno v. Goodwill Indus. Of Mideastern Pa.,* 162 F.3d 235, 236 (3rd Cir. 1998) (adverse employment action found where employer transferred plaintiff to a position it knew would trigger a phobia in plaintiff); *Jeffries v. Kansas,* 147 F.3d 1220, 1231-32 (10th Cir. 1998) (adverse employment action found where plaintiff's supervisor threatened not to supervise her or to renew her contract, even though threat to discharge was not ultimately carried out); *Bryson v. Chicago State University,* 96 F.3d 912, 916 (7th Cir. 1996) (adverse employment action found where plaintiff lost in-house title of Special Assistant to Dean and banishment from committees that ran much of university's business).

In reality, it is Appellee who has failed in its burden to proffer a legitimate non-discriminatory reason for its actions. Although an employer's burden is only to articulate a legitimate non-discriminatory reason, there are some instances when an employer's proffered reason for discharge may be deemed insufficient. As the Supreme Court stated in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993), if the employee has established a *prima facie* case but the employer fails to meet its burden of production, by failing "to introduce evidence, which taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action," then the plaintiff is entitled to judgment as a matter of law. The Fifth Circuit has also concurred with this reasoning in

George v. Farmers Elec. Co-op, Inc., 715 F.2d 175, 177-8 (5th Cir. 1983). As argued earlier, Appellant has clearly proffered a *prima facie* case of race discrimination, and Appellee has not proffered a legitimate non-discriminatory reason for demotion Appellant. As such, summary judgment or judgment as a matter of law should be granted in Appellant's favor as to his race discrimination claim.

CONCLUSION

The Circuit Court was incorrect in granting Appellee's Motions to Dismiss and for Summary Judgment. As such, the Circuit Court's Orders granting the Motion to Dismiss and Motion for Summary Judgment should be reversed and remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nick Norris, attorney for Appellants, hereby certify that I have this day served, via United States Mail, First Class, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the following:

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CIRCUIT COURT JUDGE

This the 7th day of December, 2010

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