

BEFORE THE ALASKA STATE COMMISSION FOR HUMAN RIGHTS

ALASKA STATE COMMISSION FOR HUMAN RIGHTS, PAULA M. HALEY, EXECUTIVE DIRECTOR, *ex rel.* HARRY ROSS, Complainant, v. SOA, DCED, ALASKA RAILROAD CORPORATION, Respondent.

ASCHR No. R-99-080 OAH No. 08-0230 HRC

FINAL ORDER

In accordance with AS 18.80.130 and 6 AAC 30.480, the Hearing Commissioners, having reviewed the hearing record, now ORDER that the Administrative Law Judge's decision of July 15, 2009 is hereby ADOPTED by the Commission in its entirety. Accordingly, the complaint of Harry Ross v. SOA, DCED, Alaska Railroad Corporation alleging failure to promote based on his race, Black, in violation of AS 18.80.220, is DISMISSED.

IT IS SO ORDERED.

Judicial review is available to the parties pursuant to AS 18.80.135 and AS 44.62.560-570. An appeal must be filed with the superior court within 30 days from the date this Final Order is mailed or otherwise distributed to the parties.

DATED: March 3, 2010

Mark S. Fish, Commissioner

DATED: March 3, 2010

Faith M. Peters, Commissioner

DATED: March 3, 2010

Karen Rhoades, Commissioner

ALASKA STATE COMMISSION FOR HUMAN RIGHTS 800 A Street, Suite 204 Anchorage, Alaska 99501-3669 (907) 276-7474 FAX (907) 278-8588

CERTIFICATE OF SERVICE

I certify that on March 3, 2010, a true and correct copy of this Final Order was mailed or delivered to the following parties:

Lauri J. Owen, Attorney II  
Alaska State Commission for Human Rights  
800 A Street, Suite 204  
Anchorage, Alaska 99501 (hand delivery)

Respondent or Respondent's Representative  
William F. Mede  
Turner & Mede, P. C.  
1500 W. 33<sup>rd</sup> Avenue, Suite 200  
Anchorage, AK 99503

Administrative Law Judge  
Rebecca Pauli, Esq.  
Office of Administrative Hearings  
State of Alaska  
Department of Administration  
550 W. 7<sup>th</sup> Avenue, Suite 1600  
Anchorage, AK 99501

By: Margaret Taylor  
Margaret A. Taylor  
Commission Secretary

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

ALASKA STATE COMMISSION FOR HUMAN RIGHTS  
800 A Street, Suite 204  
Anchorage, Alaska 99501-3669  
(907) 276-7474 FAX (907) 278-8588

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
APPOINTMENT BY THE HUMAN RIGHTS COMMISSION**

Paula M. Haley, Executive Director, )  
Alaska State Commission for Human )  
Rights *ex rel.* HARRY ROSS, )  
 )  
Complainant, )  
 )  
v. )  
 )  
ALASKA RAILROAD CORPORATION, )  
 )  
Respondent. )

---

OAH No. 08-0230-HRC  
ASCHR No. R-05-080

**RECOMMENDED DECISION**

**I. INTRODUCTION**

This matter is before the Alaska State Commission for Human Rights (Commission) on remand from the Alaska Superior Court.<sup>1</sup> The complainant, Harry Ross, an African American, claims that the Alaska Railroad Corporation (ARRC) discriminated against him when it failed to select him to fill one of several newly created nonunion supervisory positions. Mr. Ross has failed to establish by a preponderance of the evidence that the ARRC's reason for not selecting him was a pretext for racial discrimination. Rather, the evidence establishes that it is more likely than not that Mr. Ross's failure to be selected was because of his poor interview. Accordingly, it is recommended that the Commission dismiss Mr. Ross's complaint against the ARRC. Mr. Ross was represented by Human Rights Attorney Caitlin Shortell; attorney William P. Mede represented the ARRC.

**II. PROCEDURAL BACKGROUND**

In the fall of 2004 the ARRC sought to fill nine newly created nonunion supervisory positions called trainmaster. On November 1, 2004, Mr. Ross was informed that he was not selected for one of the positions even though he met the minimum qualifications of the position

---

<sup>1</sup> *Ross v. State of Alaska, Human Rights Commission*, Case No. 3AN-07-6812 CI (March 10, 2008).

and had more seniority (years of service with the ARRC) than any other applicant.<sup>2</sup> All of the successful applicants were Caucasian males who also met the minimum qualifications of the position.

On November 19, 2004, Mr. Ross completed the ARRC internal Complaint of Discrimination. The ARRC commenced its internal investigation. Ouida Morrison, the ARRC's Equal Employment Opportunity (EEO) Manager commenced an investigation but no final determination was ever made.<sup>3</sup> She initiated the investigation by copying all members of the interview panel with an email requesting copies of their interview notes and an explanation of the interview process. At least one of the panel members replied via email copying the other panel members with his response which contained copies of his interview notes and his rationale.

As part of the internal investigation there was an attempt at reconciliation. The ARRC offered Mr. Ross a trainmaster position. Mr. Ross declined because he did not want to be working for someone who had discriminated against him and because he felt he would be leaving himself open to heightened scrutiny in his job performance.<sup>4</sup>

Having received no relief from the internal investigation, on April 22, 2005, Mr. Ross completed his Commission complaint:

I applied for the position to trainmaster with respondent. I am fully qualified for this position. On November 1, 2004, respondent notified me that it had awarded these six positions to Caucasian applicants with less seniority. I believe that respondent did not select me to this position because of my race.<sup>5</sup>

The Commission staff investigated Mr. Ross's complaint, applied the three part *McDonnell Douglas* burden shifting test, discussed below, and determined that his allegations were not supported by substantial evidence. His claim was dismissed. Mr. Ross appealed to the superior court, which concluded that the Commission committed an error of law when it dismissed Mr. Ross's complaint without conducting a thorough investigation, "specifically for failing to investigate Ross's response to the Railroads allegedly legitimate reasons for not hiring him."<sup>6</sup> The court noted that the Alaska Supreme Court has recognized that the

---

<sup>2</sup> November 1, 2004 is the date referenced in Mr. Ross's complaint.

<sup>3</sup> Hearing Exhibit 7.

<sup>4</sup> Testimony of Ross.

<sup>5</sup> Exhibit RES E at 2.

<sup>6</sup> *Ross v. State of Alaska, Human Rights Commission*, Case No. 3AN-07-6812 CI at 15 (March 10, 2008).

burden required to compel a hearing is less than the burden required to prevail on the merits at the hearing's conclusion ... Consequently, a staff or executive director finding of no substantial evidence cannot be based on the fact that a complainant 'failed' to meet the three part [burden shifting test] at the investigative stage. Nor should the staff or executive director attempt to determine at the investigative stage whether the non-discriminatory reasons proffered by the employer are legitimate.<sup>7</sup>

After considering evidence not presented to the staff or executive director, the court reversed the dismissal and remanded the matter, finding that "a *prima facie* case of discrimination exists and objective evidence creates a genuine issue of fact as to the Railroad[']s allegedly legitimate hiring decision. To adequately resolve these factual disputes, the commission must conduct a hearing ...."<sup>8</sup> This hearing followed.

### III. FACTS

The ARRC covers 651 miles of track serving communities from the Gulf of Alaska to Fairbanks.<sup>9</sup> As of December 2008, the ARRC had over 700 employees, the majority of whom belong to one of five unions.<sup>10</sup> The ARRC is divided into several divisions that are then separated into departments. The Transportation Department is the largest and conducts the most varied activities. Its workforce includes train dispatchers, brakemen, locomotive engineers, conductors and trainmasters.<sup>11</sup> Supervision of these employees has been a challenge for the ARRC.

In 2002, the ARRC created the Assistant Terminal Superintendent to supervise Transportation Department employees. This position ultimately took on more and more of the operation duties, leaving a void for supervising the train and engine crews. In 2004, the ARRC created the position of trainmaster. The trainmaster position would be a nonunion management position to work directly with train and engine personnel, supervising their performance, training, and certifications.<sup>12</sup>

The ARRC advertised for nine trainmaster positions (six in Anchorage, two in Fairbanks, and one in Talkeetna). The positions were open to current employees with a minimum 15 years

---

<sup>7</sup> *Ross v. State of Alaska, Human Rights Commission*, Case No. 3AN-07-6812 CI at 11 (March 10, 2008) quoting *State Dept. of Fish and Game v. Meyer* 906 P.2d 1365, 1376 (Alaska 1995).

<sup>8</sup> *Ross v. State of Alaska, Human Rights Commission*, Case No. 3AN-07-6812 CI at 15 (March 10, 2008).

<sup>9</sup> <http://www.akrr.com/arrc29.html>.

<sup>10</sup> <http://www.akrr.com/arrc29.html>.

<sup>11</sup> <http://www.akrr.com/arrc9.html>.

<sup>12</sup> Exhibit HRC 3.

of experience in train service and one year of supervising operations personnel.<sup>13</sup> Conductors supervise operations personnel.

The ARRC was looking for motivated, self-directed individuals who could make sound decisions under pressure and be effective in stressful situations. It also sought leadership, initiative, a commitment to safety and good people skills.<sup>14</sup> The ARRC expected trainmasters to be role models for the people they would be supervising. The successful candidate would need to recognize that he or she was leaving a union represented position where seniority was taken into consideration in the selection process and moving to a management position where seniority was not a factor taken into consideration in the selection process; the applicant would need to convince the panel that he or she was the best person for the job. The ARRC was looking for candidates who understood success would be measured on personal merit, not seniority.<sup>15</sup>

Because of the breadth of the trainmaster job, the ARRC utilized a broad based interview panel that would make recommendations to the Vice President of Operations, Matthew Glynn.<sup>16</sup> The panel was comprised of six ARRC management employees ranging from the recruitment manager to a new employee in the Safety Department. The panel members were: Pat Flynn, Manager, Special Projects;<sup>17</sup> Cheryl Evans, Manager, Recruitment; Curt Rudd, Anchorage Terminal Superintendent; Mike Olson, Fairbanks Superintendent; and Mark Turberville, Manager Safety Systems. Not all panelists attended all of the interviews, but all participated in Mr. Ross's interview. Mr. Olson and Mr. Rudd both knew and worked with Mr. Ross and the other applicants. Mr. Flynn had had some interaction with the applicants. Mr. Turberville and Ms. Evans had not worked with Mr. Ross. Mr. Turberville was new to the ARRC and was placed on the panel because of his role in the ARRC's safety program and because he had no prior knowledge of the applicants. He was intended to provide a fresh set of eyes and ears for the ARRC. Ms. Evans was placed on the panel because she was manager of recruitment and the personnel expert in the group.

---

<sup>13</sup> The trainmaster job description has undergone several revisions. As of 2007, the position's minimum requirements have been reduced to a minimum of three years of train and/or engine experience and one year of supervising operations personnel. Exhibit HRC 3 at 34 – 35.

<sup>14</sup> See generally Testimony of Curt Rudd, Pat Flynn, Cheryl Evans, Mike Olson, and Mark Turberville (collectively referred to as the Panel Members); Exhibit HRC 3.

<sup>15</sup> See generally Testimony of Panel Members; Exhibit RES F at 4.

<sup>16</sup> Testimony of Glynn.

<sup>17</sup> Mr. Flynn is now ARRC Assistant Vice President, Marketing, Sales and Service.

A list of interview questions was compiled. The original intent was to rank an interviewee's answer on a scale of 1 – 5. The panel members received no specific training or direction regarding the hiring or ranking process. The interview notes, if taken, were neither extensive nor detailed. Panel members had available for their review, should they choose to do so, an interviewee's disciplinary and attendance record. The panel members used the numerical scoring system of 1 -5 to rate interviewee answers in some, but not all questions and some, but not all interviews. Part way through the interviews, some of the team members abandoned the use of numerical scoring because they recognized that they were not using it consistently. They also realized that some questions were redundant and that the question order did not make sense, so they revised the questionnaire. At the end of each interview, they would discuss the interviewee and come to a consensus on whether the individual was a successful candidate. After all of the interviews were complete, the panel presented their list of successful candidates to Mr. Glynn, who approved the list without further review or interview.

Most applicants applied using the computerized application system. Some did not, including Mr. Ross and one of the successful applicants.<sup>18</sup> Seventeen applications were received from current employees who met the minimum qualifications, 15 were Caucasian (including one female) and two were African American. After the interviews were complete, the ARRC concluded that only six out of the 17 interviewees met the ARRC's criteria for a trainmaster and left three positions vacant. The six successful candidates were Caucasian males.

Four of the six positions were based in Anchorage and two in Fairbanks. Of the four Anchorage applicants, two had 29 years of service; one had 30 years of service and one 22 years of service, all less than Mr. Ross's 36 years of service. As testified to by the panel members, the 11 unsuccessful applicants were not selected because of their disciplinary history, poor interview performance, or because they wanted to be stationed in communities where there were no plans to locate a trainmaster.<sup>19</sup> Several of the candidates who were rejected based on their disciplinary record performed well in their interviews and would have been offered a trainmaster position were it not for their disciplinary record.

The panel members described how they were seeking candidates who understood the differences between their jobs in the union and their jobs as a nonunion supervisor and the

---

<sup>18</sup> Exhibit RES D.

<sup>19</sup> Exhibit RES J. The ARRC withdrew its plans for a Talkeetna trainmaster.

challenges that would pose. They were looking for candidates who displayed enthusiasm, passion and excitement about the new position. They also wanted individuals with a strong commitment to safety and who would inspire that commitment in others. As reflected in the interview notes, the successful Anchorage trainmaster interviewees conveyed that they were not fulfilled in their present positions and were looking for something more, had a work history that demonstrated a commitment to safety, and showed innovation in creating programs aimed at improving the workplace. Several had held leadership positions in the union. Their computer skills ranged from excellent to basic (Excel, e-mail, Word). They were described as being “engaged” in the interview process and sold themselves as the right person for the job.

Conversely, the panel members described Mr. Ross as being disengaged during the interview process. They described Mr. Ross’s answers as lacking detail, innovation or enthusiasm. In their view, he did not bring anything to the table other than his years of experience.<sup>20</sup> As with some of the successful interviewees, Mr. Ross’s computer skills were basic. When asked why he wanted the job, the panel members’ interview notes reflect that Mr. Ross was interested in the position because he had a new wife, liked working with people, and was qualified and looking for his “high three” for purposes of retirement.<sup>21</sup> While one team member found this answer “honest,” others found it indicative of Mr. Ross lack of interest in what he could do for the ARRC. Regardless, the panel members were unanimous in their conclusion that Mr. Ross did not interview well, he failed to sell himself, and he came across as though the interview process was a mere formality because he had the job if he wanted it. Mr. Ross testified that he was annoyed during the interview because Mr. Flynn arrived late, which he considered disrespectful.

Mr. Ross applied for the position after he was encouraged to do so by Mr. Glynn. Mr. Glynn testified that Mr. Ross, because of his longevity with the ARRC, had influence with other union members and did a good job with the younger employees.<sup>22</sup> Mr. Ross believes that he should have been awarded a trainmaster position because was the most qualified applicant based

---

<sup>20</sup> Testimony of Panel Members.

<sup>21</sup> The ARRC offers a defined benefit retirement based on an employee’s high three years. Only the base salary is a factor in the calculation, not overtime. Because Mr. Ross received overtime, he earned considerably more in his union position than he would as a trainmaster. However, because the base pay of a trainmaster exceeded his base pay as a represented employee, had he been selected for a trainmaster position, his retirement would have increased. Testimony of Evans; Testimony of Ross.

<sup>22</sup> Testimony of Glynn.



on his years of service, work history, and ability to relate to people. Facts known to panel members Olson and Rudd that they did not raise during the panel's consideration of Ross's application.<sup>23</sup>

In the 1980's Mr. Ross worked for over five years as a yardmaster. He testified that the duties of yardmaster and trainmaster are the same and this should have been taken into account in the hiring process. The duties of a yardmaster were to direct yard crews and supervise switching and building of trains.<sup>24</sup> The yardmaster also performed a variety of administrative duties including training and reporting. Mr. Ross mentioned he had worked as a yardmaster in his interview, but he did not explain how it was relevant to the trainmaster position. Mr. Ross is an entertainer and knows how to relate to people. He combined his knowledge of the entertainment world with his service at the ARRC to help bring about the popular Blues Train.<sup>25</sup> Mr. Ross and other ARRC employees have been included in several promotional videos.<sup>26</sup>

Mr. Ross and three other witnesses testified that they had been subject to or observed the use of racial epithets and discriminatory treatment over the years. One witness testified that as recently at 2000 he was called "nigger" by a coworker. Another witness, also African American, testified that like Mr. Ross, when he sought a promotion he was denied in favor of Caucasian males. Mr. Rudd was also involved in his hiring process and when he questioned his failure to be promoted, the witness testified that like Mr. Ross, he was told he did not interview well. This witness also testified that he designed a logo which was selected the winner in an ARRC contest, but when management found out that it was designed by an African American, the ARRC declined to use his logo. The third witness, a Caucasian male, testified that he observed a lack of equal opportunity for African Americans at the ARRC, noting the lack of African Americans in management in the Transportation Department.

Mr. Ross recalled the use of racial names in his early years at the ARRC and management's refusal to ride in the same car as him. He also testified that Mr. Rudd called him "Black Magic," which Mr. Ross found offensive. The ARRC's records regarding Mr. Ross's complaint do not mention Mr. Ross complaining of the use of racial epithets.

---

<sup>23</sup> Testimony of Panel Members.

<sup>24</sup> Hearing Exhibit 26; Testimony of Olson; Testimony of Ross.

<sup>25</sup> The Blues Train is a special train that travels round trip from Anchorage to Seward featuring live entertainment.

<sup>26</sup> Exhibit HRC 10, 11.

Mr. Rudd explained that the use of nicknames in the yard is common practice. He gave Mr. Ross the nickname “Black Magic” because Mr. Ross is black and his ability to bring the trains in on time and getting them out of a troublesome situation is “magic.” He said the name was not intended to be racial or derogatory.<sup>27</sup> Mr. Rudd recalled that he has been calling Mr. Ross “Black Magic” for several decades. Mr. Ross disputes that the name had been used over several decades but does agree that it was used before and after he was denied the trainmaster position. Mr. Rudd claims he heard Mr. Ross refer to himself as “Black Magic.” Mr. Ross denies this. Regardless, the name was never used in the interview process. Mr. Flynn, who had worked with Mr. Rudd, testified that he had never heard Mr. Rudd refer to Mr. Ross as “Black Magic.”

Regarding Mr. Ross’s interview performance, Mr. Rudd described Mr. Ross as not acting like himself. He knew Mr. Ross as outgoing and charismatic, characteristics not observed during the interview. Mr. Rudd did not expand upon his personal knowledge of Mr. Ross to the other panel members because he felt it was Mr. Ross’s responsibility to promote himself as the person for the job. Regarding the importance of computer skills in the selection process, Mr. Rudd testified that it was not something that would have stood in Mr. Ross’s way had he done a better job selling himself as the person for the job.

Mr. Turberville is no longer employed at the ARRC. He confirmed that because he was unfamiliar with the interviewees he was coming into the interviews “blind.” He took the lead in the interviews and asked the questions during the interview. Mr. Turberville explained that he ranked all the interviewees numerically because he thought it would be intimidating to the interviewees if he were to ask the questions and at the same time was taking notes.

Mr. Turberville could not recall all of the interviewees. He did recall that he considered Mr. Ross to be a weak candidate because Mr. Ross did not sell himself to the panel members. Mr. Ross left him with the impression that it was a done deal that he had the job. When asked to explain why he was left with this impression Mr. Turberville testified that it was Mr. Ross’s body language and that his answers were short and glib, with “almost a smirk, like why are we going through this.”<sup>28</sup> When asked about the importance of computer skills, Mr. Turberville responded that they were important to him but not a deal breaker.

---

<sup>27</sup> Testimony of Rudd.

<sup>28</sup> Testimony of Turberville.

Mr. Olson, at the time of hearing, had retired from the ARRC. He had been supervised by Mr. Ross. He knew Mr. Ross to be polite and professional, someone who performed his job well and knew how to get others to perform. Mr. Olson was surprised when Mr. Ross did not discuss these qualities during his interview. Like Mr. Rudd, Mr. Olson noted that during the interview Mr. Ross was not acting like the Harry Ross he knew. Also like Mr. Rudd, Mr. Olson did not raise these points with the other panel members because he believed it was an applicant's responsibility to promote himself as the right person for the job. Finally, Mr. Olson explained that the trainmaster and yardmaster were not the same position. The yardmaster was limited to the yard and the trainmaster was everything beyond the yard. The jobs entailed very different responsibilities.

Mr. Olson confirmed that the panel was not interested in ensuring racial diversity among the successful candidates. Rather, they wanted the best candidate for the job.

Ms. Evans testified that the consensus among the panel members was that Mr. Ross did not interview well. She wanted to hear the applicants tell her why they were qualified and why she should select them for the trainmaster position. She found it surprising that with Mr. Ross's years of experience he gave short terse answers to the questions.

After his interview, Ms. Evans was left with the sense that Mr. Ross wanted the trainmaster position because of how it would benefit him. She saw other applicants as coming to the interview with ideas of how things could be done differently; they saw this position as a way to effect change and had given thought to the job. Finally, Ms. Evans testified that she had been told that Mr. Ross had difficulty completing the Workplace Alaska form online, an allegation Mr. Ross denied. As with panel members Olson, Rudd, and Turberville, the lack of computer skills was not a deal breaker for her if the applicant had the motivation, and drive they were looking for.

Mr. Flynn testified that the goal of the interview process was to find the best person for the position. He did not recall arriving late to Mr. Ross's interview. He did recall that Mr. Ross interviewed poorly because Mr. Ross did not make an effort to convince the panel members that he was the best person for the job. Mr. Flynn characterized Mr. Ross's attitude as demonstrating "a union mentality" – that he would get the job because he was the most senior applicant. Mr. Flynn testified that Mr. Ross's computer skills were not a deal breaker although Mr. Flynn, in response to an inquiry during the internal ARRC investigation, wrote:

The scores I recorded were based on the answers candidates gave. For example, one candidate described himself as having basic computer skills but later I learned that, despite help from Human Resources personnel, he was unable to complete the on-line application and instead did it by hand. While this sort of thing doesn't appear in my interview notes, it certainly influenced my thinking as to a candidate's qualifications.<sup>29</sup>

#### IV. DISCUSSION

##### A. Legal Framework

It is unlawful for an employer to discriminate against a person because of the person's race, religion, color, or national origin.<sup>30</sup> In general, to prevail, Mr. Ross has the burden of proving each element of his claim by a preponderance of the evidence.<sup>31</sup> When determining whether a person has been discriminated against, the courts apply a three-part burden shifting analysis, although the ultimate burden remains with the complainant. The burden-shifting test is known as the *McDonnell Douglas* test, named after the case in which it was first articulated.<sup>32</sup>

Under *McDonnell Douglas*, the complaining party must first establish a *prima facie* case of discrimination. If the complainant is alleging discrimination because of race, religion, national origin, or a similar protected status, the complainant meets this burden by showing that (1) the complainant is a member of a protected class; (2) the complainant applied for and was qualified for a job for which the employer was seeking applications; (3) the complainant was rejected despite his or her qualifications and (4) the employer either left the position open while seeking more applicants with the same qualifications, or hired an individual not within the same protected class as the complainant.<sup>33</sup>

Once established, a *prima facie* case "raises an inference of discrimination" because it is presumed that, in the absence of explanation, a potential employee's rejection under these circumstances is "more likely than not based on the consideration of impermissible factors."<sup>34</sup> A

---

<sup>29</sup> Hearing Exhibit 7 at 56.

<sup>30</sup> AS 18.80.220(a)(1).

<sup>31</sup> AS 18 80.120(d); 6 AAC 30.440(a).

<sup>32</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Alaska adopted the *McDonnell Douglas* test in *Brown v. Wood*, 575 P.2d 760, 770 (Alaska 1978).

<sup>33</sup> *Raad v. ASCHR*, 86 P.3d at 904-5.

<sup>34</sup> *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

*prima facie* showing therefore “creates a presumption that the employer unlawfully discriminated against the employee.”<sup>35</sup>

Once a *prima facie* case of discrimination is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment action. To satisfy its burden, the employer “need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus.”<sup>36</sup> The reason must be one that existed at the time the employment decision was made.<sup>37</sup>

If the employer meets its burden of production, the burden shifts back to the complainant to show that discriminatory reasons were a more likely motive for the employer’s action than the explanation offered by the employer. This is ordinarily done by showing the employer’s reason or reasons to be a pretext for discrimination.<sup>38</sup>

A complainant can demonstrate pretext “either directly by persuading the [tribunal] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”<sup>39</sup> The Alaska Supreme Court recognizes that “there are generally three types of evidence used to show pretext: (1) direct evidence of discrimination; (2) comparative evidence; and (3) statistics.”<sup>40</sup> In a failure to hire or promote case, pretext may be established if the complainant can prove by a preponderance of the evidence that the complainant was the “clearly superior” applicant.<sup>41</sup>

Mr. Ross has established his *prima facie* case. He is African American, he met the minimum qualifications of trainmaster, he was denied the position, and all successful applicants were white males. The parties agree that the ARRC produced admissible evidence which would allow the trier of fact to conclude that the employment decision had not been motivated by discriminatory animus. Therefore, the case moves to the third step in the McDonnell Douglas analysis: to prevail, Mr. Ross must establish by a preponderance of the evidence that the

---

<sup>35</sup> *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

<sup>36</sup> *Raad v. ASCHR*, 86 P.3d at 905 (quoting prior authority).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Raad*, 86 P.3d at 904.

<sup>40</sup> *Raad*, *supra* at 905 (citing *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 462 (9<sup>th</sup> Cir. 1987)).

<sup>41</sup> *See, e.g., Raad*, 86 P.3d at 906.

ARRC's decision to not hire him into a trainmaster position was motivated by discriminatory reasons and that its explanation was pretextual.<sup>42</sup>

Mr. Ross asserts that direct and circumstantial evidence support a finding that the ARRC's proffered explanation is pretextual. Mr. Ross believes that the ARRC's failure to select him for a trainmaster position was part of a workplace culture where there has been a failure to commit to a genuine policy of equal employment opportunity. Mr. Ross asserts that the rationale offered by the ARRC—that it failed to select Mr. Ross because he did not sell himself during the interview—is an incredible, *post hoc* rational and that he possessed superior qualifications for the trainmaster position. In support of this contention, Mr. Ross relies upon the lack of African Americans in upper management in the Transportation Department, the alleged culture of discrimination at the ARRC, a selection process he views as flawed, the belief that he was clearly superior to any of the selected candidates, and the use of racial epithets. The ARRC argues that Mr. Ross has failed to establish by a preponderance of the evidence that he was not selected for a trainmaster position because he is African American. Rather, the ARRC argues that Mr. Ross was rejected based on legally permissible subjective criteria.<sup>43</sup>

B. *Mr. Rudd's Use Of The Nickname "Black Magic" Is Not Persuasive Evidence Of A Discriminatory Hiring Process*

Mr. Rudd readily admits that he gave Mr. Ross the nickname "Black Magic" because he was black and because Mr. Ross could perform "magic" with the trains. It is undisputed that the use of nicknames is common in the train yard. Mr. Rudd's testimony regarding the origins of Mr. Ross's nickname is credible. It is undisputed that once Mr. Ross informed Mr. Rudd he no longer wanted to be called "Black Magic," Mr. Rudd complied. Mr. Ross has not alleged nor has evidence been presented that Mr. Rudd referred to Mr. Ross by "Black Magic" in the interview or decisionmaking process. After listening to the testimony, I find the name, while racial, was not intended to be derogatory. I find Mr. Rudd's testimony credible. He testified with candor and did not attempt to "spin" his testimony. Mr. Ross has not presented evidence sufficient to establish that it was used in a derogatory manner.

---

<sup>42</sup> In failure-to-hire cases, the critical issue is the motivation for that rejection. *See, e.g., Arraleh v. County of Ramsey*, 461 F.3d 967 (8th Cir. 2006).

<sup>43</sup> *Risher v. Aldridge*, 889 F.2d 592, 597 (5<sup>th</sup> Cir. 1989) ("subjective criteria necessarily and legitimately enter into personnel decisions involving supervisory positions.").

Courts distinguish between comments which demonstrate discriminatory animus in the decisional process and those made by individuals closely involved in employment decisions, on the one hand, and stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process, on the other.<sup>44</sup> Here, we have a racially-related but non-derogatory comment made by a decisionmaker unrelated to the decisional process. Use of the name “Black Magic” in this context was not discriminatory.

The unchallenged testimony is that in the past, there had been racial epithets at the ARRC. The racial epithets were used years ago by people not associated with this hiring decision. This is not direct evidence of discrimination in Mr. Ross’s case. However, the use of racial epithets and “Black Magic” may be circumstantial evidence of a discriminatory attitude and will be considered in conjunction with the entire record in the analysis below.<sup>45</sup>

C. *Lack of African American Managers In The Transportation Department Is Not Persuasive Evidence of Disparate Treatment*

Mr. Ross claims disparate treatment. In such cases, the focus is on how and why an employer treated a particular individual the way it did. Statistical evidence of the employer’s general hiring practice is less probative in these cases because statistical evidence has little bearing on the specific intentions of the employer in making particular hiring decisions. The information offered by Mr. Ross is raw data and is offered without a complete analytical foundation. Therefore, it is of little if any probative or persuasive value.<sup>46</sup>

For this same reason, evidence offered through the testimony of Mr. Ross’s witness that neither he nor Mr. Ross was selected for a management position in the Transportation Department and that Mr. Rudd was involved in both hiring decisions, without more, is of little if any persuasive value. While Mr. Rudd was involved in both decisions, in Mr. Ross’s case there were four other decisionmakers and the panel’s impression was unanimous. Mr. Ross has not established that Mr. Rudd’s influence or choice of hire carried any more weight than another team member. The absence of African Americans in management positions in the

---

<sup>44</sup> *Arraleh v. County of Ramsey*, 461 F.3d 967, 975 (8<sup>th</sup> Cir. 2006), *cert. denied* 550 U.S. 904 (2007) *quoting Rivers-Frison v. Southeast Mo. Cmty Treatment Ctr.*, 133 F.3d 616, 619 (8<sup>th</sup> Cir. 1998) (discussing whether a prejudiced remark made at work supports an inference of discrimination).

<sup>45</sup> *Ross v. Rhodes Furniture Inc.*, 146 F.3d 1286, 1291 (11<sup>th</sup> Cir 1998).

<sup>46</sup> *See e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-502 (1989) (discussing the importance of a relevant representative statistical pool for purposes of demonstrating discrimination in hiring for positions requiring special qualifications.)

Transportation Department, without more, is not probative evidence that there was a pattern or practice of racial discrimination in hiring decisions made by the Transportation Department or Mr. Rudd in this instance.

D. *The Hiring Process, While Not Perfect, Was Not Discriminatory*

Mr. Ross's complaint that the ARRC failed to use objective criteria in its hiring decision is a nonstarter. He has presented no legal authority for his proposition that use of subjective criteria in a promotion decision is improper or *ipso facto* discriminatory.

The interview process was not perfect, but an imperfect process does not equate to discriminatory motive. It does, however, make the hiring process easier to attack. Mr. Ross admits that he was annoyed during the interview process. He felt that Mr. Flynn had not shown him the respect he deserved when he arrived late for the interview. Mr. Ross does not deny that he did not expand on the relevancy of his yardmaster experience to the position of trainmaster, nor does he deny the information contained in the panel members' interview notes regarding his interest in the job. Mr. Ross does not challenge Mr. Rudd's and Mr. Olson's testimony that the Harry Ross at the interview was not the Harry Ross they knew. Rather, he challenges why they did not share with the other panel members what they knew about Mr. Ross. I find that it was Mr. Ross's responsibility to expand upon his qualifications and he failed to do so.

The panel member's testimony regarding their expectations of interviewees and what they were looking for is reasonable and served a legitimate business purpose. It is supported by the trainmaster position description. Their concern about interviewees making the transition from union to a nonunion supervisory position is also reasonable and consistent with the history of the trainmaster position.

As evidence of a *post hoc* justification, Mr. Ross believes that the internal investigation process was flawed and provided panel members with an opportunity to get their stories straight. He believes the consistency in their testimony makes their testimony suspect. This is not a persuasive argument. I find it is more probable that the panel members testified similarly because their recollection is similar. I also find that their recollection of Mr. Ross's interview is more vivid than of other interviews, in part, because Mr. Ross's interview has been the focus of a complaint.

Regarding the weight given to Mr. Ross's answer regarding computer skills and the discrepancy in the record regarding his application process, because the successful candidates'



computer skills ranged from excellent to basic, I find that it is unlikely that this criterion was the deciding factor. Mr. Flynn was one of five panel members. I find that, for the Anchorage positions, Mr. Ross has not provided persuasive evidence that any one panel member's vote carried more weight than another's. While he may have focused on this aspect of Mr. Ross's qualifications, the evidence does not support a finding that this was a deal breaker. Rather I find that the panel members were more interested in an interviewee's attitude and that had Mr. Ross performed better in his interview, computer skills would not have been a determinative factor.

E. *Mr. Ross Has Not Established That It Is More Likely Than Not That He Possesses Superior Qualifications For The Trainmaster Position.*

Mr. Ross argues that his years of experience and experience as a yardmaster make him the clearly superior candidate for a trainmaster. The record does not support such a finding. First, I find, based on the credible testimony of Mr. Olson, that the duties of a yardmaster were not the same as a trainmaster. Second, I find Mr. Ross did not expand upon how this experience was relevant to the trainmaster position during his interview. Even if Mr. Ross's prior experience as a yardmaster rendered him better qualified for a trainmaster position, he cannot claim he possessed superior qualifications if he failed to make the hiring panel aware of those qualifications. Third, I find longevity was not a consideration in the hiring process. The panel hired based on merit. It is more likely than not that Mr. Ross's failure to be awarded a trainmaster position was due to the difference between hiring for a union position and hiring for a nonunion position.

Mr. Ross offers his involvement in the Blues Train as evidence of what he can do for the ARRC. The panel described how some of the applicants that they considered to interview well discussed programs they had been involved with to improve safety and operations. The Blues Train is retail oriented, whereas the panel was interested in ideas to improve operations. Therefore, Mr. Ross's involvement in the Blues Train is of little relevance to the operations position. Moreover, Mr. Ross does not seem to have explained to the panel any relevance that the Blues Train experience might have.

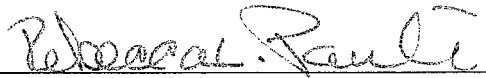
F. *When Viewed In Its Entirety, The Evidence Does Not Support A Finding That Discriminatory Reasons Were A More Likely Motive Than The Reason Articulated – Mr. Ross’s Poor Interview Performance.*

When viewed as a whole, the evidence is insufficient to support a finding that the ARRC’s failure to award Mr. Ross a trainmaster position was racially motivated. The past use of the racial epithets, the lack of African Americans in management in the Transportation Department and Mr. Ross’s seniority do not detract from the legitimate subjective factors relied upon by the hiring panel when selecting persons to fill the trainmaster positions. It is not the role of the fact finder to substitute its judgment for the business judgment of the hiring panel because to do so would render the fact finder a “super personnel department.”<sup>47</sup> Instead, so long as the hiring decision, whether right or wrong, has not been shown to be motivated by race, the decision should not be disturbed.

**V. CONCLUSION**

Mr. Ross has not established by a preponderance of the evidence that the Alaska Railroad Corporation’s failure to select him to fill a trainmaster position was motivated by his race. The record supports a finding that it is more likely than not that Mr. Ross interviewed poorly and that the Alaska Railroad Corporation’s hiring decision was supported by legitimate business considerations. I therefore recommend that the Commission dismiss Harry Ross’s complaint against the Alaska Railroad Corporation.

DATED this 15<sup>th</sup> day of July, 2009.

By:   
Rebecca L. Pauli  
Administrative Law Judge

**Certificate of Service:** The undersigned certifies that on the 15<sup>th</sup> day of July, 2009, a true and correct copy of this document was mailed to the following: William F. Mede, for the Respondent; Lauri Owen, Human Rights Attorney and Lt. Governor.

By:   
Linda Schwass/Kim DeMoss

<sup>47</sup> *Rabinovitz v. Pena*, 89 F.3d 482, 487 (7<sup>th</sup> Cir. 1996) (complainant’s prior experience is a relevant factor, but it is not the only factor).