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## Document (1)

1. [Flowers v. Penn, 2021 U.S. Dist. LEXIS 255297](#)

**Client/Matter:** -None-

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## Flowers v. Penn

United States District Court for the Eastern District of Arkansas, Central Division

June 1, 2021, Decided; June 1, 2021, Filed

No. 4:18-cv-577-DPM

### Reporter

2021 U.S. Dist. LEXIS 255297 \*; 2021 WL 7541765

DA'VETTA FLOWERS, PLAINTIFF v. KENDALL W. PENN, Major General, Adjutant General for the State of Arkansas, DEFENDANT

**Prior History:** [Flowers v. Penn, 2021 U.S. Dist. LEXIS 2577 \(E.D. Ark., Jan. 7, 2021\)](#)

### Core Terms

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hiring, improvement plan, retaliation, human resources

**Counsel:** [\*1] For Da'Vetta Flowers, Plaintiff: [Michael J. Laux](#), LEAD ATTORNEY, [Laux Law Group](#), Little Rock, AR; Austin Porter, Jr., Porter Law Firm, Little Rock, AR.

For Kendall W Penn, Major General, Adjutant General for the State of Arkansas (originally named as Mark Berry), Defendant: Brittany Nicole Edwards, William C. Bird, III, LEAD ATTORNEYS, Arkansas Attorney General's Office, Little Rock, AR.

**Judges:** D.P. Marshall Jr., United States District Judge.

**Opinion by:** D.P. Marshall Jr.

### Opinion

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#### ORDER

1. The Arkansas Military Department handles all matters

relating to the command, control, and supervision of the military organizations under the Governor's jurisdiction. Flowers joined the Directorate of State Resources, an administrative division of the Department, as an assistant personnel manager in 2008 or 2009. She was promoted to personnel manager in 2015. During the last few years, the Department declined to promote her further, placed her on a performance improvement plan, and gave her a low performance evaluation. Flowers is a black woman, and she says the Department acted out of racial discrimination and retaliation in violation of Title VII and the Arkansas Civil Rights Act. Flowers also claims that the Department's actions [\*2] violated the Arkansas Whistleblower Act. The Department seeks summary judgment, while Flowers seeks a trial. She also requests a hearing on the motion for summary judgment. The parties' extensive briefs, and the full written record, adequately inform the Court, though. Plus, this motion needs resolution now. The Court takes the material facts, where genuinely disputed, in Flowers's favor. [Oglesby v. Lesan, 929 F.3d 526, 532 \(8th Cir. 2019\)](#).

2. Flowers's first charge of discrimination maintained that she was overlooked for promotion to human resources administrator in August 2017 because of her race and her participation in an EEO investigation. The Court analyzes Flowers's race-discrimination and retaliation claims under Title VII using the familiar

*McDonnell Douglas* framework. [Lucke v. Solsvig, 912 F.3d 1084, 1088 \(8th Cir. 2019\)](#). The Court assumes Flowers has made a *prima facie* case on both claims.

The Department has offered a legitimate, nondiscriminatory reason for not promoting Flowers in this instance. [Hilde v. City of Eveleth, 777 F.3d 998, 1004 \(8th Cir. 2015\)](#). The Department wanted to hire a human resources administrator who could repair its relationships with the Department of Finance Administration and the Office of Personnel Management, and who had helped write the new Arkansas Administrative Statewide Information System policies the [\*3] Department planned to implement. *Doc. 44 at ¶¶ 50-55*. Abbi Bruno, the Department's choice, checked these boxes. Flowers did not. The Department's priorities are legitimate and support Bruno's hiring. [Krenik v. County of Le Sueur, 47 F.3d 953, 960 \(8th Cir. 1995\)](#). The August 2017 claims thus come down to pretext.

There are several genuinely disputed facts on whether Porterfield's decision to hire Bruno was pretextual. There's conflicting evidence about whether the Department's rapport with other state agencies had deteriorated or that the new human resources administrator would have to salvage those relationships. Reasonable people could also disagree, based on the current record, that Bruno had any more expertise with the Arkansas Administrative Statewide Information System policies than Flowers. Further, Flowers was eligible for additional points under the veteran's preference policy, while Bruno is a non-veteran. That the human resources administrator position required neither a bachelor's degree nor a master's degree — two qualifications Flowers possessed that Bruno lacked — raises an eyebrow. So does the alleged manipulation of the Department's emergency hiring process. And the checkered relationship between Porterfield and Flowers — including [\*4] Blessing's testimony that Porterfield

sought to "get rid" of Flowers — supports Flowers's claims. The competing proof about Bruno's hiring should be sorted by a jury.

3. Flowers's second charge of discrimination asserted that she wasn't selected as a human resources administrator in June 2018, and was disciplined in October 2018, in retaliation for her prior EEOC charge. But Flowers hasn't made a *prima facie* case of discrimination on these claims. Scott Stanger joined the Department as director of the Directorate of State Resources in March 2018. Bruno resigned. Stanger headed up the second selection process for the human resources administrator position. Michelle Young-Hobbs was the highest-ranked applicant; Flowers was fourth. The Department hired Young-Hobbs, who is also a black female. There's no evidence that Stanger, or any other member of the hiring panel, was aware of Flowers's 2017 EEOC charge during the hiring process. Stanger learned about Flowers's earlier protected activity when this lawsuit was filed. Though she argues flaws in the hiring panel's approach, Flowers hasn't offered sufficient evidence to support a verdict that her protected activity was the but-for cause [\*5] of Young-Hobbs's hiring. [Smith v. Riceland Foods, Inc., 151 F.3d 813, 818 \(8th Cir. 1998\)](#); [Talley v. United States Postal Service, 720 F.2d 505, 508 \(8th Cir. 1983\)](#). Flowers also hasn't offered sufficient proof that her protected activity was the but-for cause of the disciplinary she received from Young-Hobbs in October 2018. Young-Hobbs, like Stanger, knew nothing of Flowers's earlier EEOC Charge at the time. The record supports no causal connection between the discipline Flowers received and her prior complaints. [Riceland Foods, 151 F.3d at 818](#); [Talley, 720 F.2d at 508](#).

4. Flowers's third charge of discrimination alleged that she was placed on a performance improvement plan in April 2019, and received a low annual performance evaluation in June 2019, in retaliation for filing this

lawsuit. *McDonnell Douglas* applies, [Solsvig, 912 F.3d at 1088](#), and the Court assumes that Flowers has made a *prima facie* case.

The Department has offered legitimate, non-discriminatory reasons for the challenged actions. [Hilde, 777 F.3d at 1004](#). Ahead of the performance improvement plan, the Department identified in Flowers behavior unbecoming of an employee, periodically substandard work, violations of leave policy, and follow-up and initiative issues. The performance improvement plan provided specific objectives and planned meetings to help Flowers improve in these deficient areas. *Doc. 47 at 59-61*. In August 2019, Young-Hobbs concluded [\*6] that the performance improvement plan had been satisfied and Flowers's improvement was noted and appreciated. The Department has offered proof that explains Flowers's June 2019 performance evaluation on similar grounds. *Doc. 47 at 62-64*. This review was the first time Young-Hobbs had evaluated Flowers. Her evaluation outlined specific deficiencies consistent with Flowers's performance improvement plan and prior disciplinary issues, supporting Young-Hobbs's decision to give Flowers an overall rating of "Development Needed". The 2019 retaliation claims thus come down to pretext.

Flowers says that Young-Hobbs manipulated the performance improvement plan criteria and falsified Flowers's paperwork. There were two alleged breaks from protocol: there were no witnesses present for the counseling; and Young-Hobbs sat on the discipline form for about a month. Flowers highlights these breaks, and possible inconsistencies in dates, to hint that Young-Hobbs made up events that never actually happened. That's speculation. The performance improvement plan outlined Flowers's deficiencies in certain areas and how to improve them. After Flowers completed the plan, Young-Hobbs noted her improvement. In [\*7] addition, Flowers doesn't address the Department's explanation

of the performance evaluation claims. Taking the evidence in the light most favorable to Flowers, she hasn't carried her burden to create a jury issue about pretext on her 2019 retaliation claims.

5. Last, Flowers concedes that her Arkansas Whistle-Blower Act claims, [Ark. Code Ann. §§ 21-1-603\(a\)\(1\) & \(c\)](#), can't be pressed here as a matter of law, *Doc. 62-2 at 2 n.2*. Because the Act doesn't specifically waive the sovereign immunity of public employers, her whistleblower claims are barred by the [Eleventh Amendment. Faibisch v. University of Minnesota, 304 F.3d 797, 800 \(8th Cir. 2002\)](#).

\* \* \*

The Department's motion for summary judgment, *Doc. 42*, is partly granted and partly denied. Flowers's race discrimination and retaliation claims arising from her August 2017 non-promotion will be tried. The Court dismisses Flowers's other discrimination claims with prejudice. Her state law whistleblower claims are dismissed without prejudice. The Court must try older cases the week of 9 August 2021. The Scheduling Order, *Doc. 38*, is therefore suspended. A Fourth Amended Final Scheduling Order will issue. Unopposed motion to extend the motions *in limine* deadline, *Doc. 73*, denied as moot.

So Ordered.

/s/ D.P. Marshall Jr.

D.P. Marshall Jr.

United States District [\*8] Judge

1 June 2021

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