Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev.14 September 2011

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am a sole practitioner. I occasionally serve as co-counsel or assist other attorneys on large cases, but my current caseload consists entirely of matters that I handle alone.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1995; BPR #17400

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I was admitted to the Kentucky bar in 1999, and my membership number is 87413. Although licensed to practice law in Kentucky, I did not appear as counsel of record in any Kentucky courts. After I returned in November 2009 from my second deployment to Iraq, I learned that my "active duty/military-inactive" status only waived the annual CLE requirement, but had not excused me from Kentucky bar dues during my absence. I decided to allow my license to lapse rather than incur penalties and the retroactive and ongoing expenses for maintaining a Kentucky license that I have never actually used.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

See response to #3.

5. List your professional or business employment/experience since the completion of your

legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

August 1994-September 1995: **The Honorable Danny J. Boggs, United States Court of Appeals for the Sixth Circuit, Louisville, KY.** *Judicial Clerk.*

My Sixth Circuit appellate clerkship was an immensely rewarding experience that honed my analytical and writing skills. Judge Boggs is renowned for his "test" that is administered to clerkship candidates, and that prerequisite reflects his attention to detail and breadth of knowledge, qualities that he passes on to his clerks. As a clerk, I researched key issues, prepared detailed legal memoranda ("bench briefs"), and drafted opinions under the close guidance of the judge.

Because Judge Boggs is notorious for red-lining the proposed decisions of his fellow judges, we were required to produce a work product that was flawless in reasoning and execution. We were given broad latitude in our assignments, though, and Judge Boggs encouraged his clerks to write with creativity and precision. While Judge Boggs alone decided each case's outcome and legal rationale, individual clerks contributed significantly to the finished product.

This clerkship also gave me considerable insight into the judicial decision-making process, skills that I have used in my practice and that I hope will help guide me if elevated to the bench.

December 1995 – December 1997: **Manier, Herod, Hollabaugh & Smith, Nashville, TN.** *Associate, Litigation.*

Although hired into the firm's construction law section, I was able to work in numerous areas under the tutelage of several experienced attorneys. Some notable cases include:

- challenging a company's use of a Tennessee statute to avoid soliciting competitive bids on school construction projects
- defending a university against claims that it discriminated in dropping a student from a graduate program
- overturned an arbitration award on the basis of a panelist's misconduct
- successfully arguing that a corporate reorganization revived a long-dormant "gold clause" that required a lease to be paid in gold coins, increasing the rent paid on a commercial building nearly a hundred-fold; the case went to the Supreme Court twice
- defending the general contractor of a bridge that collapsed during construction
- appealing an employment classification before the workers' compensation board
- defending a municipality against claims that police officers used excessive force and caused a fatal seizure
- drafting two state appellate briefs and a petition for certiorari to the U.S. Supreme Court
- obtained pull payment of sums owed to a small graphic design firm, plus interest and attorneys fees

When several attorneys left Manier Herod to start their own boutique firms, I was offered positions with two of the new firms, as well as asked to stay on at Manier. Because I felt a great deal of loyalty to clients on three large pending cases that now had become dispersed among the three entities, I started a solo practice and was hired by each of the three firms.

JANUARY 1998 – DECEMBER 2002: **Solo practitioner, Nashville, TN.**

My solo practice began as a way to continue representing clients after Manier Herod's restructuring, and other Nashville firms were my primary clients for the first few years. I gradually transitioned into working for my own clients. After the attacks of September 11, 2001, it became clear that my position as a military policeman in the Tennessee National Guard would likely result in activation, as my unit was repeatedly put on varying levels of alert. In 2002, I was even mobilized for a short stint for performing homeland security in Smyrna as part of Operation Noble Eagle. Around that time, I started winding down my practice and taking cases with shorter timelines (like amicable divorces), and prepared to be called to active duty.

MAY 2004 – MARCH 2007: **Snappy Sales LLC, Nashville, TN.** ***General Counsel / COO.***
While home on military leave in 2003, I learned a close friend was starting an eBay-drop off store. She asked me to draft an e-consignment agreement, which was completed in a computer trailer in the southeastern corner of Iraq. She subsequently decided to franchise her business, and I was hired as legal counsel. The law at that time regarding internet auctions was not well defined, and we faced many challenges and uncertainties, such as appearing before the Tennessee Auctioneer Commission. I had limited experience in corporate and transactional matters, so I had to learn franchise law on the job in order to prepare a standard Franchise Agreement and file timely Uniform Franchise Offering Circulars.
In short order, I supervised franchise registration in twelve states, created policies to protecting the franchisor's intellectual property, and ultimately dealt with legal issues arising from franchise locations and online sales in 26 states. My duties included personally conducting training in legal issues for each of our franchisees as part of their orientation. In addition to advising the CEO, I served as our franchisees' legal resource for a variety of legal issues that arose in this new industry, as well as typical business matters such as employment practices, leases, taxes, and insurance. The eighty-hour work weeks were exhausting but satisfying.
Snappy Auctions quickly grew from four to sixty-two locations with gross monthly sales of $1 million. When Snappy Auctions expanded into Japan, I oversaw and negotiated the international franchise agreements. I supervised the preparation of the required annual audited financial statements, which required that I become familiar with Generally Accepted Accounting Principles. As my role expanded into operations, I was appointed COO, in which capacity I formulated and monitored performance metrics, monitored compliance with franchisor policies, and performed on-site compliance audits. When a new CEO was brought in that had a different vision for the company, I decided to return to my solo practice.

APRIL 2007 – NOVEMBER 2008: **Solo practitioner, Nashville, TN.**

It became obvious that my National Guard unit would again be activated for overseas duty again within two years. Both of my parents had recent health scares but were now enjoying a period of relative health, so I rejoined the 267th MP Company for an early deployment, in the hopes that I would be back before anything serious occurred. In the interim, I again took smaller, short-timeline cases and worked on various projects for other attorneys.

MARCH 2010 – MAY 2011: **Malcap Mortgage LLC, Brentwood, TN.** ***General Counsel.***
After returning from my second tour in Iraq, a friend asked me to help defend his mortgage company against a FLSA lawsuit. We soon learned that the company had additional legal and business issues, partly because the company had undergone rapid growth, as well as the advent of new state and federal regulation. I was hired as general counsel to support and coordinate the FLSA defense with outside counsel, as well as to firm up general business matters like rewriting the employee handbook, drafting personnel agreements and a FLSA-compliant compensation plan, and ensuring strict regulatory compliance. Unfortunately, the combination of the dramatic downturn in the real estate market and the costs of defending the lawsuit led to the company's decline and closing.

JUNE 2010 – PRESENT: **Solo practitioner, Nashville, TN.**
Since that time, I have returned to my solo practice but with an eye toward new opportunities and challenges, such as this judgeship.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The major areas of law in which I currently practice are: commercial litigation (30%), business advising (20%), construction and mortgage disputes (20%), family law (20%), and appeals (10%).

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about

whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

In the 16 years that I have been licensed to practice law, I have enjoyed an extremely diverse legal practice, partly because I enjoy the challenge of mastering new areas of law, and partly due to my role as general counsel to two businesses facing a changing legal landscape. Litigators are frequently required to swiftly become knowledgeable in arcane areas of law or business; this is particularly true for solo practitioners whose clients insist upon being represented by the same person that they have come to trust, even in new areas of practice. The following is an attempt to illustrate the breadth and depth of my legal practice.

As a sole practitioner, I have appeared before General Sessions, Circuit or Chancery court in five state judicial districts, both civil and criminal. Although I generally refer criminal matters to attorneys that specialize in that area of law, I have personally defended eight clients in criminal cases, including two successful trials in General Sessions courts in Davidson and Wilson Counties.

Largely due to my experience as a judicial clerk for a Sixth Circuit judge, I have submitted briefs or appeared before the Courts of Appeals for the Fourth, Sixth and Eighth Circuits, had primary responsibility for writing briefs seeking or opposing certiorari by the United States Supreme Court three times, as well as filed numerous appellate briefs in Tennessee, both as attorney of record and in the employ of other attorneys. Much of this work was performed as a member of a legal team, although I was usually the primary author of such works.

When bankruptcy issues arose in the course of representing commercial clients, I have appeared before the Bankruptcy Courts of the Western District and Middle Districts of Tennessee. In the latter, I was able to obtain discharge under Chapter 7 for an insolvent television producer despite opposition by several creditors and it being my first bankruptcy filing; in the former, I was able to force a debtor who was abusing the bankruptcy system into involuntary liquidation (the first attached writing sample is from that case).

As part of my construction law practice, I have represented large general contractors, small subcontractors, homeowners, and employees. I have pursued these cases in chancery and circuit court, as well as arbitration proceedings, both as co-counsel and as a solo attorney. Most of these cases were resolved well before trial, either through a negotiated settlement or after formal mediation or arbitration.

I have practiced and appeared before government and regulatory boards such as Metropolitan Nashville Board of Zoning Appeals, the Auctioneer Licensing Board, Workers Compensation Classification Board, and the Tennessee Department of Financial Institutions, each time on my

own.

Although I do not claim to specialize in family law, I have represented clients or served as co-counsel in roughly twenty divorces, custody disputes, juvenile court hearings, and emancipation actions. I represented clients who were accused of wrongdoing by the Department of Childrens' Services and was able to get the charges dropped. Although the same legal issues tend to arise in many custody disputes and post-divorce actions, the unique facts of each case require an attorney, as well as a court, to view them with an open mind and great diligence. Family law cases have been some of my most emotionally challenging cases, but also the most rewarding.

Although I never intended to practice corporate or transactional law, a recent count revealed that I have created approximately 600 business documents in my capacity as general counsel and solo practitioner. My experience in litigation has influenced my drafting of business documents, and thus far I have never had a document be the basis for a lawsuit.

In my role as a sole practitioner, I was the final decision-maker on legal matters.

In my positions as general counsel, I frequently collaborated with outside attorneys or consulted professional colleagues for advice. Similarly, much of my work was performed at the behest of or with the assistance of corporate officers. Nonetheless, in almost every instance I was the final decision-maker on legal matters. My philosophy as to how to avoid sleepless nights agonizing over these decisions was to instead spend those late hours researching the law and reviewing the facts and documents of each matter.

I intend the employ the same approach if I am appointed to this position.

9. Separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Last month I completed civil mediation training with the Nashville Conflict Resolution Center, I am now in the process of finishing the required mediation observations and co-mediations, after which I will apply in November in order to become Rule 31-certified by January 2012.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I was appointed guardian *ad litem* to an elderly hospital patient over the July Fourth weekend. Her family felt that the state-run nursing home was not providing proper care, so after she became fully incapacitated, she was transferred to a prominent Nashville hospital. The patient faced from daunting medical challenges, and the inability of the family and the medical providers to agree on a course of action prevented her from receiving prompt or decisive treatment.

After visiting my client in the hospital, reviewing the medical records from her 20 years under state care, and meeting with the hospital staff and her family, I was able to help them agree on a course of treatment. She passed away peacefully not long after, without suffering or family discord.

This case was a sobering example that the traditional adversarial system of justice may not produce an appropriate in all contexts. It was also a reminder of the powerful role we can play as attorneys, and that even what may appear to be a "small" case, to those involved, the issues are literally of life-or-death importance.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

One of my most rewarding legal experiences was perhaps the most unusual: in the late 1990s, I helped defend a student against allegations of sexual assault brought before one of Vanderbilt's Student Conduct Boards. The adjudicative process of a private university is not subject to traditional judicial protections, especially the prohibition on my attendance at the hearing. After weeks spent gathering evidence establishing the student's innocence, I needed to coach my client, his faculty representative, and his father to conduct direct and cross-examination of witnesses (whose identities were not disclosed prior to the hearing) and introduce evidence. Not only was the student completely exonerated after a twelve-hour hearing, but his accuser was ordered to take an immediate leave of absence or face prosecution for bringing the false allegations.

Another non-traditional legal representation that is worthy of mention involved a long-time property owner in East Nashville whose neighbors protested his proposed commercial development. Despite obtaining all required permits for such use, self-appointed neighborhood advocates tried to block his development through litigation and generating public opposition. In addition to representing him *pro bono* before the Zoning Appeals Board, I represented him at a volatile community meeting, where we were able to marshal the support of a until-then silent

majority, revealing the opposition to be a very vocal minority. After several negotiating sessions with neighborhood leaders, we were able to craft a compromise agreeable to both sides.

Finally, several years ago I represented a man who had been sentenced to life in prison as a teenager. After almost three decades of incarceration, he had become a model prisoner and his sentence was commuted by Governor Alexander. When his probation officer retired, a bureaucratic error resulted in my client being imprisoned for violating his probation. The standard for reversing a revocation of probation is quite onerous, and almost any evidence will support the decision to revoke. Revocation hearings are held before a corrections official at the prison and are not constrained by any rules of procedure or evidence. After weeks of wading through documentation and with the help of many character witnesses from the community, we were able to convince the state board to reverse the decision of the probation officer and release my client.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Vanderbilt University Law School, Nashville, TN, Juris Doctorate, 1994.
I was on the Dean's List each year, finished with a cumulative grade-point average of 3.53, and participated on the Jessup International Moot Court Team. I served as a member of the Faculty Curriculum Committee, as well as the Dean's *Ad Hoc* Committee on First-Year Writing. I was also Editor-in-Chief of the law school newspaper, *The VLS Brief* (which was more time-consuming and interesting than it sounds).

Duke University, Durham, NC, A.B. 1986. Double Major: Public Policy Sciences and Chemistry, with concentration in biochemistry.
I was elected Vice-President of the Public Policy Science Majors Union, and served as a chemistry tutor with the Office of Minority Affairs. I carried an overload of at least one extra course every semester except for my first and last, and was one course short of

completing the requirements for a third major in history. Throughout my time at Duke, I worked at least two jobs in order to support myself.

Cumberland University School of Public Service Management, Lebanon, TN, M.P.S.M. Candidate.
I am now pursuing a Masters of Science in Public Service Management, with a projected graduation date in June 2013.

PERSONAL INFORMATION

15. State your age and date of birth.

47

April 11, 1964

16. How long have you lived continuously in the State of Tennessee?

Except for my two deployments to Iraq, I have lived in Davidson County, Tennessee continuously since September 1995.

17. How long have you lived continuously in the county where you are now living?

See #16

18. State the county in which you are registered to vote.

Davidson County

19. Describe your military Service, if applicable, including branch of service, dates of active

duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Since January 16, 1990, I have been a member of the Army Reserves and/or National Guard continuously for the last 21 years, and I am scheduled to retire as a Staff Sergeant (E-6) on January 20, 2012. During my time of service, I have been twice called to active duty in Iraq as a member of the 267th Military Police Company based in Dickson, Tennessee, from December 2002 until March 2004 and again from November 2008 until November 2009. I was awarded an Army Commendation Medal for each tour of duty. I have also been awarded the Iraq Campaign Medal with two Campaign Stars, three Army Reserve Components Achievement Medals, two National Defense Service Medals, two Armed Forces Reserve Medals with M Device and Bronze Hourglass, a Non-Commissioned Officer Professional Development Ribbon, two Overseas Service Ribbons, two Reserve Components Overseas Training Ribbons, and the Army Service Ribbon.

Although my service has entitled me to these awards, the most important accolade is that none of the soldiers under my care or in my platoons ever received serious injuries, despite the very challenging conditions of service.

I originally enlisted in the Army Reserves at the age of 26, the year before I began law school. I felt that since I and my family had enjoyed the fruits of freedom in the united States, I should repay that debt with my service. Knowing that I would soon be inhabiting law libraries and office buildings for my career, I selected the military specialty as far from the legal field as possible, in the infantry (11B).

At Basic and Advanced Individualized Training at Fort Benning, GA, I was named Soldier of the Cycle and held the rank of Private First-Class. My first reserve unit was in Gettysburg, Pennsylvania with a mechanized infantry unit, but when I came to Nashville for law school, I was put in the Dickson National Guard unit as a mortarman (11C), the closest analogue to 11B.

In 1993, when I was still in school at Vanderbilt, the Dickson unit was reclassified as military police. The entire unit was sent to MP school in May, during my law school exams – I still remember smuggling "Law In A Flash"® cards into some of the less engaging Army classes. A Secret or Top Secret security clearance is required to be an MP, which I possess.

In the Army, I have received specialized training as a Bradley Fighting Vehicle Commander, an MRAP (Mine Resistance Ambush Protected Vehicle) driver, a Combat Lifesaver, and in operating a small arsenal of weapons. I have served as an instructor for hundreds of classes, at the team, squad, platoon, company, and battalion level.

The National Guard has enabled me to travel to some unique places, including training missions in the Panama Canal Zone, Honduras, Bulgaria (where I acted as a translator due to a working knowledge of Russian), the National Training Center in the Mojave Desert, and of course Iraq and Kuwait.

My first deployment was as a team leader of a rifle squad. Our company was one of the first, if not the first, National Guard unit to cross the Iraq border once hostilities began. Our primary mission was to establish a major interment facility, which became Camp Bucca, the largest enemy prisoner of war camp in Iraq. Camp Bucca was located in a remote southeastern corner of Iraq, and our living conditions were spartan and bleak.

Without lapsing into lengthy and potentially boring Army-speak, my platoon handled

camp and compound security, performed convoy and prisoner escorts, and served as the Quick Reaction Force for emergencies and riot-control duties. At times we transported prisoners across dangerous stretches of territory, captured escapees, and dealt with the lack of equipment and direction that characterized the early days of the occupation of Iraq.

It is a testament to our leadership and individual soldiers' character that not a single complaint of improper conduct was made against the 267th M.P. Company, despite dealing with tens of thousands of enemy prisoners of war, quelling half a dozen riots, and traveling thousands of miles throughout Iraq. Like thousands of Tennessee soldiers before us, we did our duty, with honor.

My second deployment was as a team leader of a Police Transition Team that trained, mentored, and supervised Iraqi Police operations in Baghdad and the surrounding area, including Abu Ghraib province. My platoon and squad performed over 100 missions outside of the wire, without serious injury or death. To accomplish these duties required a great deal of interaction with the Iraqi people, and my platoon received specialized training in cultural awareness, asymmetric warfare and intelligence gathering. Even as the military reduced its profile and presence in Iraq, my platoon continued missions throughout Baghdad, with limited support. We were again fortunate to return home safely, due to the vigilance, determination and teamwork of every member of our platoon.

This year I was honored to assist in training a unit deploying to Afghanistan for record, an experience both humbling and motivating.

Having fulfilled my professional goals in the National Guard, I am retiring on January 20, 2012.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

In 1998, I was the plaintiff in a personal injury lawsuit brought in Fulton County, Georgia after being struck by a drunk driver. The case was handled by a local personal injury lawyer, and I enjoyed the luxury of not participating in the case in an official legal capacity. I do not have any of the pleadings and do not recall the defendant's name or the docket number. The case was settled out of court for approximately $30,000.

In 2001, I sued a former client in Davidson County Chancery Court for unpaid attorneys fees (Case # 01-2410-II, Heacock v. Laxmi Hospitality Group, LLC et al.). That case was also settled out of court.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Member, Tennessee Enlisted Soldiers Association
Co-founder, Tennessee Sentinels of Freedom
Judge, Center for Civic Education *We the People* program

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Member, Nashville Bar Association, 1995 to present (except when deployed in 2003 & 2009)
Member, Nashville Bar Association Young Lawyers Division, 1996 to 2002
Member, Tennessee Bar Association, 1996 to present (except when deployed in 2003 & 2009)
Member, Kentucky Bar Association, 1999 to 2008

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional

accomplishments.

In 2002, I was inducted as a Fellow into the Nashville Bar Association Young Lawyers Division after several years as editor of their newsletter *OYEZ*. The publication won several awards during that time.

I was selected to be a member of the Tennessee Bar Association Leadership Law Program Class for 2010.

30. List the citations of any legal articles or books you have published.

J. Michael Franks and John W. Heacock, Arbitration and the Contract Surety: Inclusion and Preclusion, *Tort & Insurance Law Journal*, Vol. 32, No.4, Sum. 1997.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

I have served as a guest lecturer in the following for-credit classes:

- Vanderbilt University School of Law: Professional Responsibility (conflicts of interest, attorney advertising, confidentiality), Employment Discrimination (mixed-motive discrimination), First Amendment Law (commercial speech, the Establishment Clause, Free Exercise Clause).
- Nashville School of Law: Introduction to Law and Legal Research, First Amendment (commercial speech) and Advanced Legal Writing.
- Belmont University: Personal Finance (mortgages, bankruptcy, credit reporting, and consumer protection law).
- Middle Tennessee State University: Law and the Legal System (introduction to tort law).

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

1) The attached Motion to Dismiss or Convert was filed with the United States Bankruptcy Court for the Eastern District of Tennessee. Although the signature lines reflect additional attorneys of record, who handled the case during my military deployment, I prepared this pleading in its entirety.

2) The second attached document is an opinion I drafted as a Sixth Circuit clerk. This case was noteworthy because the decision and reasoning was relatively simple: although the plaintiff had produced *some* evidence of age discrimination, it did not rise to the level of the proverbial *scintilla*. This straightforward holding meant that I had more than usual leeway in writing the draft opinion, such that my contribution could be estimated at 80-90% of the finished product. As always, the decision reflects Judge Boggs's guidance and direction, but he allowed me greater creativity and flexibility in this case.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

On my deployments to Iraq, I witnessed first-hand the consequences of when the law is neither enforced nor respected. Respect for the rule of law is not merely an abstract legal principle – it is a matter of a nation's life and death. I will follow and enforce the law with absolute impartiality , humility, and diligence. In so doing, I hope to foster respect for our the justice system.

I also feel that my professional and personal experiences have well prepared me for a judicial position. I have repeatedly had to learn novel areas of law and provide clients with reliable legal advice, and similarly, the varied docket of Circuit Court requires a judge to quickly master new areas of law and fact. Even where the legal issues are routine, the details of each case vary, requiring tenacity and an attention to detail that I believe I possess.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Earlier in my career, I participated in the NBA *Pro Bono* Program. My first referral was a contested divorce case involving domestic violence. In another, I defended an indigent mother sued by a car dealership over a "lemon" car she had returned after discovering its defects. Not only did they drop their suit, but *she* was paid $500 by the dealer.

Later *pro bono* clients came via friends. I helped a father regain custody of his son after his estranged wife tested positive for drugs in Indiana and had her parental rights terminated. Navigating two states' court systems took a year to finalize, but he was granted full custody.

I have spent countless hours giving soldiers legal assistance on issues like debt relief, divorce and custody, and tax preparation. Recently I helped a friend's children visit him in the VA hospital over the objections of other family members, just weeks before he passed away.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

There has been a great deal of discussion concerning this vacancy on the Circuit Court of the 20th Judicial District, primarily over the number of family law cases that the new judge will handle. I have assumed that this position will involve a diverse mix of cases within a circuit court jurisdiction, including family law. Accordingly, I expect that any circuit judge should expect to handle almost any type of case or legal issue.

My record shows that I am a team player, and I look forward to contributing to the 20th District in any way that I can. If that means adjudicating family law matters, I am glad to help reduce the backlog and ready to work long hours in preparation for that challenge. Moreover, reducing the backlog and expediting the court's docket will enhance the public's confidence and respect for the judicial system.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

When I was an active in the Nashville Young Lawyers Division, I saw many judges make the judicial process accessible and transparent to the public: I escorted student groups on courthouse tours, judged rounds of mock trial at the courthouse, and visited schools as part of Law Day commemorations. I also have sat with dozens of judges on moot court panels at Vanderbilt and the Freedom Forum First Amendment Center. As a judge in Davidson County, I would continue such efforts by inviting the public into the courtroom, as well as going into the community to speak to civic and neighborhood groups about general principles and our rich legal history in Nashville.

The public perception of judges is critically important when it comes to building respect for and confidence in our judicial system, which is why judges must avoid even the *appearance* of impropriety. Jurists who actively engage the community and demonstrate

in and out of court that they are informed, respectful and fair-minded foster confidence in our entire system of justice. I intend to be such a judge.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

1) Before law school, I taught high school science for four years. I loved sharing with students subjects that I find fascinating, and I hold the same passion for the law. I never learn something more effectively than when I have to explain it to someone else.

For our judicial system to survive, we as attorneys and judges must continually educate and inform the public. I have tried to do this in my practice and would continue to do so as a judge; legal education is not just for lawyers, it is a civic necessity.

2) I am the first to admit that my legal career lacks a clear or traditional direction. Part of that is by circumstance, but much of it is by design. It is not that I lack focus, but rather that I find so many things worth looking at.

Time and again, I have taken a deep breath, jumped into a new area of law, and forced myself to swim. I am a lifetime-learner, which is a virtue in a judge, whose docket is as unpredictable as the people who come to court each day.

3) The most important thing I have gained from my military experiences is what it means to be a grunt, to get one's hands dirty in pursuing a worthy goal, and to follow difficult orders despite hardship. It brings a humility that reminds me that no matter how elevated the bench, I must respect the attorneys and parties on the front lines.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Absolutely. Under our state and federal systems of government, the legislators are entrusted with writing laws, and the democratic process regulates their actions through the ballot box. While federal and state constitutions each establish a judiciary designed to be insulated from politics, both by its structure and system of judicial selection, that independence should be exercised in only for the rarest of circumstances, not because a judge disagrees with majority opinion. If a person wishes to change the law, their energies should be directed to their elected representatives, not a court.

Even in cases where strict enforcement of legal precedent might lead to an unfavorable result for a sympathetic party, failing to apply the law in that particular case does not advance the interest of justice. Fairness requires that all parties be treated consistently and equally under the law, and judge-made exceptions means a case's outcome hinges on who sits on the bench that day. As Lincoln noted, "the best way to get a bad law repealed is to enforce it strictly." Judicial nullification only masks the symptoms while allowing the underlying problem to continue unabated.

In my role as general counsel, I was frequently required to obey, explain, and often defend regulations that seemed to have no rational business purpose. Where I could not justify or rationalize these rules on their merits, I demanded compliance with them as the price we pay for a democratic system of laws.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Toby Compton, Tennessee Department of Economic and Community Development, 312 Rosa Parks Avenue, 11th Floor, Nashville, TN 37243, 615-532-1129 (w); 615-275-8629 (c).

B. Rick Clouse, Patrol Sergeant, Franklin Police Department, 3034 Liverpool Drive, Thompson Station, TN 37179, 615-308-7351 (cell)

C. Jay Graves, Vice-President of Digital Products, Wiland Direct, 3617 Central Avenue, Nashville, TN 37205, 615-566-8300 (cell); jay.graves@gmail

D. David Hudson, Scholar, Freedom Forum First Amendment Center, 1207 18th Avenue Nashville, TN 37212, 615-727-1342 (w)

E. Mary Dohner Smith, Partner, Costangy Brooks & Smith, LLP, 401 Commerce Street, Suite 700, SunTrust Plaza, Nashville, Tennessee 37219, 615-320-5200 (w)

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Circuit Court of the 20th Judicial District of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: ____October 29_____, 2011.

Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

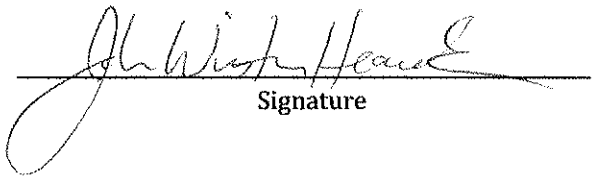
TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on

file with the Board of Professional Responsibility of the Supreme Court of Tennessee, and I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information.

John Winston Heacock
Type or Printed Name


Signature

October 29, 2011
Date

17400
BPR #

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

IN RE:	)	
	)	
JAMES GAYLE MOORE	)	**Case No. 04-32176**
ALICE CAROL MOORE	)	**Chapter 11**
	)	**Judge Richard Stair, Jr.**
Debtors.	)	

MOTION TO DISMISS OR CONVERT THE MOORES' CHAPTER 11 PETITION AND FOR EXPEDITED REVIEW AT THE HEARING SET FOR AUGUST 6, 2004

Comes now the Movant, Gula Clyde Jinks, Jr. ("Jinks"), by and through his attorneys, and respectfully files this motion to dismiss the Moores' Chapter 11 Petition, or in the alternative, convert the Case to a Chapter 7 Liquidation.

This Court has already scheduled a related hearing on August 6, 2004, to address the motion to dismiss for abusive filings of Charter One Mortgage Corporation ("Charter One"). Because this motion addresses the same subject matter, and the facts cited in this document consist almost exclusively of the Moores' filings with this Court and the United States District Court for the Eastern District of Tennessee, the Moores are well aware of these matters and are unlikely to dispute the specific facts cited, as opposed to their interpretation. Accordingly, there being no just reason for delay, Jinks would ask that this matter be placed on the same docket in order to foster judicial economy and efficiency to the parties.

I. JURISDICTION

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334.

2. This is a core proceeding under 28 U.S.C. § 157.

3. This action is filed within the time permitted by applicable law.

II. FACTUAL BACKGROUND

Jinks loaned James and Alice Moore $100,000 in 1990 so that they could expand their business. Complaint at p. 2 (attached as *Exhibit A*). After making just a few payments on the loan, the Moores began to miss or make partial payments, citing financial difficulties due to an embezzling employee (although they have refused to identify the responsible party). Although the Moores made sporadic attempts to tender small partial payment on the debt, when they halted all payments and communication with Jinks in 1999, he initiated formal collection efforts in earnest. Jinks ultimately filed suit in federal district court (Case No. 3:01-CV-93) on February 26, 2001. The Moores answered the lawsuit on June 29, 2001, and conceded that Jinks had given them $100,000, but denied that the money was a loan. The case was set for trial before Judge Varlan on June 14, 2002.

After various continuances and prior to depositions, the Moores moved to dismiss Jinks' suit on December 19, 2001. The Moores now argued that Jinks had loaned them the money, but at zero interest, and that they had paid roughly $60,000 of it back. Affidavit of James Moore at p. 2. para. 6 (attached as *Exhibit B*). In contrast, Jinks calculated that the value of the debt, with interest and late fees, exceeded $800,000. Briefing of the motion to dismiss was completed in February, and the parties moved forward in preparation for the June 14 trial. In the meantime, Charter One scheduled foreclosure of the Moores' house for April 11, 2002. A week before the foreclosure, and on the eve of Judge Varlan's denial of the motion to dismiss, the Moores filed their first bankruptcy petition on April 5, 2002, seeking relief under Chapter 13 of the Bankruptcy Code (Case No. 02-31850).

The Moores filed a 100% + 4% plan, listing total assets of $1,194,382.50 and outstanding liabilities of $575,467.43 (relevant excerpts of the first Chapter 13 filing are attached as *Exhibit*

C). They valued their home at $475,000, subject to Charter One's mortgage of $308,582.46. (Id. at p.3) The Moores claimed $149,382.50 in personal property, and sought to exempt $23,700 on Schedule C. (Id. at 2, 4-7). Despite conceding in their district court filings that they still owed at least $40,000 to Jinks (Affidavit of Moore at p. 2, para. 6), he was not named as a creditor. The Moores did, however, state that they owed the Internal Revenue Service ("IRS") $50,000, as well as $3,200 in property taxes. (Id. at p. 9-10).

On May 21, 2002, Trustee Gwendolyn M. Kerney objected to the plan, noting that the Moores' Schedule C exceeded Tennessee's $8,000 limit on personal property exemptions by almost $16,000. This Court agreed, and on June 21, 2002, the case was dismissed.

Upon learning of the dismissal, Judge Jordan lifted the stay on the Jinks' district court action and set a status conference for September 12, 2002. (Order of August 16, 2002, attached as *Exhibit D*). Before the litigants could attend that conference, the Moores filed their second bankruptcy petition under Chapter 13 in this Court on September 3, 2002, (Case No. 02-34553). This had the Moores' desired effect of stopping Charter One's second attempt to foreclose on their mortgaged property, set for November 11, 2002. Accordingly, Judge Varlan again stayed Jinks' case against the Moores and cancelled the September 12 status conference. (Order of September 12, 2002, attached as *Exhibit E*).

The Moores' filings in the second Chapter 13 (relevant excerpts are attached as *Exhibit F*) were virtually identical to those filed just months earlier, except for a few notable differences: the Moores' assets increased slightly to $1,194,382.50, due to $164,382.50 in personal property, which reflected $15,000 in cash that was now disclosed. (Id. at p. 2-3). This time, the Moores named Jinks as an unsecured creditor, stating that he was owed $47,000, but they again sought to exempt $23,700 in personal property on Schedule C (Id. at p. 3), the same error that resulted in

their first dismissal. The Moores also revised upward the amount that they owed the IRS, to $89,668.58. (Id. at p. 4)

This time, the IRS and the Tennessee Department of Revenue joined the Trustee in objecting to the plan's confirmation. After granting the Trustee's objection to the personal property exemption, the Court learned that the Moores were delinquent in filing required state and local tax documents. After a hearing on October 23, 2002, this Court gave the Moores ten days to amend their filings to correct this deficiency. When the Trustee certified on November 5, 2002, the Moores' non-compliance with this Court's Order, the Court dismissed the Moores' second Chapter 13 on November 13, 2002.

Upon learning in December of the dismissal of the Moore's second bankruptcy, Judge Jordan set a status conference January 30, 2003. (Notice of December 3, 2002, attached as *Exhibit G*). Whether coincidence or not, the Moores filed their third Chapter 13 petition (Case 03-30414) on January 29, 2003. This again halted Charter One's efforts, which were set to foreclose on Moores' property on March 5, 2003.

The Moores' filings in the third Chapter 13 were again similar to those filed twice previously, except for some slight changes[1]: the Moores now increased the amount owed in property taxes to $8,100, but they still insisted that they only owed the IRS $89,668.58. It seems to strain credibility that the Moores were not aware of an increased tax debt, especially when they had been instructed by this Court just three months earlier to file their delinquent returns. At best, the Moores' sworn claim in their Chapter 13 schedules of an $89,000 tax debt is extremely willful ignorance, and at worst, a lie. The Moores' latter theory is buttressed by statements by the Moores' bankruptcy attorney in a letter dated December 9, 2002, where he

[1]In order to know whether to attend the Status Conference, counsel for Jinks sought confirmation that the Moores had indeed filed a third petition. As an indication of how identical the Moores' third filing was to their second, their attorney never bothered to send the entire third petition, but only the cover page. (Attached as *Exhibit H*).

states "[m]y client however further [sic] owes Federal taxes of at least approximately $100,000 and state taxes of some $8,000." Letter of Fowler of December 9, 2002, at 1 (attached as *Exhibit I*). Yet less than two months later, the Moores' filings do not reflect this more recent and accurate estimate of the tax debt.

Given these glaring inconsistencies, it is no surprise that the Assistant United States Attorney moved to dismiss the plan on March 11, 2003. (Motion to Dismiss, attached as *Exhibit J*). The IRS pointed out in that the Moores had not filed a total of twenty-four federal tax returns, and their failure to do so made it impossible to gauge the true extent of their tax debts. The IRS attached to their Proof of Claim detailed printouts showing the Moores' tax payment/delinquency history. Id. Moreover, in the Moores' first bankruptcy petition, the IRS never even received proper notice of the Moores' petition. The IRS also noted that the Moores' total unsecured debt of $391,702.23 far exceeded the statutory limit for Chapter 13 relief of $290,525, rendering it impossible for the Moores' plan to succeed.

By the time that the IRS had filed its objection to confirmation and motion to dismiss, the Trustee and Jinks had filed similar pleadings. Perhaps recognizing that Chapter 13 relief was impossible, the Moores followed suit and moved to dismiss their own petition, which was granted on March 19, 2003.

Having abandoned the idea of a fourth Chapter 13 petition, the Moores instead sought Chapter 11 reorganization, filing less than a month after their latest exit, on April 10, 2003, (Case No. 03-31998) (relevant excerpts are attached as *Exhibit K*). The Moores filed this Chapter 11 so quickly that by the time that Judge Varlan had received notice of the Chapter 13 dismissal, it was too late to lift the stay in that litigation. Now on their *fourth* dalliance with the bankruptcy system, one might reasonably expect that the Moores were familiar with the provisions of

bankruptcy law, and since they had filed three prior Chapter 13s, they would be able to submit a timely plan of reorganization. Nonetheless, the Moores failed to file a plan during the ten months that they were debtors-in-possession. The lack of a trustee in this case only meant there was one less party to object to the Moores' filings, or lack thereof.

The Moores' fourth bankruptcy and first Chapter 11 is a microcosm of this legal odyssey: the Moores' delayed and deceived this Court and their numerous creditors for ten months without losing any assets, sacrificing their comfortable standard of living, or moving a day closer to resolving their financial situation. They have not paid a penny on their home mortgage since October 2001 and are $126,000 in arrears. They have prevented Jinks from even setting a trial date in a lawsuit that was filed three and a half years ago.

Without slogging through all of the continuances, motions, and understated debts and assets that characterize the Moores' tenure as debtors-in-possession, the Moores' fourth bite at the bankruptcy apple is more notable for what did ***not*** happen than for what did: an accountant was hired, but none of the Moores' schedules or tax debts were updated or corrected; a real estate agent was hired, but no property was sold (despite the Moores' ownership of a "lot and building at 447 Ownby Circle" worth $120,000 with a $4,000 mortgage (*Exhibit L* at p. 4)); objections were made to the Moores' disclosures, but there were no corrections or revisions made.

Astonishingly, the Moores even insisted on listing the taxes owed to the IRS as still being $89,668.58, despite the detailed itemization and documentation of a much greater liability in the IRS's previous motion to dismiss! The Moores did, however, include for the first time $11,766.01 that was owed to the Tennessee Department of Revenue for unpaid sales taxes, as well as an apparently understated $5,000 owed to Sevier County for property taxes. (*Exhibit I* at p. 5). Yet even this belated candor seems to have come at the point of a financial sword: the

Moores filed, on the same date as their petition, a request to use cash collateral to pay "the State of Tennessee['s] tax lien in the approximate amount of $11,8000." (attached as *Exhibit L*, at para. 2). Surely the Moores knew that they owed the state taxes before this lien was filed, and their failure to disclose this fact in the preceding three sworn bankruptcy petitions is simply a deception to this Court, as well as the other creditors.

Predictably, there was a flurry of objections to the adequacy of the Moores' disclosures, as well as motions to dismiss. After hearings on these issues could no longer be delayed, the Moores once again moved to dismiss their own case, conceding that they "are unable to generate sufficient income which will support a viable plan." On February 13, 2004, this Court agreed and entered an Order dismissing the case.

Yet the Moores are resilient. A mere two months after admitting that reorganization was impossible, the Moores on April 20, 2004,[2] returned to seek the temporary refuge of Chapter 11 (Case No. 04-32176). Again, no trustee has been appointed in this matter, and, pursuant to §§ 1107(a) of the Bankruptcy Code, the Moores are "managing" their property as debtors-in-possession. This second Chapter 11, coming on the heels of a self-dismissal whose ink is still wet, begs the obvious question "so what's different ***this*** time?" The Moores have submitted virtually the same filings in all their prior attempts, so their financial situation is unchanged. As recently as last year, they demonstrated that their business cannot generate sufficient revenue to make a plan viable. The Moores' admission in the prior motion to dismiss that they are "unable to generate sufficient income which will support a viable plan" clearly constitutes "cause" under § 1112(b)(2), just as their failure to even *propose* a plan in the ten months spent in Chapter 11 satisfies § 1112(b)(4).

[2]Not so coincidentally, Charter One prepared to foreclose on their mortgage on April 26, 2004, for a *fourth* attempt. Moreover, the district court had scheduled a status conference for April 1, 2004 (Order of March , 2004, attached as *Exhibit M*), which had been truncated based on assurances made by the Moores' attorney via telephone that a fifth bankruptcy was in the works.

More probative is that the Moores have made it abundantly clear that they do not intend to do anything different. They have not accurately updated their schedules to reflect the full extent of their debts, especially their tax liability. They have made no sincere effort to see if a portion of their substantial real estate holdings can be sold to reduce the debt to a level manageable under a Chapter 11 plan, blaming incompetent real estate agents. In fact, the Moores admitted at the Section 341 hearing on May 27, 2004, that despite more than two years spent in bankruptcy, they still have no factual basis for the valuation of their properties; i.e., the square footage, original purchase price, comparable property values, tax assessments, etc., even though they are basically asked to make a sworn statement of their assets in every petition. They willfully remain ignorant in order to stymie the bankruptcy process, and doggedly avoid taking affirmative steps in furtherance of a viable plan of reorganization, despite claiming net assets of $693,907.32.

Ironically, the only debts that the Moores *have* paid during this three-year wild goose chase are those to their bankruptcy attorney and the court clerk: they have paid bankruptcy filing fees totaling $2,014 ($115 + $115 + $115 + $830 + $839) and attorney fees of $20,040 ($1,000 + $1,000 + $1,000 + $10,040 + $7,000)[3]. While cognizant of the necessity of attorney's fees, this amount seems excessive for what amounts to cloning previous petitions, with slight modifications. There is no question that some time and work was involved in preparing these five filings, but little seems expended toward actually advancing the case properly through this Court or pursuing a plan with a "reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(1).

[3]These are the figures referenced in the court's Docket Entries, which differ slightly from those set forth in the Moores' schedules ($640 + $955 + $140 + $10,040 + $7,000).

Jinks asserts that the Moores' five filings to date, and their failure to file accurate mandatory disclosure documents in those five petitions, demonstrate that they have no genuine desire to comply with bankruptcy requirements. The evidence further shows numerous instances of actions and disclosures so at odds with reality that one can only conclude intentional deception. The Moores are instead manipulating the stay provisions to alternate between bankruptcy and federal district court, as a means to prevent both courts from fulfilling their duties. Jinks' federal court litigation has now been stayed and reinstated four times, for more than three years, without the Moores advancing either case.

III. RELIEF REQUESTED

The Moores' history indicates a textbook case of bad faith in the bankruptcy process, which warrants immediate dismissal of this case, along with a prohibition against further filings. Additionally, the Moores' obvious unwillingness to liquidate any of their assets, their failure to even submit a Chapter 11 plan, and their admission that reorganization is not possible warrants immediate conversion to a Chapter 7 case.

Pursuant to 11 U.S.C. § 1112(b), a court may, "on request of a party in interest" and "after notice and a hearing," convert a Chapter 11 case to a Chapter 7 liquidation, or dismiss the case entirely, whichever is in the best interest of creditors and the estate. These remedies can be used only "for cause," which includes:

> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
>
> (2) inability to effectuate a plan;
>
> (3) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan;

(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

These ten illustrations of grounds of "cause" are non-exhaustive, and a bankruptcy court can consider other factors as they arise and can exercise its equitable powers to achieve an appropriate result in individual cases. *See In re Great American Pyramid Joint Venture*, 144 B.R. 780, 790 (Bankr. W.D. Tenn. 1992).

In this matter, the "cause" to dismiss Debtors' case, including those factors enumerated in 11 U.S.C. § 1112(b), has been exhaustively set forth in this motion. As evidenced by the Debtors' previous inability to effectuate a plan with this Court, Debtors do not take this bankruptcy process seriously, and are simply using it to delay payment on obligations to their creditors, including Jinks. Accordingly, this bankruptcy case should be dismissed or, in the alternative, converted from a Chapter 11 to a Chapter 7 case.

Put most simply, if the Moores' trek in and out of bankruptcy these five times does not constitute abuse of the bankruptcy process, highlighted by repeatedly incomplete and inaccurate disclosures, then it is hard to image what conduct does. Whether this Court sees fit to dismiss the petition with a prohibition against re-filing, or deems it more prudent to convert the case to a Chapter 7 liquidation, either solution is better than the status quo.

WHEREFORE, premises considered, Jinks respectfully submits this Motion to Dismiss or Convert Case to Chapter 7 pursuant to 11 U.S.C. § 1112(b).

Respectfully submitted,

_____

Daniel H. Puryear (BPR # 18190)
John A. Mueller (BPR # 22954)
144 Second Avenue North, Suite 333
Nashville, Tennessee 37201
(615) 255-4849

-and-

_____

John W. Heacock (BPR # 17400)
2109 Early Avenue
Nashville, TN 37243
(615) 741-4376
Attorneys for Gula Clyde Jinks, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served either via Federal Express to the following persons:

John H. Fowler
112 Bruce Street
Sevierville, Tennessee 37862

United States Bankruptcy Court
Attn: Donna W. Temple
Howard H. Baker Jr. U.S. Courthouse
800 Market Street
Suite 330
Knoxville, Tennessee 37902

this ____ day of _____, 2004.

_____

2052, 80 L.Ed.2d 674 (1984))[,] and it is not apparent that defeat was snatched from the hands of probable victory (*United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992), *cert. denied*, 508 U.S. 975, 113 S.Ct. 2969, 125 L.Ed.2d 668 (1993))." Slip opinion at 20–21.

United States District Judge James H. Jarvis agreed with the recommendation of the magistrate judge. Like all of the other judges who had examined the trial record up to that point, Judge Jarvis found that whereas the testimony of Ms. Guili was virtually unimpeached, the testimony of Mr. Gravley, "replete with untruths, was simply not credible." Moreover, Judge Jarvis observed, the evidence of Mr. Gravley's silence was not of "predominant importance." The *Doyle* evidence

"was mentioned four times during testimony over two days. The assistant district attorney mentioned it in only two sentences during his closing argument. I conclude that the *Doyle* error did not 'substantially influence' the jury's verdict under the *Brecht* standards and the error was harmless." Slip opinion at 22–23 (footnote omitted).

I agree. The denial of Mr. Gravley's habeas corpus petition should be affirmed, in my opinion.

Ila HARTSEL, Plaintiff–Appellant,

v.

Michael B. KEYS, individually and in his capacity as Mayor of the City of Elyria; the City of Elyria, Ohio; and the City of Elyria Utilities Department, Defendants–Appellees.

No. 94–3693.

United States Court of Appeals, Sixth Circuit.

Argued Aug. 1, 1995.

Decided June 26, 1996.

Former city employee brought suit against mayor and city contending that mayor's failure to promote her to superintendent of city utilities department constituted age and sex discrimination, and retaliation for her support of mayor's rival in primary election, in violation of her rights of free speech and association. The United States District Court for the Northern District of Ohio, Ann Aldrich, Senior District Judge, granted summary for defendants, and plaintiff appealed. The Court of Appeals, Boggs, Circuit Judge, held that: (1) with respect to discrimination claims, plaintiff failed to establish that she was constructively discharged; (2) plaintiff failed to rebut defendants' proffered reason that she was not promoted because she lacked computer skills necessary to lead computer upgrading that department needed; (3) with regard to retaliation claim, plaintiff did not show that her support of rival was a substantial or motivating factor in mayor's decision; and (4) even assuming that plaintiff's support of mayor's rival in primary election was a substantial or motivating factor in mayor's decision not to promote plaintiff, no First Amendment violation was shown because evidence established that mayor would have made same decision to select a candidate with more computer experience and proficiency, even in absence of plaintiff's protected conduct.

Affirmed.

1. Federal Courts ⟹776

Court of Appeals reviews de novo district court's grant of motion for summary judgment, and will affirm district court only if it determines that pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; when evaluating such appeal, Court must view evidence in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⟹2544

Party moving for summary judgment need not support its motion with evidence disproving nonmoving party's claim, but need

dence; nonetheless, court may grant summary judgment even in a causation inquiry, where it is warranted. U.S.C.A. Const. Amend. 1.

16. Constitutional Law ⟹90.1(7.2), 91
Municipal Corporations ⟹217.5

Former city employee who claimed that mayor's failure to promote her to position of superintendent of city utilities department constituted retaliation for supporting mayor's rival in primary election, in violation of her First Amendment rights, did not show that her support of rival was substantial or motivating factor in mayor's decision; plaintiff offered only hearsay statement that mayor was upset that she had supported rival, and mayor promoted plaintiff to acting superintendent with attendant raise of $13,000 per year, a year after primary campaign. U.S.C.A. Const.Amend. 1.

17. Constitutional Law ⟹91
Municipal Corporations ⟹217.5

Even assuming that city employee's support of mayor's rival in primary election was substantial or motivating factor in mayor's decision not to promote employee to position of superintendent of city utilities department, no First Amendment violation was shown because evidence established that mayor would have made same decision to select a candidate with more computer experience and proficiency, even in absence of employee's protected conduct; employee's cursory knowledge of computers left her dependent upon subordinate personnel, and thus an inappropriate choice to lead an expensive and expansive restructuring of department's computer system. U.S.C.A. Const.Amend. 1.

Ellen Simon Sacks (argued), Michael T. Pearson (briefed), Spangenberg, Shibley, Traci, Lancione & Liber, Cleveland, OH, for Plaintiff–Appellant.

Stephen J. Gurchik (argued and briefed), Office of the Solicitor, Elyria, OH, for Defendants–Appellees.

Before: JONES and BOGGS, Circuit Judges; and CHURCHILL, District Judge.*

BOGGS, Circuit Judge.

Ila Hartsel appeals the district court's grant of summary judgment for the defendants, the City of Elyria and the Elyria Utilities Department ("City") and Michael Keys, its mayor. Hartsel's suit arises from her failure to be promoted to Superintendent of the Utilities Department. She alleges discrimination on the basis of gender, in violation of Title VII, 42 U.S.C. § 2000e *et seq.;* discrimination on the basis of age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.;* and deprivation of her rights of speech and association under the First and Fourteenth Amendments to the United States Constitution and Article I, § 11 of the Ohio Constitution.

The defendants counter that Hartsel was not selected to be Superintendent because the City was about to implement a major computerization of the Utilities Department and that Hartsel had poor computer skills. The district court granted summary judgment for the defendants because Hartsel failed to demonstrate an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel. Hartsel timely appeals.

For the reasons that follow, we find that Hartsel has failed to produce more than a scintilla of evidence supporting her claims under her various theories. Accordingly, we affirm the district court's decision.

I

Hartsel started working in the Elyria Utilities Department as a clerk-typist in March 1969. In 1977, she was promoted to office supervisor, where she worked under Joe Grace, the utility department's superintendent. Grace held the position of superintendent from 1969 until 1992. In early 1991, Hartsel performed many of the superintendent's duties when Grace missed work due to

* The Honorable James P. Churchill, United States District Judge for the Eastern District of Michigan, sitting by designation.

his wife's illness. Hartsel continued to perform many of these duties in April 1992, when Grace was absent due to his own poor health.

In the spring of 1991, Joe Grace's son, Billy, ran against Mayor Keys in a party primary election for mayor. Hartsel publicly supported Billy Grace and assisted the campaign with signs, calling voters, and sat with the Graces at a candidate debate. Keys defeated Grace in the May 1991 primary.

In 1992, Hartsel became uncomfortable fulfilling so many of Grace's duties in an unofficial capacity, and in late April 1992, she approached Safety–Service Director Tim Coey to discuss the problem of Grace's prolonged absence. After Coey discussed the issue with Mayor (and defendant) Michael Keys, she was promoted on May 1, 1992, to Acting Superintendent of the Utilities Department. The new position paid Hartsel approximately $13,000 more than her salary as office supervisor.

Hartsel claims that, in late 1992, Coey had told her that Keys "was very upset" when he saw her sitting with Bill Grace at a campaign debate; Coey does not remember such a conversation. Joe Grace officially resigned on November 30, 1992, and Hartsel expressed her desire to remain as superintendent permanently, first to Coey, and then to Keys. The mayor indicated that he expected to make a final decision on the appointment around the first of the new year.

Tom Brand, a forty-three-year-old deputy auditor in the city's auditing department, also expressed interest in the job. Brand, along with Grace, had played a major role in computerizing the installment department of Elyria's municipal court in 1986. In 1988, Brand had also played a prominent role in computerizing the whole municipal court, which required him to write specifications for the new system and to demonstrate the software to the employees who would use it. Brand had acquired additional computer knowledge by attending adult education classes at night, and he received training from Hewlett–Packard in conjunction with his computerization of the municipal court.

Hartsel met with Mayor Keys on December 21, 1992, to discuss the situation. Hartsel alleges that, during the meeting, Keys said three times that he was "99% sure" that he was going to appoint somebody with more computer experience and that he wanted her to stay on "and help the new man" because of her experience and skills. Hartsel interpreted this to mean that she would have to train her replacement, although nobody ever told her as much. Keys and Hartsel also discussed her possible retirement plans.

Hartsel claimed that she had heard through the "grapevine rumor mill" over the next few days that Brand was to be promoted to superintendent. During her Christmas vacation, Hartsel stewed over this information, until she concluded that going back to her job as office supervisor and training a less-qualified replacement would be "intolerable." When she returned to work on December 31, 1992, Hartsel submitted a letter of resignation at 9:45 a.m., effective midnight. Keys accepted her resignation at 10:00 a.m., but at 11:40 a.m., he reassigned Hartsel to her prior position as office manager and appointed Brand as Acting Superintendent, effective 11:00 a.m. Keys later justified this decision on the basis that he wanted to maintain a chain of responsibility over the building over the long New Year's weekend, that he was concerned about the abrupt nature of Hartsel's departure, and that Hartsel had returned her keys to the building. Coey was similarly "not thrilled about the idea of having an employee in charge who had after 20 some odd years of service given us a two-hour [sic] notice of resignation."

II

On June 10, 1993, Hartsel sued the City and Keys, claiming that the refusal to promote her to permanent Superintendent constituted a constructive discharge from her job. Defendants moved for summary judgment on January 31, 1994, and plaintiff filed motions and briefs in opposition. On May 27, 1994, the district court granted summary judgment for the defendants, and an appropriate order was entered on May 31, 1994.

Judge Aldrich granted summary judgment on the age and sex discrimination claims

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because Hartsel failed to create an issue of material fact sufficient to rebut defendants' legitimate, non-discriminatory reason for not promoting Hartsel—that "the city sought a new superintendent with computer skills necessary to assist in the upgrade of computers in the Public Utilities Department." The district court noted that Hartsel did not dispute that Brand was more experienced with computers, and "[t]here is nothing illegal about seeking a candidate with the skills necessary to best perform the tasks ahead." Memorandum and Order May 26, 1994, at 17. Indeed, Hartsel's evidence actually supported the defendants' claim that Brand was hired to implement a new computer system—Elyria had purchased an expensive and complex computer and continues to implement the system. The court therefore granted summary judgment, finding that "none of Hartsel's evidence tends to show that the defendant's legitimate reason for its decision is unworthy of belief, or that discrimination was more likely the reason for the decision." [1] *Id.* at 19.

The district court also dismissed Hartsel's § 1983 claim of retaliatory discharge because she had "offered insufficient evidence for this Court to find that her political expression was a 'motivating factor' in the decision not to appoint her." *Id.* at 20. The district court described the causal connection between the mayoral primary in May 1991 and Keys's decision not to promote Hartsel in December 1992 as "extremely attenuated," particularly in light of his April 1992 decision to make her acting superintendent with a salary increase of $13,000. Hartsel's only evidence of discriminatory motive was Coey's alleged comment that Keys was upset with her, which the court discounted as a "mere scintilla of evidence" that would not prevent summary judgment. *Id.*, at 21.

III

[1] This court reviews *de novo* the district court's grant of defendants' motion for summary judgment. *Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268, 271 (6th Cir.), *cert. denied*, 506 U.S. 975, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992). This court must affirm the district court only if it determines that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). When evaluating this appeal, this court must view the evidence in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

[2, 3] The moving party need not support its motion with evidence disproving the nonmoving party's claim, but need only " 'show[ ]'—that is, point[ ] out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The pivotal question is whether the party bearing the burden of proof has presented a jury question as to each element of its case. *Id.*, 477 U.S. at 322, 106 S.Ct. at 2552.

[4–7] The plaintiff must present more than a mere scintilla of evidence in support of her position; the plaintiff must present "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Accordingly, hearsay evidence may not be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992) (*quoting Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir.1986)). Accordingly, this standard requires a court to make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*.

1. The district court dismissed Hartsel's so-called "statistical evidence" that only one of Elyria's sixteen department heads is female, because she provided no background facts, such as the number of women in each department, and the sex and qualifications of applicants for the department head positions.

IV

[8] As a preliminary matter, we reject plaintiff's suggestion that she was constructively discharged. Hartsel argues that the Mayor's failure to promote her to what she perceives as her rightful position created intolerable work conditions, such that her preemptive resignation the morning of December 31, 1992, was essentially a firing; she offers no other evidence that shows she was driven out of her prior position. If we were to accept this line of reasoning, every person passed over for a purportedly deserved promotion could bring an illegal discharge suit, and the distinction between the two would be erased. Instead, we treat her allegations as a failure to promote claim.

[9] Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252–56, 101 S.Ct. 1089, 1093–95, 67 L.Ed.2d 207 (1981); *see Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867, 871 (6th Cir. 1990). "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . ." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977).

[10] Under the now-familiar burden-shifting principle of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), a plaintiff establishes a *prima facie* case and creates a presumption of discrimination by showing: (1) membership in the protected class; (2) that she suffered adverse employment action; (3) that she was otherwise qualified for the position; and (4) following the plaintiff's rejection, the position was filled by a person outside of the protected class.[2] This general framework applies to both gender and age discrimination, with appropriate modification.

[11, 12] Once the *prima facie* case is made, a defendant may offer any legitimate, non-discriminatory reason for the employment action, which the plaintiff may rebut by evidence of pretext; however, the burden of proof always remains with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). It is important to note that the defendant need not *prove* a nondiscriminatory reason for not promoting Hartsel, but need merely *articulate* a valid rationale. *Id.* at 514, 113 S.Ct. at 2751.

[13] The district court found that Hartsel had satisfied the elements of a *prima facie* case for both sex and age discrimination, and we need not disturb its conclusion. Thus, the relevant issue is whether the proffered reason for promoting Brand rather than Hartsel was instead a pretext for illegal discrimination. In this case, the defendants claimed that their non-discriminatory reason was that Hartsel lacked the computer skills necessary to lead the upgrading that the department needed. As plaintiff notes, summary judgment is not appropriate every time an employer offers this "business judgment" rationale. "The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir.1988).

Here, the facts do not at all lack merit, and much of the evidence most damaging to Hartsel's allegations comes from her own testimony. For example, Hartsel claims the defendants inflated the position's qualifications as a facade, designed to keep her from getting the job. In fact, she virtually concedes that she was not qualified for the superintendent's position, as defined by Keys:

> . . . I felt as if I had considerable experience in operating the terminals, turning the computer on and off, when necessary,

2. The Supreme Court has recently held that in ADEA suits, the replacement need not be younger than 40, although the difference in age between the plaintiff and the younger replacement may be probative of ageist bias. *O'Connor v. Consolidated Coin Caterers Corp.*, — U.S. —, —, 116 S.Ct. 1307, 1310, 134 L.Ed.2d 433 (1996).

> and I had a lot of experience inputting into the computer on a daily basis.... I knew what I wanted out of the computer and I knew what I wanted put in, which I could explain to the data processing supervisor on what I needed and wanted....

Hartsel Dep. at 18. Further, Hartsel admits that the mayor "knew I could not operate the computer, as far as putting the programs on and all this type of thing." This self-assessment is consistent with Coey's characterization of Hartsel's skills:

> From working with Ila and from working with the department, it is my understanding that computer skills was not her strong point.... We have a data processing supervisor[3] in the department, and Ila ... did not work in that area and had limited knowledge of computer abilities.

Hartsel counters with the affidavits of several co-workers that the department functioned well when she was Acting Superintendent. William Fullgrabe, an Engineering Department employee, stated that "Hartsel was doing a good job" and "was well qualified for the Superintendent's position." Mary Grace stated that Hartsel "did a great job," that "I do not believe that it was necessary ... to appoint someone with a data processing background," and that "[g]iven Ila Hartsel's experience in the department and her knowledge of the ordinances, rules and regulations, I believe that she was more qualified than Tom Brand." Tami White, a meter reader who worked in the Utilities Department when the cold prevented outside work on January 18 and 19, 1994, stated that the mail was four days behind under Brand, but "[w]hen Ila Hartsel was Acting Superintendent, the Department rarely got even two days behind on its mail."

However, these affidavits miss the point. There is no doubt that Brand and Hartsel have differing strengths and weaknesses, and that Hartsel performed her duties as Office Manager and Acting Superintendent well. The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons. These affidavits reveal perhaps a reasonable difference in opinion, but their bald assertions and conclusory statements fail to provide any factual support for Hartsel's claim of sexist, ageist, or politically retaliatory animus.

Hartsel's failure to produce direct evidence of either pretext or discriminatory animus is fatal. There is no testimony that computer skills were not highly desirable for the superintendent's position, and Hartsel only disputes the degree of familiarity needed and argues that the job could have been done by a less expert employee, herself. The evidence supports the defendants' use of computer expertise as a hiring criterion: the city had long been urged to modernize its computer system; shortly after Hartsel resigned, it did so; the previous superintendent, Joe Grace, was much more familiar with computers than Hartsel; and, Brand was much more skilled with the technology than she was. As a result, Hartsel's circumstantial evidence is mere speculation ungrounded in fact, and Keys has demonstrated "an absence of evidence to support the non-moving party's case," as required by *Celotex*. 477 U.S. at 325, 106 S.Ct. at 2554.

To support her claims of discrimination based on gender, Hartsel cites the dearth of female department heads, although Hartsel admits that she does not know how many women applied for department head positions.[4] Ironically, she bases her belief of

3. Mary Grace (apparently no relation to Joe or Billy Grace) had worked with Hartsel as the Utilities Department data processing supervisor. Ms. Grace majored in data processing in acquiring her Associates Degree in Applied Business from Lorain Community College. Ms. Grace opined that it was unnecessary to appoint a person with a data processing background to the superintendent position, in part because "I was available, with years of experience and a degree, to assist Ila Hartsel with any and all computer issues."

However, the availability of Ms. Grace does not preclude the Mayor from hiring a candidate based on computer proficiency, nor does it transmute a business judgment into a pretext.

4. In reality, this is not evidence of discriminatory treatment, but rather, a claim of disparate impact. A disparate impact theory of discrimination exists because "some employment practices,

gender discrimination on her "women's intuition" about "the tone of the whole situation." Hartsel Dep. at 41–44. Although she concedes that Keys never said or did anything to indicate a tone of bias—she claimed that "it is just one of those things that you feel"—she pointed to Keys's "body language" and "vibes." Clearly, Hartsel has failed to proffer sufficient information to put these extremely subjective and vague allegations in logical context, and has therefore failed to exceed the scintilla threshold to prevent summary judgment.

Hartsel infers age bias from the injustice of requiring older workers who "didn't grow up with [computers] the way these kids are doing" to compete for promotions against "younger" employees. In a sense, every technological advancement appears to favor the young, but only if one presupposes that older workers are more resistant to change and are adverse to learning new methods; ironically, this is the very type of ageist stereotype that the ADEA was enacted to address. In fact, Brand is forty-three (within the protected class himself and hardly a callow youth), and he states that he also did not grow up with computers, but instead went to adult education classes and sought outside training to become more computer literate. We decline this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a *prima facie* case of age discrimination.

Hartsel relies on several cases, all of which are distinguishable. The plaintiff supported her claim of constructive discharge in *Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1573 (10th Cir.1992), with testimony that the employer had told her that she was "too old" and "did not fit the image [the company] wished to project." Significantly, the plaintiff in *Acrey* was let go because she lacked the ability to use a new accounting system, but she offered evidence that the defendants had intentionally withheld the proper training to create an excuse to fire her. *Id.* at 1572–73. Likewise, *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 677 (10th Cir.1990), is inapplicable because, in that case, the plaintiff demonstrated that his employer's proffered reasons were pretextual because the younger employee who was hired acquired the required computer skills only *after* the plaintiff was fired.

In a post-oral argument submission, Hartsel cites the unpublished case of *Kline v. TVA*, No. 92-5919, 1993 WL 288280 (6th Cir. July 29, 1993), for the proposition that whether, in that case, a "plaintiff was better qualified for the job is a question that should not have been decided in summary judgment proceedings," *id.* at *5, is also misplaced. Even accepting as a generality this statement of the specific holding in *Kline*,[5] the fact remains that there is no question that Brand is more qualified than Hartsel—the parties have practically stipulated to that by their respective testimonies. The relevant factual inquiry is whether computer expertise was a valid job criterion, or if it was a pretense designed to thwart Hartsel's promotion. Since the latter claim is based solely on speculation and hunches, the plaintiff has not created a *genuine* issue of *material* fact sufficient to prevent summary judgment.

V

Hartsel's § 1983 claim of retaliatory "discharge" suffers from a similar absence of evidence. Unlike the claims of sex and age discrimination, where the evidence is based

adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987, 108 S.Ct. 2777, 2785, 101 L.Ed.2d 827 (1988). A plaintiff must show for a prima facie case of disparate impact "that a specific employment practice or policy caused a significant disparate impact on a protected group," in this case, women or older workers. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656, 109 S.Ct. 2115, 2124, 104 L.Ed.2d 733 (1989). Hartsel identified no practice as causing such impact.

5. In *Kline*, the defendant contradicted himself on a material issue: he claimed that he used a draft job description in concluding that the plaintiff was not suited for the position, then twice stated during an EEOC investigation that the job description had been destroyed. *Kline*, at 4. In contrast, the testimony of Keys and other witnesses consistently supports their claim that computer skills were relevant to the superintendent's job.

entirely on Hartsel's subjective beliefs and intuition, Hartsel has produced some circumstantial evidence that would buttress a claim of politically motivated conduct. However, that evidence consists of a hearsay statement by Coey that Mayor Keys "was very upset" that Hartsel had supported his opponent more than a year earlier, and the district court concluded that this was a mere scintilla which was refuted by the weight of contrary evidence.[6] Hartsel also points to a conclusory affidavit of Joe Grace, which alleges that "[b]ased on my experience and observations of the decisions made by [Keys], I believe [his] decision not to appoint Ila Hartsel permanently to [Superintendent] was politically motivated."

[14, 15] Hartsel correctly notes that if a plaintiff produces evidence that her protected expression [7] was a "substantial" or "motivating" factor in a defendant's decision to terminate employment, the burden of proof shifts to the defendant to prove that it would have made the same decision in the absence of the protected conduct. *Mount Healthy City Sch. Dist. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); *Matulin v. Village of Lodi,* 862 F.2d 609, 613 (6th Cir.1988). Usually, the question of causation is a factual issue to be resolved by a jury, *Matulin,* 862 F.2d at 613, and may be satisfied by circumstantial evidence. *Langford v. Lane,* 921 F.2d 677, 683 (6th Cir.1991) (quoting *Conklin v. Lovely,* 834 F.2d 543, 546–47 (6th Cir.1987)). Nonetheless, a court may grant summary judgment even in a causation inquiry, where it is warranted.[8] *Langford,* 921 F.2d at 683–84.

[16] In this case, Hartsel has not shown that her support of Billy Grace in the May 1991 mayor's race at the debate was a substantial or motivating factor in Keys's decision to select a candidate with computer experience and proficiency, and therefore she has not carried her initial burden of proof. Hartsel's case hinges upon her claim that Coey told her in the fall of 1992 that the mayor was upset that she had supported Billy Grace. Coey does not remember such a remark, although he stated that he could have said it; Mayor Keys denies discussing Hartsel's political activity on Grace's behalf with anybody, and he was unsure whether he was even aware of her involvement. In any event, Hartsel's statement as to the content of Coey's comment must be disregarded, as being inadmissible hearsay. It is a statement being offered for the truth of the matter asserted, i.e., to show that Mayor Keys truly "was very upset" by Hartsel's political activity. *Wiley,* 20 F.3d at 225–26; Rule 56(e), Fed.R.Civ.P.; *State Mut. Life Assur. Co. v. Deer Creek Park,* 612 F.2d 259, 264 (6th Cir.1979).

Moreover, the chronology of events in this case weakens Hartsel's claim of a grudge by Keys. Mayor Keys promoted Hartsel to acting Superintendent in May 1992, with an attendant raise of $13,000 per year, a year after the primary campaign against Billy Grace. Hartsel points to *no* actions or statements of Keys that indicate he held any grudge against her in the intervening time. Then, several months later, but before Joe Grace's resignation due to health problems, Coey purportedly told her that the Mayor was very upset with her. A couple of months later, Hartsel is passed over for promotion due to her lack of computer skills. Keys would be a shrewd and extravagant politician indeed to cover his tracks by promoting and

6. In contrast, Brand was active in the state Democratic Party and had supported Keys in 1984 and 1988, performing routine campaign functions and attending some five-to fifteen-dollar-a-plate fundraising dinners.

7. Hartsel's conduct is protected by the First Amendment because a mayor's election campaign is a matter of public concern, thus satisfying *Doyle*'s first requirement. *Mount Healthy City Sch. Dist. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977).

8. For instance, in *Langford,* a nursing home employee was fired for insubordination after speaking out against her supervisor at a public meeting. The evidence was undisputed that the employee had repeatedly clashed with co-workers and that two days before the public meeting she had refused to meet with the supervisor to discuss her grievances, which constituted insubordination. Because the court concluded that her supervisor could have fired her at any time, the plaintiff could show no disputed issue of material fact concerning her discharge, and the court granted summary judgment for the defendants.

rewarding the target of his ire while simultaneously fabricating an alibi premised on computerizing the Utilities Department. The district court appropriately deemed Coey's purported remark as at most a scintilla of evidence incapable of staving off summary judgment.

[17] Even if we assume that Hartsel satisfied her threshold requirement of evidence of a substantial or motivating factor, so that the defendants must prove that they would have made the same decision in the absence of Hartsel's protected conduct, we believe that the defendants have met this burden. The decision to value a strong understanding of computers over other possible professional skills is a quintessential example of a business judgment, which must be respected if there is evidence to support its legitimacy. In this case, there is no dispute that the Utilities Department purchased a $165,000 computer system and indeed carried out a computerization program, and that Brand was integral in computerizing two other city departments and had familiarity with the system proposed for implementation. In contrast, Hartsel's cursory knowledge of computers left her dependent upon subordinate personnel, and thus an inappropriate choice to *lead* an expensive and expansive restructuring of the department's computer system. Hartsel admits that Mayor Keys was aware of her minimal computer skills. Although Hartsel may have been capable of *operating* a computer system, she has never contended that she personally possessed the skills for supervising such an upgrade. Instead, Hartsel has consistently argued that she could use the computer skills of other employees to achieve the computerization, and that her familiarity with the department's rules and day-to-day operation was more important than computer proficiency.

Thus, summary judgment is appropriate where, as in *Langford*, "a reasonable jury could not fail to conclude from the uncontested evidence that [plaintiff] ... would have fired her even if she had not [engaged in the protected conduct]." 921 F.2d at 683. The district court reached the same conclusion in this case, placing particular emphasis on the timing of Hartsel's endorsement of Keys's opponent and the later dispute. Keys's intervening elevation of Hartsel and concomitant $13,000 raise weaken her claim of a grudge,[9] especially where her accusation is based on an inadmissible single alleged remark by Coey and where the evidence of her lack of qualifications is so overwhelming.

We similarly disregard the affidavit of Joe Grace because it consists of subjective allegations and vague, conclusory allegations such as "I have witnessed many decisions made by Mayor Michael Keys regarding appointments, personnel, budgeting, funding and the purchase of new equipment. I believe those decisions ... usually were based on [ ] political considerations." We also note that Grace's affidavit fails to link the purported "political" nature of Mayor Keys's decision-making process to Ila Hartsel's particular grievance, beyond his opinion that Hartsel was "more qualified for the job than Tom Brand." If this document were sufficient to preclude summary judgment, than every employee who failed to support Keys in an election would be able to get any claim of "politically motivated" job discrimination before a jury.

Furthermore, a civil servant is not allowed to immunize herself from being fired or denied a promotion by supporting an unpopular cause or losing candidate. As the Supreme

9. This circuit has recently endorsed the "same actor inference," which allows an inference of a lack of discriminatory animus where the same person is responsible for both hiring and firing the individual. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461 (6th Cir.1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 785, 133 L.Ed.2d 736 (1996). This rationale seems applicable to Keys's decision to promote Hartsel temporarily but later find her lacking for the permanent position. It "... hardly makes sense to hire workers from a group one dislikes ... only to fire them once they are on the job." *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir.1991) (quotation omitted). Likewise, if Keys held a discriminatory animus to Hartsel because she was female, 62 years old, and supported his opponent in the primary, very little had happened to change that bias between the time he promoted her and his choice of Brand less than eight months later. The passage of time between those two events is a relevant factor in weighing the inference, *Buhrmaster*, 61 F.3d at 464.

Court noted in *Doyle*, "[a] borderline or marginal candidate ... ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record." 429 U.S. at 286, 97 S.Ct. at 575, *quoted in Langford*, 921 F.2d at 683.

Finally, Hartsel argues that by returning Hartsel to her prior position as office manager before accepting her resignation, Keys acted in a retaliatory fashion. She may be right—Keys might have been angered by her sudden and unexpected resignation—but again, there is no evidence that ties the "demotion" to her protected conduct endorsing Bill Grace almost two years before, or relating Keys's action to Hartsel's gender or age. Nor has Hartsel produced any evidence that this practice is out of the ordinary, or has been applied only to women or Democrats. Significantly, Keys took this step *after* she resigned, so it can hardly have contributed to her alleged "constructive discharge." Since the evidence is uncontradicted that her role as superintendent was temporary, Keys was not required to calculate her twenty-three years of accrued sick and vacation time at the higher salary she earned for less than a year; doing so would be fiscally irresponsible, costing Elyria additional thousands of dollars [10] without any accompanying municipal benefit, other than Hartsel's goodwill.

VI

Because we hold that the district court properly concluded that the plaintiff failed to show that the defendants' proffered non-discriminatory justifications were pretextual, and because the district court properly concluded that there was no more than a mere scintilla of evidence of politically motivated retaliation, we AFFIRM the district court's grant of summary judgment to the defendants.

10. Hartsel received $31,972.59 in backpay, based on 1161.98 hours of owed holiday, vacation, and sick time.

UNITED STATES of America, Plaintiff–Appellee,

v.

Maximiliano BAEZ, Defendant–Appellant.

No. 93–3868.

United States Court of Appeals, Sixth Circuit.

Argued April 11, 1995.

Decided June 27, 1996.

Defendant, who pleaded guilty to conspiring to distribute and possess with intent to distribute cocaine, moved to withdraw plea. The United States District Court for the Northern District of Ohio, Paul R. Matia, J., denied motion. Defendant appealed. The Court of Appeals, Gilmore, J., sitting by designation, held that: (1) defendant was not entitled to withdraw plea, and (2) sufficient factual basis supported guilty plea.

Affirmed.

1. Criminal Law ⚷274(9)

Defendant was not entitled to withdraw guilty plea, where defendant did not provide reasons to justify 67-day delay between plea and motion to withdraw plea, defendant waited until day of sentencing to move to withdraw plea, defendant admitted guilt at plea hearing and did not reassert innocence until day of sentencing, and defendant had stated to court at plea hearing that he understood charges against him, understood his rights, and was satisfied with representation by counsel. Fed.Rules Cr.Proc.Rule 32(d), 18 U.S.C.A.

2. Criminal Law ⚷1149

Appellate court reviews district court's decision to deny motion to withdraw guilty