

Court of Claims of Ohio

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DAVID BOGDAS, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2005-08638

Judge Joseph T. Clark
Magistrate Holly True Shaver

MAGISTRATE DECISION

{¶ 1} Plaintiffs David Bogdas and Ernest Scott Bernard brought this action alleging claims of age discrimination and reverse gender discrimination. In addition, Bernard asserts a claim of discrimination based upon a perceived disability. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} In 1983, Bogdas began his employment with defendant's Division of Parole and Community Services, n.k.a. Adult Parole Authority (APA), as a social counselor. In 1984, Bogdas was promoted to the position of parole officer 1. In 1987, he was promoted to the position of parole officer 2. In 1991, he was promoted to senior parole officer. Throughout his career, Bogdas had received positive employment evaluations and had been chosen for temporary work levels (TWL) as a supervisor on at least 14 separate occasions when the unit supervisor was unable to work. Bogdas testified that he is physically fit.

{¶ 3} In 1974, Bernard began his employment with the APA as a parole officer. In 1975, he was promoted to the position of parole officer 2 as a drug specialist. In 1990, Bernard was promoted to the position of parole services coordinator. Throughout his career, Bernard served as president of the Midwest Gang Investigators Association, as the national chairperson of the Great Lakes Gang Investigators, and as liaison to the U.S. Marshal's Office. Bernard testified that he is physically fit.

{¶ 4} In 2003, Bogdas was 47 years old and Bernard was 56 years old. Both plaintiffs worked as parole services coordinators in the Cleveland region of the APA. Both plaintiffs applied for the position of Parole Services Supervisor in the Cleveland Region, Unit 8 (PCN 5114). According to the job posting, the position involved the supervision and management of parole officers, the supervision of parolees and probationers, and various other administrative tasks. The position also involved contacting community groups, social agencies, government agencies and other law enforcement agencies to provide information, answer questions and create program options. (Plaintiffs' Exhibit 22.) Both plaintiffs met the minimum qualifications for the position. Bogdas was interviewed for the position. Bernard was not interviewed because the civil service application that he submitted was incomplete.

{¶ 5} On August 19, 2003, Bogdas was informed that he had not been selected for the position and that another applicant, Joy Reid, had been selected. Reid is a female who was under the age of 40.

{¶ 6} On August 8, 2003, Bogdas applied for another position as a parole services supervisor in the Cleveland Region, Unit 3 (PCN 5104). This position entailed oversight of a halfway house and of various transitional control programs. It had the same general description as PCN 5114. Bogdas met the minimum qualifications and was interviewed for the position. Jacqueline Miller, a female under the age of 40, was eventually selected.

{¶ 7} Bernard applied for two volunteer positions. In September 2003, Bernard applied to be an agent with the U.S. Marshal's Task Force. He was not selected.

Manuel Muniz, a 34-year-old male, and Linda Morgan, a 39-year-old female, were selected.¹ In December 2003, Bernard applied for a volunteer position with the FBI's Fugitive Gang Task Force. He was not selected. Tim Bacha, a 31-year-old male, was selected.

{¶ 8} Plaintiffs allege that they were not selected for any of the positions that they applied for because of discrimination based upon age and gender. Bernard also asserts that he was not selected for any position because of the perceived disability of having been diagnosed with cancer in 2001.

Age Discrimination

{¶ 9} The Supreme Court of Ohio has held that age discrimination cases brought in state courts should be construed and decided in accordance with federal guidelines and requirements. *Barker v. Scovill, Inc.* (1983), 6 Ohio St.3d 146, 147. A plaintiff may establish a prima facie case of discrimination either by direct evidence or by the indirect method established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792. Under *McDonnell Douglas*, an inference of discriminatory intent may be drawn where plaintiff establishes that he: 1) was at least 40 years old at the time of the alleged discrimination; 2) was subjected to an adverse employment action; 3) was otherwise qualified for the position; and 4) that after plaintiff was rejected, a substantially younger applicant was selected. See also *Burzynski v. Cohen* (C.A. 6, 2001), 264 F.3d 611, 622.

{¶ 10} In the case of age discrimination, it must be shown that age was the motivating factor for the adverse employment action. *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501. Generally, the denial of a promotion is an adverse employment action. See *Walker v. Mortham* (C.A. 11, 1998), 158 F.3d 1177, 1187.

¹On November 13, 2006, defendant filed a stipulation regarding the fact that Linda Morgan's birth date is August 23, 1964. Upon review, the stipulation is APPROVED.

{¶ 11} After a prima facie case of age discrimination has been made the burden then shifts to the employer “to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *McDonnell Douglas*, at 802. The burden then shifts back to plaintiff to show that the nondiscriminatory reason given by defendant was a pretext and that discrimination was the real reason for the adverse employment action. *Kohmescher*, supra, at 503-04.

{¶ 12} The court finds that Bogdas and Bernard have established a prima facie case of age discrimination with regard to PCN 5114 and that Bogdas has established a prima facie case of discrimination with regard to PCN 5104: both plaintiffs were over 40 years old; neither plaintiff was selected for the position; both plaintiffs met the minimum qualifications; and applicants who were substantially younger than plaintiffs were selected.

PCN 5114

{¶ 13} Both Bogdas and Bernard applied for PCN 5114. Defendant contends that Bernard was not selected for an interview because he did not properly complete the requisite Ohio Civil Service Application. The Ohio Civil Service Application states that “[a]pplications lacking sufficient information will be rejected.” (Plaintiffs’ Exhibit 19.) The court notes that the section of Bernard’s application titled “Summary of Qualifications” was left blank. Although Bernard testified that he submitted a resume with his application to serve as his required “criteria sheet,” his application packet does not reflect that a resume was submitted. (Plaintiffs’ Exhibit 19.) The court finds that Bernard’s failure to complete the application is a legitimate, nondiscriminatory reason why defendant did not offer him an interview for PCN 5114.

{¶ 14} Steve Vukmer testified that when he left the Cleveland office as a senior parole officer, his job vacancy resulted in the posting for PCN 5114. According to Vukmer, the philosophy of the office had changed from a law enforcement oriented approach with the goal of apprehending parole violators, to a re-entry approach with the goal of keeping offenders in their homes. As a result of the change, Vukmer testified

that Unit 8, which had been the fugitive unit, was “pretty much eliminated.” Vukmer testified that in November 2001, a regular parole unit merged with Unit 8. At that time, some parole officers in Unit 8 continued to do fugitive work and some began to be responsible for a caseload of parole offenders. However, Vukmer testified that by 2002, all parole officers had an individual caseload.

{¶ 15} Bogdas was one of five people selected for an interview before a panel consisting of Regional Administrators Ron Stevenson and Joseph Dubina, Regional Services Coordinator Joyce Chisar, and Jacqueline Martin. Joyce Chisar described Bogdas’ interview as “okay for being a parole officer.” Stevenson testified that he found Bogdas’ interview to be “average” compared to Joy Reid, the unanimous selection of the panel.

{¶ 16} Richard Costas, a supervisor of both Bogdas and Reid, testified that he was not a member of the interview panel and that he was not consulted with regard to the interview process. According to Costas, he “always picked” Bogdas to be acting supervisor in a TWL capacity when he was not available to perform his duties. Costas also stated that Reid was not physically fit and that physical fitness was a requirement for the position because of the potential need to apprehend fugitives.

{¶ 17} Reid’s application packet shows that in addition to a master’s degree in counseling, she also had twelve years of experience as a parole unit supervisor in El Paso, Texas. (Plaintiffs’ Exhibit 21.) Stevenson testified that he was impressed with how Reid had started in a clerical position and had worked her way into a position roughly equivalent in Texas to PCN 5114. The members of the interview panel also testified that they appreciated Reid’s ideas for agency programming, her educational background in counseling given the new direction the agency was taking, and her overall enthusiastic and personable demeanor.

{¶ 18} Conversely, both Chisar and Stevenson testified that physical fitness was not a requirement of PCN 5114. The court also notes that the position description

for PCN 5114 does not mention a physical fitness requirement. (Defendant's Exhibit L.)

{¶ 19} The court finds that based upon the evidence presented at trial, Joy Reid was qualified for PCN 5114. Accordingly, the court therefore finds that defendant has articulated a legitimate, nondiscriminatory reason for plaintiffs' rejection. The burden then shifts to plaintiffs to show that the reason given by defendant for Reid's selection was a pretext and that discrimination was the reason that they were not selected. Plaintiffs presented statistical evidence in an attempt to show that defendant's selection of Reid was a pretext.

{¶ 20} Plaintiffs' expert, Melvin Ott, a statistician, opined that the statistical data that he had compiled showed that defendant's promotion process resulted in gender and age discrimination in 2003 and 2004. However, the court finds that Ott's testimony was not particularly persuasive for the following reasons.

{¶ 21} Ott testified that his statistical data classified applicants solely by their age and gender. The court notes that for the period from 2001 to 2004, 365 individuals sought promotions at the APA. With regard to gender, 18 of 131 women were promoted (14 percent) versus 19 of 234 men (8 percent). With regard to age, 28 of 208 applicants under 40 were promoted (13.5 percent) versus 9 of 106 applicants over 40 (8.5 percent). Ott testified that he did not take into account the education levels of the applicants, their prior work experience, their answers to the interview questions, their demeanor during the interviews or their individual attitudes toward the department's shift toward a social work approach.

{¶ 22} Statistical data by itself will not conclusively demonstrate what motivated the particular decision that was adverse to plaintiffs. *Furnco Construction Corp. v. Waters* (1978), 438 U.S. 567, 580. Upon review of Ott's testimony, the court finds that the statistical data does not show that the reason given by defendant for Reid's selection was a pretext and that age discrimination was the reason that plaintiffs were not selected.

PCN 5104

{¶ 23} Bogdas also applied for PCN 5104. Bogdas' assertions with regard to being denied the position focus upon alleged irregularities in the selection process. Therefore, the court will examine the selection process in detail.

{¶ 24} On May 19, 2003, personnel manager Rebecca Fair issued a directive regarding a new selection policy to be used for all future job postings. (Plaintiffs' Exhibit 14.) The new process called for a "single screener" who would evaluate the applications. The screener, known as the "subject matter expert" would evaluate each application and enter relevant data onto a "Subject Matter Expert Screening Form." (Plaintiffs' Exhibit 17.) Candidates were given up to seven points for their highest degree obtained. Candidates could earn up to five points for their prior job-related experience. A single point could be earned for relevant licenses, certifications, or computer training. Finally a single point could be earned based upon the presentation of the job application and the attachments to it. A candidate could earn up to a total of 14 points. The new policy called for the subject matter expert to select the five highest-scoring applicants to comprise a primary applicant pool. If there were more than 15 applicants, the primary applicant pool could be the lesser of a third of the applicants or the ten highest-scoring individuals.

{¶ 25} After a primary applicant pool is selected, a "recommendation committee" consisting of one white male, one white female, one minority male, and one minority female interviews the primary applicant pool and selects a person to recommend for the position. The interview includes both an oral and a written component.

{¶ 26} Twenty-two people applied for PCN 5104. Seven applicants scored 14 points. Jacqueline Miller, the candidate ultimately selected for the position, scored 12 points as did three other applicants. Bogdas scored 11 points. Stevenson testified that after reviewing the screening forms, he requested that Deputy Director Harry Hageman expand the primary applicant pool to include all applicants.

{¶ 27} Plaintiffs argued that the applicant pool was improperly expanded so that Miller would receive an interview. Plaintiffs note that Miller's score was improperly calculated: she had been initially awarded a score of 13 instead of the 12 points to which she was entitled. Plaintiffs assert that Miller's incorrect score could have qualified her to be considered in the primary applicant pool as the applicant with the eighth highest score of 22 applicants. However, Stevenson testified that he wanted to include more applicants from the Cleveland office so he sought permission to consider all applicants. The court finds that plaintiffs have not proven that defendant expanded the applicant pool solely to include Miller; on the contrary, if Stevenson had not expanded the pool, Bogdas would not have been interviewed.

{¶ 28} Following the interview process, three "prime" applicants were chosen. Carl Sanniti, a male over 50, received a score of ten; Miller received a score of nine; and Earl Hall, another male over 50, received a score of eight. Stevenson testified that Sanniti was the number one candidate for the position at that point; however, after a reference check with Sanniti's former employer, he was disqualified. The position was then offered to Miller.

{¶ 29} Stevenson also testified regarding the specific characteristics that made Miller a desirable candidate including relevant counseling experience and experience working at a halfway house. Miller had also been a parole officer in the Cleveland region for over eight years. The court finds that defendant has articulated a legitimate, nondiscriminatory reason why Miller was chosen for the position.

{¶ 30} As evidence of pretext, plaintiffs point to the fact that Miller's written responses to the interview questions appear on separate sheets of paper instead of on the form that contained the interview questions. Plaintiffs also assert that Miller was given more time than other applicants to complete the written questions. Miller testified that she did not specifically recall whether she used paper that she had taken to the interview with her or whether she asked for additional paper at the interview. However, Miller denied that she was given additional time to complete her answers. Plaintiffs also

assert that Miller was “hand-picked” by Stevenson as the selected candidate before the interviews. However, Miller testified that she barely knew Stevenson prior to her interview.

{¶ 31} Upon review of the evidence, the court finds that although there may have been “irregularities” in the selection process for PCN 5104, the irregularities do not support Bogdas’ theory that age discrimination was the reason that he was not promoted. Indeed, applicants Sanniti and Hall were both over 40 years old when they were chosen as two of the top three candidates. The court finds that, based upon the evidence presented, Bogdas has not proven that age was the reason that he was not selected for PCN 5104.

Volunteer Task Force Positions

{¶ 32} Bernard also applied for two volunteer leadership positions: one with the U.S. Marshal’s Fugitive Task Force (Marshal’s Task Force) and one with the FBI’s Fugitive Gang Task Force (FBI Task Force). Defendant asserts that Bernard cannot prove that he was subjected to an adverse employment action when he was not selected for either volunteer position.

{¶ 33} Whether an employment action is considered “adverse” is to be determined on a case-by-case basis. *Tessmer v. Nationwide Life Ins. Co.* (Sept. 30, 1999), Franklin App. No 98AP-1278. Generally, an adverse employment action is defined as a material adverse change in the terms and conditions of employment. *Kocsis v. Multi-Care Management, Inc.* (C.A.6, 1996) 97 F.3d 876, 885.

{¶ 34} Because the task force positions were voluntary it is not likely that Bernard was subjected to an adverse employment action as required to state a prima facie case of age discrimination. However, because Bernard testified that certain fringe benefits were associated with the task force positions, namely the use of a government car as well as free parking, the court will examine the merits of Bernard’s discrimination claims related to these two positions.

{¶ 35} In regard to the Marshal's Task Force, Bernard testified that Stevenson told him that although he thought that Bernard was qualified for the position, Stevenson needed him to stay in his current position to train the new Fugitive Gang Unit that defendant was establishing. The court finds that it is not unreasonable or discriminatory for Bernard's supervisor to desire that Bernard's experience be channeled toward the job for which he was being paid. Ultimately, however, representatives from the U.S. Marshal's office made the final decision on the selection. Bernard testified that the announcement for the Marshal's Task Force position stated that bi-lingual applicants were preferred, and that Manuel Muniz, a successful applicant, was fluent in Spanish.

{¶ 36} In regard to the FBI Task Force, Michelle Jindra, who served on the interview panel, testified that during discussions about the candidates Stevenson made a reference to Bernard's age and the fact that he had had cancer. Stevenson testified that although he did not remember making such a reference, Bernard's surgery in 2001 was known to the interview panel and that the comment about Bernard's age could have been about his status as the most senior parole officer being interviewed for the position.

{¶ 37} Stevenson's alleged comments, if true, are disconcerting, and could certainly indicate an age bias on his part. However, stray comments in the workplace are insufficient to prove discrimination absent a showing that they are related to the decision-making process. *Brewer v. Cleveland City Schools Bd. Of Educ.* (1997), 122 Ohio App.3d 378, 384, (even comments made by the decision-maker himself did not warrant reversal of grant of summary judgment). In this case, the interview panel for the FBI Task Force included a representative from the FBI. Jindra testified that the decision came down to two applicants: Vince Fazio and Tim Bacha. The FBI representative preferred Tim Bacha and he was selected for the position. Plaintiff has not presented any evidence that Stevenson's alleged comments were a deciding factor. Therefore, the court finds that Bernard has not proven age discrimination with regard to selection for the FBI Task Force.

Reverse Gender Discrimination

{¶ 38} Plaintiffs have also claimed reverse gender discrimination. The “reverse discrimination complainant” bears the burden of demonstrating that he was intentionally discriminated against “despite his majority status.” *Murray v. Thistledown Racing Club* (C.A. 6, 1985), 770 F.2d 63, 67. A prima facie case of reverse gender discrimination requires: a showing that “background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority * * *, and upon a showing (2) that the employer treated differently employees who were similarly situated but not members of the protected group.” *Id.* (Additional citations omitted.)

{¶ 39} Plaintiffs have established that female employees were selected for three of the positions in question (PCN 5114, PCN 5104, and one volunteer position). However, the court finds that plaintiffs have failed to present evidence that background circumstances support the suspicion that defendant is that unusual employer who discriminates against the majority, or that defendant treated plaintiffs differently than the successful applicants. Therefore, the court finds that plaintiffs have failed to make a prima facie case of reverse gender discrimination.

Perceived Disability Discrimination

{¶ 40} Bernard also asserts that he was not selected for any position based upon the fact that he had been diagnosed with cancer in 2001. Bernard asserts that knowledge of the diagnosis resulted in a “perceived disability.”

{¶ 41} Under Ohio law, an individual has a “disability” if he or she has “a physical or mental impairment that substantially limits one or more major life activities.” R.C. 4112.01(A)(13). The term “substantially limits” means: “(i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or

duration under which the average person in the general population can perform that same major life activity.” 29 CFR 1630.2(j). Further, “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives,” and “[t]he impairment’s impact must also be permanent or long-term.” See *Toyota Motor Mfg. v. Williams* (2002), 534 U.S. 184, 198.

{¶ 42} An individual may be perceived as having a disability if an employer “mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities” or “mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.” *Sutton v. United Air Lines, Inc.* (1999), 527 U.S. 471, 489. For such a claim to succeed, it is necessary that the employer “entertain misconceptions about the individual * * *.” *Id.*

{¶ 43} An employee’s burden is to establish that the employer regarded him as substantially limited in his ability to perform such fundamental and routine tasks as are necessary to exist in everyday life, not merely to establish that the employer regarded the employee as limited in his abilities to perform the specific tasks associated with a specific job. *Kemo v. City of St. Clairsville* (1998), 128 Ohio App.3d 178, 186.

{¶ 44} Bernard has not specified what “major life activity” his supervisors believed that he was incapable of performing. The only evidence that Bernard presented was a comment that Stevenson allegedly made when Bernard was applying for the FBI Task Force position. The stray comment that Bernard had been diagnosed with cancer two years prior does not prove that Stevenson perceived Bernard as limited in a substantial life activity. In fact, Bernard testified that only months earlier, when he was applying for the Marshal’s Task Force position, Stevenson approached him and stated that he wanted his help training the new fugitive gang unit. No other evidence was presented to show that any decision-maker at the APA viewed Bernard as anything but a capable and experienced parole officer. Therefore, the court finds that Bernard

has not established a prima facie case for disability discrimination, perceived or otherwise.

Conclusion

{¶ 45} For the foregoing reasons, the court finds that plaintiffs have failed to prove any of their claims by a preponderance of the evidence and, accordingly, judgment is recommended in favor of defendant.

{¶ 46} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

HOLLY TRUE SHAVER
Magistrate

cc:

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