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19-P-1780

Appeals Court

GEORGE DEMERIS vs. TOWN OF FOXBOROUGH.

No. 19-P-1780.

Norfolk. March 4, 2021. - May 21, 2021.

Present: Wolohojian, Englander, & Hand, JJ.

Police, Retirement, Assignment of duties. Municipal Corporations, Police. Police Officer. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on March 14, 2016.

The case was heard by Peter B. Krupp, J., on motions for summary judgment.

Christopher J. Trombetta for the plaintiff.
Bradford N. Louison for the defendant.

WOLOHOJIAN, J. The Foxborough police department has a written policy that its reserve police officers must retire at age sixty-five, which is also the mandatory retirement age for members of its regular police force. The plaintiff's service as a long-time reserve officer was accordingly terminated when he

turned sixty-six years old. The question presented is whether summary judgment properly entered against the plaintiff on his age discrimination claim under G. L. c. 151B, § 4 (1C). We conclude that it did.

Background. The plaintiff was a reserve police officer with the Foxborough police department for twenty-one years.¹ He was never a full-time police officer, and he never had a set schedule. Instead, the department would call him as needed, and he then had the option of either accepting or rejecting the particular assignment. Sometimes, these assignments (known as details²) only entailed traffic control. On other occasions, the plaintiff responded to calls for medical emergencies, burglaries, vandalism, intoxicated persons, domestic violence, assault, suspicious activity, and motor vehicle accidents. In addition, the plaintiff was often assigned to Gillette Stadium, where he would break up fights, place intoxicated persons into protective custody, and arrest patrons for criminal offenses. As a reserve officer, the plaintiff wore a uniform and carried a

¹ We recite the material facts in the light most favorable to the plaintiff. See Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

² The plaintiff uses the term "paid details" to refer to traffic control at construction sites of private entities. The term is misleading because the plaintiff was paid for all of his details, regardless of their nature, scope, or who needed them.

firearm, a baton, pepper spray, and handcuffs. The plaintiff's service as a reserve officer was terminated in 2014 when he turned sixty-six.

Based on this termination, the plaintiff brought the underlying one-count complaint alleging age discrimination in violation of G. L. c. 151B, § 4. On cross motions for summary judgment, a Superior Court judge allowed judgment in favor of the town. In broad summary, the judge accepted the town's argument that the definition of "maximum age" in G. L. c. 32, § 1,³ relating to the State pension and retirement system, acts as a mandatory retirement age for police officers and those reserve officers, such as the plaintiff, who functionally perform the same work as police officers and have similar powers.

The plaintiff, on the other hand, pointed to an opinion letter directed to the Berkshire County Retirement Board from the executive director of the Public Employee Retirement Administration Commission (PERAC) that concluded that a retired

³ General Laws c. 32, § 1, as relevant here, defines "maximum age," as it is used in sections 1 through 28 of c. 32, "if classified in any of the following occupations or position classifications, for which the personnel administrator has determined, pursuant to [St. 1987, c. 415, § 2], that age is a bona fide occupational qualification, [as] the last day of the month that a member in any such occupation or position classifications attains age 65: a . . . uniformed member of a police department."

police officer may continue to work "paid details" even after retirement, despite the definition of "maximum age" in G. L. c. 32, § 1.⁴ In addition, the plaintiff argues that most of his assignments as a reserve officer did not require him to exercise the full range of police powers, nor was he expected to use those powers. On that basis, he contends that he was not subject to the maximum age definition of G. L. c. 32, § 1.

Discussion. General Laws c. 151B, § 4 (1C), makes it unlawful "[f]or the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law." In other words, the Commonwealth and its cities and towns may make age-based employment decisions if those decisions are authorized by any general or special law. See generally J.F. Adkins, M.W. Batten, S.C. Moriearty, & L.F. Rubin, *Employment Law* § 8:13 (3d ed. 2016).⁵ Thus, the question

⁴ Whatever force, application, or meaning the PERAC letter may have, it clearly does not pertain to members of Foxborough's reserve officer corps, which was created pursuant to St. 1986, c. 85.

⁵ The Commonwealth, like other employers, may take additional age-based employment actions in certain circumstances not here applicable. See G. L. c. 151B, § 4 (17).

in this case is whether there is any general or special law authorizing the termination of Foxborough reserve officers at age sixty-five.

There is: St. 1987 c. 415, § 2, which provides that "no member^[6] in the occupation or position classification of uniformed member of a . . . police department . . . shall continue in service beyond the last day of the month in which he attains the age of sixty-five unless the personnel administrator . . . shall have determined by regulation that age is not a reasonably necessary bona fide occupational qualification for service in said occupations or position classifications."⁷ Cf. McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 786 (1975)

⁶ We need not decide whether the term "member," as used in St. 1987, c. 415, § 2, is subject to the definition of "member" in G. L. c. 32, § 1.

⁷ "On April 25, 1989, the Massachusetts Personnel Administrator announced that he had determined that age was in fact a bona fide professional qualification . . . for law enforcement personnel. As a result, the Administrator never issued the regulations contemplated by [St. 1987, c. 415, § 2]." Bouras v. Danvers, 11 F. Supp. 2d 159, 162 (D. Mass. 1998). See Department of Personnel Administration, Report of the Study Conducted Pursuant to Section 2, Chapter 415, Acts of 1987, at 74 (March 31, 1989) ("The conclusion of this study is, based on the research documented in this report, that age is a reasonably necessary bona fide occupational qualification for service in the occupations or classifications listed in [St. 1987, c. 415, § 2]. It is recommended that no change be made to the current mandatory retirement age for these occupations at this time"); Department of Personnel Administration, Annual Report: Fiscal Year 1989, at 13.

(classifications in G. L. c. 32 evince "a legislative intent to provide for earlier retirement of those government officers concerned with the safety of the public"). Thus, persons in the "occupation" or "position classification" of a uniformed member of a police department are required to cease service before turning sixty-six, and no claim of age discrimination may lie under G. L. c. 151B, § 4 (1C), as a result.⁸ See G. L. c. 32, § 1.

All that remains is to determine whether reserve officers in Foxborough, such as the plaintiff, are in the "occupation" of a uniformed member of its police department or in the "position classification" of one. We set aside "position classification" and focus on "occupation," which "is a term of broad significance and includes the trade, calling, profession, office, employment or business by which one usually gets [one's] living." Everson v. General Fire & Life Assur. Corp., Ltd., of Perth, Scotland, 202 Mass. 169, 175 (1909). The touchstone for our analysis of this question begins with the legislative scheme that created Foxborough's reserve police force.

Foxborough's reserve police force was created by St. 1986 c. 85, § 1, which, in pertinent part, provides:

⁸ Nor does such a requirement violate equal protection. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316-317 (1976).

"There shall be a reserve police force consisting of such number of members as the board of selectmen may determine. Members of such force shall be appointed by the board of selectmen in consultation with the chief of police. Members of said reserve force may be removed by the board of selectmen in consultation with the chief of police at any time for any reason satisfactory to said board. Said members shall, while on duty, have all the powers and duties of members of the regular police force of Foxborough and shall be paid by the town of Foxborough such compensation as the selectmen may fix. Said members shall comply with the standards and rules and regulations of the police department of the town and with the orders of the chief of police."

It is plain that the statute created a reserve police force whose members were to have all the powers and responsibilities of regular members of the police force while they are on duty and were to be under the direction of the police chief. Thus, Foxborough reserve officers, as a matter of law, are occupied as uniformed members of a police department for purposes of St. 1987, c. 415, § 2, and are therefore subject to its mandatory retirement requirement.

The police department's written policy concerning reserve police officers (policy) compels the same conclusion. Not only does the policy incorporate the directives of St. 1986, c. 85,⁹ several other policy provisions demonstrate the close

⁹ Specifically, the policy states that members of the reserve force "shall, while on duty, have all of the powers and duties of members of the regular [p]olice [f]orce of Foxborough. The level of training and their use is under the control of the [c]hief of [p]olice and applicable State [l]aw."

relationship between reserve police officers, the police department, and the regular members of the police force. For example, the policy states:

"It shall be the policy of the Foxborough Police Department to employ Reserve Police Officers to supplement the regular Police Force. Reserve Officer[s'] authority is controlled by Statute Law and written directives from the Chief of Police. Reserve Officers shall, under the direction of the Police Chief, be utilized in situations which cannot be met by the Regular Police Force. The Chief of Police shall place specific limitations on the activities which Reserve Officers are required to perform. Reserve Officers shall be assigned primarily to law enforcement related community service functions where the likelihood of making arrests is minimal."¹⁰

Also by way of example, the policy provides that reserve officers receive their work assignments from the chief of police, and that "[w]hile working at the direction of the [c]hief, [r]eserve [o]fficers have the same power as a fulltime member of the force."¹¹ Reserve officers are required to undergo specific training in topics customary to police work, such as criminal law, motor vehicle laws, traffic direction and control, accident investigation, child abuse, search and seizure, apprehension and arrest, use of force, crime scenes, crisis

¹⁰ A nonexclusive list of possible assignments for reserve officers is given as: parades, large scale special events, traffic direction at construction sites, disaster relief, large scale searches for missing persons, security type details, and any events or situations the police chief may deem necessary.

¹¹ The policy, however, sets some limits on the situations in which reserve officers can effectuate arrests.

intervention, drugs and alcohol, and firearm proficiency. The department specifies the types of firearms and ammunition that reserve officers carry while on duty. In addition, reserve officers are required to wear the same uniform as regular officers with only a few small differences.¹² Reserve officers are bonded to the same extent as regular police officers and are given public liability protection to the same extent. Finally, the department's policy treats reserve officers and regular officers exactly the same for purposes of retirement age: both groups must retire at age sixty-five.¹³ In short, not only do reserve officers wear virtually the same uniform as regular officers, they are under the direction of the police chief, their assignments come through the department, and their training, duties, restrictions, and responsibilities are subject to the policies of the police department.

The debate that consumes much of the parties' argument here and below over whether, and to what degree, the plaintiff exercised the full range of police powers on any particular

¹² Reserve officers have a black plastic headband on their police hat, have a blue name tag rather than the traditional silver one, and wear a "Boston Blue" cord braid on their uniform pants rather than the one inch stripe worn by full-time officers.

¹³ "The maximum service age for [r]eserve [p]olice [o]fficers shall be the same as the mandatory retirement age for regular fulltime [p]olice [o]fficers[: s]ixty-five (65) years of age."

assignment or in the aggregate over time, does not matter. Statute 1986, c. 85, vests reserve officers with all the powers and duties of Foxborough's regular police officers whenever they are on duty. Just as regular full-time police officers remain in the occupation of a uniformed member of the police department even on days when they are not called upon to use the full scope of their authorized power, so too, as a result of St. 1986, c. 85, do reserve officers while they are on duty.

Finally, the plaintiff asserts that, until 2013 (the year before the plaintiff's termination), there were five reserve officers who continued to work beyond age sixty-five. The town admits that these people were employed by the town and does not dispute their ages. But the plaintiff does not explain how this fact supports his age discrimination claim. While inconsistent application of the retirement age requirement (if indeed that is what occurred) may raise other issues (which the plaintiff does not identify or argue), it does not support the plaintiff's age discrimination claim.

Conclusion. As summary judgment was properly allowed in favor of the defendant, we affirm the judgment.

So ordered.