

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wordsworth Academy, :
Appellant :
v. : No. 562 C.D. 2008
Philadelphia Commission on : Submitted: December 5, 2008
Human Relations :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: January 6, 2009

Wordsworth Academy appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) denying Wordsworth's appeal and affirming the decision of the Philadelphia Commission on Human Relations (Commission) to award back pay to Major James. We affirm.

Wordsworth is a social services agency in the mental health field located in Philadelphia, Pennsylvania. Wordsworth employs Therapeutic Support Staff Workers who work with adolescents on an individual basis based on a treatment plan developed by a supervising psychiatrist and a team of mobile therapists.

On May 24, 2002, James applied for the position of Therapeutic Support Staff Worker with Wordsworth at an open house job fair. James was

interviewed by Rashaeda Paey, an employee of Wordsworth. At the time of his application, James was 49 years old with 18 years of extensive work in the mental health field and specific experience working with severely emotionally disturbed children.

Following the interview with Paey, James expected Wordsworth to contact him within a few weeks of the interview. This was based on Paey's representation that she was recommending James for employment. James was not contacted for a second interview until August 28, 2002. At the conclusion of the second interview, James again believed that Wordsworth would contact him within a week or two for a 40 hour a week position as a Therapeutic Support Staff Worker.

James was not contacted by Wordsworth; therefore, he called Wordsworth on September 24, 2002, concerning his employment status with Wordsworth and on two additional occasions. When James did not receive an explanation for the delay of his employment application, he expressed his frustration during a telephone conversation with Kizzi Edens, staff coordinator with Wordsworth, and Barbara Motts, Edens' supervisor.

During each of the interviews, especially the second round of interviews attended by James, he observed younger applicants who appeared to be recent college graduates in the age category of mid to low twenties. James subsequently did not receive a position with Wordsworth.

In October 2002 James filed a complaint with the Commission alleging discrimination in hiring because of age and/or gender. The Commission conducted an investigation and on November 2, 2004, it found probable cause that Wordsworth violated Section 9-1103(A)(1) of the Philadelphia Fair Practices

Ordinance.¹ A public hearing was held on December 16, 2005, at which the parties presented evidence. James testified on his own behalf and presented documentary evidence. James also presented the testimony of Deborah Rudbarg, an investigator with the Commission. Wordsworth presented the testimony of Kizzi Edens. Based on the evidence presented, the Commission found as follows:

Investigator Rudbarg confirmed that three individuals were considered for a position as a Therapeutic Support Staff Worker. Those three individuals were all under the age of 40 and were hired by Wordsworth for part time positions as Therapeutic Support Staff Workers. The successful candidates did not have the equivalent experience of James. This fact was stipulated to by Wordsworth at the start of the December 16, 2005, public hearing. The experiences of the successful candidates ranged from mosquito technician, bank teller and gym coordinator in contrast to the 18 years of experience in the field by James.

During the administrative investigation, Investigator Rudbarg spoke with Barbara Motts, Rashaeda Paey, and Kizzi Edens concerning the hiring process. Wordsworth's counsel stipulated that the hiring process was flawed and that James was extensively more qualified than the comparative applicants for the Therapeutic Support Staff Worker position at Wordsworth.

¹ Section 9-1103(A)(1) provides as follows:

(A) It shall be an unlawful employment practice:

(1) For any employer to refuse to hire, discharge, or discriminate against any person because of race, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, handicap, or marital status with respect to tenure, promotions, terms, conditions or privileges of employment or with respect to any matter directly or indirectly related to employment.

Edens, former staffing coordinator for Wordsworth, testified at the hearing that she was responsible for checking the qualifications of the eligible candidates following the open house job fair. The names of the candidates determined to be ineligible were forwarded to Barbara Motts, Human Resources Manager for Wordsworth.

Edens confirmed that following James' initial interview with Paey, he was identified as a candidate to be hired. Edens subsequently spoke with James in June 2002 following his initial interview in May 2002, and informed him that Wordsworth would be holding off placing new employees on cases due to a decrease in authorizations for additional staff. Edens did not dispute Wordsworth's initial interest in hiring James and testified that the authorization of services was presumed at that time to be in the middle or end of September 2002. Edens conducted James' second interview and confirmed Wordsworth's interest in hiring him for the position of Therapeutic Support Staff Worker.

Edens acknowledged that James contacted Wordsworth on the status of his employment application and she testified that James was disrespectful during the conversation. Edens reported the telephone encounter to Motts. Edens was unable to provide any credible testimony for the reason less qualified candidates were hired over James other than the allegedly unprofessional phone conversation.

No documentation was provided by Wordsworth during the investigation or the hearing for the delay in hiring Therapeutic Support Staff Workers that substantiated the claim. No documentation was provided to the investigator for the Commission which justified the list of individuals whom were hired by Wordsworth. No testimony was presented which adequately explained the basis for Wordsworth's hiring practices. Edens' testimony was not credible

concerning her telephone conversation with James as the basis for not hiring James for a Therapeutic Support Staff Worker position.

Based on the foregoing findings of fact and credibility determinations, the Commission determined that James established unlawful age discrimination pursuant to Section 9-1103(A)(1) of the Philadelphia Fair Practice Ordinance as the basis for not hiring him for a Therapeutic Support Staff Worker position with Wordsworth. The Commission concluded further that Wordsworth did not present credible, legitimate, nondiscriminatory reasons for its actions in hiring younger, less qualified candidates for the Therapeutic Support Staff Worker position.

Accordingly, the Commission upheld the finding of probable cause issued by the Commission's staff. Based on the testimony and evidence presented at the hearing, the Commission directed Wordsworth to pay James \$37,993.00, which represented the salary James would have received for the period 2002 up to the date of the December 16, 2005, public hearing minus any earnings James may have received in a subsequent position from 2002 to 2005.

Wordsworth appealed the Commission's decision to the trial court which affirmed. This appeal followed.²

² This Court's review of an adjudication of a municipal civil service commission is limited to determining whether constitutional rights have been violated, an error of law has been committed, or findings of fact necessary to support the adjudication are not supported by substantial evidence. Lewis v. Civil Service Commission of Philadelphia, 518 Pa. 170, 542 A.2d 519 (1988). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, but must be more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. Id. The Commission's findings of fact, which are supported by substantial evidence, are conclusive upon appeal; only the legal conclusions drawn by the Commission remain subject to judicial review. Anastasi v. Civil Service Commission of the City of Philadelphia, 488 A.2d 384 (Pa. Cmwlth. 1985).

Herein, Wordsworth raises the following issues: (1) whether the Commission erred by placing upon Wordsworth the affirmative burden to prove that it did not discriminate against an undesirable candidate for employment; and (2) whether the Commission's findings are supported by substantial evidence when no evidence of pretext exists and the Commission disregarded evidence produced by the Commission's staff proving that Wordsworth did not discriminate against James for employment because of his age when Wordsworth ultimately rejected James for his acting out behavior during the hiring process. We shall address together the two issues raised by Wordsworth.

In support of the first issue raised, Wordsworth argues that the trial court erred by placing the ultimate burden upon Wordsworth to prove that it did not discriminate against James because of his age. Wordsworth contends that it presented non-discriminatory reasons for not hiring James and that it was James' ultimate burden to prove that its proffered reasons were only a pretext.

Wordsworth contends that James simply failed to meet his burden of proving that he was intentionally discriminated against as there is no evidence that can reasonably support any inference that Wordsworth engaged in invidious intentional discrimination against James because of his age. Wordsworth argues that it was not its burden to disprove that it discriminated against James and that the ultimate burden of persuasion remained with James.

Wordsworth contends further that in order to impose liability upon any employer for discriminatory employment practices, an ultimate finding of unlawful discrimination is required regardless of whether or not the employer's explanation is believed. Wordsworth contends that the Commission did not properly make the required ultimate finding of intentional discrimination against James because it made no determination of pretext, and it made no determination

that James' age actually played a role in Wordsworth's decision, but also had a determinative influence on the outcome. Wordsworth argues that in the absence of such findings, there is no basis for imposing liability on Wordsworth.

In support of the second issue raised, Wordsworth argues that the Commission's findings are not supported by substantial evidence because no evidence of pretext exists. Wordsworth contends further that the Commission ignored evidence produced by the Commission's staff of non-discriminatory reasons for Wordsworth's rejection of James for his acting out behavior during the hiring process.

The United States Supreme Court, in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), set forth the burden-shifting analysis for a disparate treatment claim. Under McDonnell Douglas, as applied in this context, a plaintiff must offer a prima facie case demonstrating that the aggrieved party is a member of a protected class, suffered an adverse action, and others not in the protected class have been treated differently, which would raise an inference of discrimination. See McDonnell Douglas, 411 U.S. at 802. The burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the action. Id. Once this burden is met, the plaintiff has an opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804.

The United States Supreme Court further explained in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), that "[t]he nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens." With regard to the

defendant's burden once the plaintiff successfully establishes a prima facie case, the Supreme Court stated:

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

Burdine, 450 U.S. at 254-56 (citation and footnotes omitted). With regard to the plaintiff's ultimate burden, the Supreme Court further explained:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 804-805.

Id. at 256.

It is well settled that it is ultimately the trier of fact in employment discrimination cases, in its role as arbiter of credibility, which determines which party's explanation of the employer's motivation it believes. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983). The weight and credibility of the evidence is for the Commission to measure, not this Court. Anastasi. We may not weigh the evidence and substitute our judgment for that of the Commission. Id.

Herein, Wordsworth does not dispute that James succeeded in presenting a prima facie case of age discrimination. In support of his claim of age discrimination, James testified on his own behalf and presented the testimony of Investigator Rudbarg.

Investigator Rudbarg testified that during her investigation, Wordsworth informed her that it hired three unqualified individuals for the position of Therapeutic Support Staff Worker, who were younger than James, due to a

mistake in their hiring procedures. Reproduced Record (R.R.) at 103a. Investigator Rudbarg testified further that she was verbally informed by Wordsworth that it was unable to hire new employees for the Therapeutic Support Staff Worker position because it had to keep its current employees working; however, when she asked Wordsworth to document that fact, Wordsworth did not provide any documentation detailing who was hired, how many hours were worked, or a stoppage in hiring. Id. at 109a-110a. Investigator Rudbarg testified that she received very minimal participation by Wordsworth. Id. at 110a.

To meet its burden of producing a non-discriminatory reason for not hiring James, Wordsworth presented the testimony of its former staffing coordinator, Edens. Through Edens' testimony on direct examination, Wordsworth presented two reasons for not hiring James. First, that there was a hold on new hires and second, that James exhibited disrespectful and unprofessional behavior in a phone conversation.

With respect to the hiring hold, Edens testified that there was a decrease in authorizations for additional staff and as a result she had to hold off placing new employees on cases. R.R. at 120a. Edens testified that she informed James of the hold on hiring but did not give James any details. Id. at 121a-24a.

With respect to James' unprofessional behavior, Edens testified that James was disrespectful to her in a phone conversation wherein James called to inquire about the status of his application for employment. Id. at 125a. When questioned on direct examination if she made the decision not to proceed with the hiring of James as a result of his behavior, Edens testified that she did not make

that decision. Id. Edens testified further that she referred James to her supervisor, Barbara Motts. Id. at 126a. Edens testified that Motts later informed her not to worry about James, that Motts would handle the situation. Id. at 127a.

On cross-examination, Edens testified that she did not know how or why the three unqualified younger individuals were hired or if they were hired as a result of a hiring mistake. Id. at 140a. Edens testified further on cross examination that after her last phone call with James, where she referred him to her supervisor, Barbara Mott, she did not go to her supervisor with the intent of telling the supervisor not to hire James but to find out what her decision would be regarding James as Edens did not have the authority to make the decision as to whether or not James would be hired. Id. at 141a-42a.

With respect to the two reasons given by Wordsworth for not hiring James, the Commission found that Edens was unable to provide any credible testimony for the reason that less qualified candidates were hired over James other than the allegedly unprofessional phone conversation. The Commission also found that Edens' testimony was not credible concerning her phone conversation with James as the basis for not hiring James for a Therapeutic Support Staff Worker position. Although Wordsworth was able to meet its burden of production by presenting non-discriminatory reasons for hiring James, as the trier of fact, it was well within the Commission's province to reject Edens' testimony as incredible.

The Commission pointed out that no documentation was provided by Wordsworth during the investigation for the delay in hiring Therapeutic Support Staff Workers that substantiated the claim that James was not hired due to a hiring

hold. This finding is supported by Investigator Rudbarg's testimony. The Commission also found that no documentation was provided which justified the list of individuals whom were hired by Wordsworth. This finding is also supported by Investigator Rudbarg's testimony.

Accordingly, we conclude that the Commission's determination that Wordsworth's failure to hire James was based on a discriminatory reason is supported by the evidence. James was able to meet his ultimate burden indirectly by showing that the Wordsworth's proffered explanations were unworthy of credence. As previously pointed out by our Superior Court, the plaintiff must, point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable factfinder could rationally find them 'unworthy of credence' and hence infer that the proffered nondiscriminatory reason 'did not actually motivate' the employer's actions. Kroptavich v. Pennsylvania Power and Light Company, 795 A.2d 1048, 1059 (Pa. Super. 2002) (quoting Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998)). James met this burden through the testimony of Investigator Rudbarg and by showing on cross examination of Eden that her explanations were unworthy of belief.

Moreover, contrary to Wordsworth's assertions, the Commission did not improperly shift the burden to Wordsworth. While Wordsworth did produce non-discriminatory reasons for its failure to hire James, as pointed out above, there is evidence of record that supports the Commission's conclusion that James prevailed on his ultimate burden and successfully established unlawful age

discrimination as the basis for not hiring him for a Therapeutic Support Staff Worker position. In addition, the Commission's findings sufficiently set forth the basis for the Commission's conclusions in this matter.

Accordingly, the trial court's order affirming the Commission's decision is affirmed.

JAMES R. KELLEY, Senior Judge

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Wordsworth Academy,	:	
Appellant	:	
	:	
v.	:	No. 562 C.D. 2008
	:	
Philadelphia Commission on	:	
Human Relations	:	

ORDER

AND NOW, this 6th day of January, 2009, the order of the Court of Common Pleas in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge