

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

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

DECISION

{¶ 1} On June 12, 2008, the magistrate issued a decision recommending judgment for defendant.

{¶ 2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Plaintiffs timely filed their objections on June 19, 2008. Defendant filed a response to the objections on June 27, 2008.

{¶ 3} Plaintiffs, David Bogdas and Ernest Scott Bernard, brought this action alleging age discrimination and reverse gender discrimination. Bernard also asserted a claim of discrimination based upon a perceived disability.

{¶ 4} Plaintiffs were employees of defendant’s Division of Parole and Community Services, n.k.a. the Adult Parole Authority (APA). Both had lengthy, successful careers with the APA, ultimately as parole services coordinators in Cleveland, Ohio. In 2003, both plaintiffs applied for the position of Parole Services

Supervisor in the Cleveland Region, Unit 8 (PCN 5114). At the time, Bogdas was 47 years old and Bernard was 56 years old. Both plaintiffs met the minimum qualifications for the position. Bogdas was interviewed but was not selected. Bernard was not offered an interview because defendant determined that his application was not completed as required. Joy Reid, a female who was under the age of 40, was selected.

{¶ 5} Bogdas also applied for another supervisory position in 2003, in Cleveland's Unit 3 (PCN 5104). He was interviewed for that position; however, Jacqueline Miller, a female under the age of 40, was selected.

{¶ 6} Bernard applied for two other positions in 2003. The first was a position as a volunteer agent with the U.S. Marshal's Task Force. Both Manuel Muniz, a 34-year-old male, and Linda Morgan, a 39-year-old female, were hired. Bernard then applied for a volunteer position with the FBI's Fugitive Gang Task Force. Tim Bacha, a 31-year-old male, was ultimately selected. Bernard contends that he was denied that position because of a perceived disability.

{¶ 7} Based upon the evidence presented, the magistrate found that, although plaintiffs established a prima facie case of age discrimination, neither plaintiff satisfied his ultimate burden of proving that defendant's proffered reasons for hiring other job candidates were a mere pretext for discrimination. With respect to reverse-gender discrimination, the magistrate found that plaintiffs did not establish even a prima facie case for such claims. Finally, the magistrate found that plaintiff Bernard did not establish a prima facie case of disability discrimination, perceived or otherwise.

{¶ 8} Plaintiffs have asserted numerous, detailed objections challenging the factual basis for the magistrate's conclusions. The court is required to independently review the objections "to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." *Chan v. Tasr*, Hamilton App. No. C-070275, 2008-Ohio-1439 ¶ 8. Upon review, the court finds as follows.

{¶ 9} Plaintiffs' first and second objections concern the magistrate's decision that defendant demonstrated legitimate, nondiscriminatory reasons for selecting candidates other than plaintiffs for the PCN 5114 and PCN 5104 positions. Plaintiffs allege that defendant's proffered reasons were in fact discriminatory and that "[defendant's] officials conceded at trial that no legitimate reason could have existed under the circumstances of the promotion process for PCN 5104."

{¶ 10} With respect to PCN 5114, the court finds that the transcript of proceedings amply demonstrates that the magistrate relied upon competent, credible evidence in finding that defendant had legitimate, nondiscriminatory reasons for hiring Joy Reid and not one of the plaintiffs.

{¶ 11} As to plaintiff Bernard, the court finds that the application for the position was not properly completed and that such finding, in and of itself, was a sufficient nondiscriminatory basis for defendant to choose not to interview Bernard. Contrary to plaintiffs' arguments, the record does not support the conclusion that such failure on Bernard's part was a "mere technicality" which defendant asserted as a pretext to conceal a discriminatory animus.

{¶ 12} As to defendant's decision not to promote Bogdas, the record demonstrates that prior to 2003, the philosophy of the APA began to shift away from a law enforcement approach that focused upon apprehension of parole violators to a community re-entry approach that focused upon keeping offenders out of prison. Thus, by 2003, neither Bogdas' previous experience in apprehending fugitives, nor his physical fitness for such work, held as much relevance as it had in the past. The evidence is sufficient to establish that Reid had the type of educational background and work experience to supervise the unit in accordance with defendant's new philosophy, and that neither her age nor gender were determining factors in the decision to grant her the promotion. The court concludes that the magistrate properly determined that defendant had legitimate reasons for promoting Reid, and that plaintiffs failed to prove that such reasons were a pretext for discrimination.

{¶ 13} With respect to Bogdas' application for the PCN 5104 position, plaintiffs assert that the selection process was fraught with procedural irregularities that defeated defendant's policies against discriminatory hiring and promotion and, further, that defendant's officials conceded as much at trial. The court disagrees. It is true that certain of defendant's employees, such as Regional Administrator Ron Stevenson and Personnel Manager Rebecca Fair acknowledged that, if the alleged wrongful procedures had in fact occurred, then no legitimate, nondiscriminatory reasons could be offered to justify them. However, after careful review of the record, the court finds that no employee made an outright concession that discrimination occurred in this case as a result of the selection process.

{¶ 14} Moreover, the magistrate examined the selection process in detail in her decision and concluded 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.” The magistrate noted that two of the top three candidates for the position were over 40 years of age. Further, there is competent evidence in the record that Jacqueline Miller, who was selected for the position, demonstrated to the hiring panel that she understood the importance of defendant’s new community re-entry philosophy, and that defendant was looking for someone who would further that objective. The court concludes that the magistrate properly determined that defendant had legitimate, nondiscriminatory reasons for the decision to promote Miller and that plaintiffs failed to prove such reasons were pretextual. Absent a finding of illegal purpose or discriminatory intent, the general rule is that this court will not substitute its judgment for that of an employer and may not second-guess the business judgments of employers regarding personnel decisions. See, e.g., *Dodson v. Wright State Univ.* (1997), 91 Ohio Misc.2d 57; *Washington v. Central State Univ.* (1998), 92 Ohio Misc.2d 26. Therefore, plaintiffs’ first and second objections are OVERRULED

{¶ 15} Plaintiffs’ third and fourth objections concern the magistrate’s consideration and analysis of the statistical evidence presented as proof of discrimination. In the fourth objection, plaintiffs assert that the magistrate erred in considering such evidence only as proof of pretext with respect to the promotion of Reid to the PCN 5114 position.

{¶ 16} The court notes that the magistrate indeed stated that “[p]laintiffs presented statistical evidence in an attempt to show that defendant’s selection of Reid was a pretext.” The magistrate went on to state that plaintiffs’ expert, a statistician, had opined that “the statistical data showed that defendant’s promotion process resulted in age and gender discrimination in 2003 and 2004.” However, the magistrate found that such testimony was not persuasive and she articulated logical reasons for that finding.

{¶ 17} It is well-settled that the trier of fact “is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony.” *Bey v. Bey*, Mercer App. No. 10-08-12, 2009-Ohio-300, ¶ 15, citing *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159; *In re Jane*

Doe I (1991), 57 Ohio St.3d 135. It is equally clear that the trier of fact “who hears a witness testify may believe any, any part or none of the testimony given.” *Ross v. Biomet-Ross, Inc.*, (Dec. 4, 1989), Logan App. No. 8-88-12, citing *Cleveland Heights v. Friedman* (1955), Cuyahoga App. No. 23406, 127 N. E. 2d 423. There is nothing in the record that persuades the court that the magistrate’s findings were in error. Given that the magistrate was not persuaded by the statistical evidence as a whole, the court finds that it is of little importance that reference to the evidence was made in respect to only one aspect of plaintiffs’ claims. The court concludes that the magistrate properly determined the factual issues and appropriately applied the law with regard to the statistical evidence. Therefore, plaintiffs’ third and fourth objections are OVERRULED.

{¶ 18} Plaintiffs’ fifth objection concerns the magistrate’s findings with regard to reverse-gender discrimination. Plaintiffs assert that the magistrate erred in finding that “plaintiffs have failed to present evidence that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority, or that defendant treated plaintiffs differently than the successful applicants.” Plaintiffs’ primary argument is that the magistrate failed to consider the statistical evidence on this issue. Again, that argument is not well-taken. Notwithstanding, plaintiffs argue that Bogdas was clearly more qualified than Reid for the PCN 5114 position. However, Bogdas’ own subjective opinion of his qualifications is not enough to meet his burden of proof in a discrimination claim. As noted previously, the general rule is that this court will not substitute its judgment for that of an employer in a choice between two qualified candidates. *Dodson, supra; Washington supra*, see also *Brown v. Worthington Steel, Inc.*, Franklin App. No. 05AP-01, 2005-Ohio-4571, ¶ 14. The court concludes that the magistrate properly determined the factual issues and appropriately applied the law with respect to the reverse-gender discrimination claims. Accordingly, plaintiffs’ fifth objection is OVERRULED.

{¶ 19} Plaintiffs’ sixth objection concerns the magistrate’s findings that plaintiff Bernard failed to prove age discrimination with regard to volunteer positions with the U.S. Marshal’s Fugitive Gang Task Force and the FBI Task Force. Plaintiffs also challenge the magistrate’s finding that Bernard failed to prove he was discriminated against on the additional basis of a perceived disability with respect to the FBI position.

{¶ 20} As was the case with plaintiff Bogdas, plaintiffs argue that Bernard was more qualified for these positions than the candidates who were selected. The court does not doubt that both plaintiffs were highly qualified individuals; however, the weight of the evidence demonstrates that the decision-makers simply preferred other qualified candidates. With respect to the U.S. Marshal's position, the court finds that the magistrate's conclusion that defendant did not discriminate against Bernard on the basis of his age is amply supported by the evidence. Bernard himself admitted that the posting for the position stated that bilingual applicants were preferred and the person who was selected was fluent in Spanish.

{¶ 21} With respect to the FBI position, Bernard alleges that Administrator Stevenson made a comment to the interview panel concerning Bernard's age and the fact that he had previously been diagnosed with prostate cancer. The magistrate acknowledged that such comments, if true, could indicate a discriminatory animus. However, the magistrate found that the evidence was insufficient to prove that any such comments were related to the decision-making process. The court finds that the preponderance of the evidence supports that conclusion. For example, Michelle Jindra, who was present during the selection process, testified that no member of the interview panel preferred Bernard over other candidates. Thus, Bernard failed to demonstrate that he would have received the volunteer appointment but for Stevenson's alleged remarks. The court concludes that the magistrate properly determined the factual issues and appropriately applied the law with respect to Bernard's age discrimination and perceived disability claims. Accordingly, the sixth objection is **OVERRULED**.

{¶ 22} Plaintiffs' final objection concerns defendant's failure to promote plaintiff Bernard to the PCN 5104 position. Plaintiffs acknowledge that Bernard did not apply for the position, but argue that it would have been a futile act because his application would have been rejected just as it was for the PCN 5114 position. Plaintiffs further argue that the magistrate failed to address this claim in her decision. Inasmuch as failure to properly complete an application form is clearly a valid, nondiscriminatory basis for eliminating a potential candidate from the interview process, which the magistrate so found, such argument is spurious, at best. Therefore, the seventh objection is not well-taken and is **OVERRULED**.

{¶ 23} Having overruled each of plaintiff's objections, the court shall adopt the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment shall be rendered in favor of defendant.

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JUDGMENT ENTRY

For the reasons set forth in the decision filed concurrently herewith, and having overruled each of plaintiffs' objections, the court adopts the magistrate's decision and recommendation as its own, including findings of fact and conclusions of law contained therein. Judgment is rendered in favor of defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK

Judge

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