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United States District Court,
N.D. Ohio, Western Division.

Alan ROSE, Plaintiff
v.
CITY OF TOLEDO, Defendant

Case No. 3:18CV1645
|
Filed: 01/08/2020

Synopsis

Background: Former employee, who had retired from employment with city water department, filed an employment discrimination lawsuit against city alleging city water department did not hire him when he chose to go back to work due to his age. City filed a motion for summary judgment.

Holdings: The District Court, James G. Carr, Senior District Judge, held that:

[1] evidence supported finding that city took an adverse employment action against former employee;

[2] former employee, who was 13 and 19 years older, respectively, than the two individuals city hired for fresh water operator positions former employee had applied for, adequately established an inference of discrimination; and

[3] genuine issue of material fact existed as to whether city's proffered reasons for not hiring former employee was a pretext for age discrimination.

Motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (10)

[1] Civil Rights
Practices prohibited or required in general; elements

To establish a prima facie case of age discrimination under the ADEA and Ohio law, a plaintiff must show: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.; Ohio Rev. Code Ann. § 4112.14.

[2] Civil Rights
Age discrimination

The employee's burden at the prima facie stage of an age discrimination case is not an onerous one, and it is easily met. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.,.

[3] Civil Rights
Public employment

Evidence supported finding that city took an adverse employment action against former employee when city water department refused to rehire former employee, who had retired but then chose to go back to work when he was 62 years old and applied for two open positions, for the purpose of former employee's age discrimination claim. Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C.A. § 623(a)(1).

[4] Civil Rights
Age discrimination

When assessing whether a plaintiff has carried his burden at the prima facie stage of an age discrimination claim, a court must examine the plaintiff's evidence independent of the non-discriminatory reason produced by the defense as its reason for the adverse employment action. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[5] Civil Rights
Age discrimination

An allegation that the plaintiff was replaced by a younger individual supports an inference of discrimination, as element of prima facie case of age discrimination under the ADEA, only if the difference in age is significant. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[6] **Civil Rights**
Practices prohibited or required in general; elements

For purposes of establishing a prima facie case of age discrimination under the ADEA, an age difference of six years or less between an employee and a replacement is not significant. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[7] **Civil Rights**
Age discrimination

Former employee, who was 13 and 19 years older, respectively, than the two individuals city hired for fresh water operator positions former employee had applied for, adequately established an inference of discrimination, in action alleging age discrimination under the ADEA; individual who interviewed former employee testified that former employee was not hired because city was interested only in candidates who could work "long term," however former employee was never asked about his willingness to work "long term." Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[8] **Civil Rights**
Motive or intent; pretext

A party claiming age discrimination in violation of the ADEA may establish pretext by proving (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the refusal to hire, or (3) that they were insufficient to motivate the refusal to hire. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[9] **Civil Rights**
Motive or intent; pretext

In an age discrimination action under the ADEA, the no-basis-in-fact category of pretext challenges implicates evidence that the proffered bases for the plaintiff's adverse employment action never happened. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

[10] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact existed as to whether city's proffered reasons for not hiring former employee, who had retired but then chose to return to work when he was 62 years old and applied for two open positions, based on other applicants scoring higher than former employee on a written exam was a pretext for age discrimination, precluding summary judgment in former employee's age discrimination claim under the ADEA. Age Discrimination in Employment Act of 1967 § 2, 29 U.S.C.A. § 621 et seq.

Attorneys and Law Firms

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Dale R. Emch, Jeffrey B. Charles, Rhonny L. Brady, City of Toledo Law Department, Toledo, OH, for Defendant.

ORDER

James G. Carr, Sr. U.S. District Judge

***1** This is an employment-discrimination case under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and an analogous provision of Ohio law, O.R.C. § 4112.14.

Shortly after retiring from a career working for the City of Toledo's Water Department, plaintiff Alan Rose decided he wanted to go back to work. Rose, born in 1955 and 62 years old at all relevant times, applied for two positions in the Water Department. The City offered him one position, but Rose declined it because a Department employee told him that the City was likely to offer him a water control room operator's position. Rose preferred that position, as it was the job he had held when he retired. In the end, the City filled the operator position with two applicants who were much younger than Rose, had less experience than him, and had not performed as well during the interview process.

This suit ensued, with Rose alleging that the City refused to hire him because of his age.

Jurisdiction is proper under 28 U.S.C. §§ 1331 and 1367(a).

Pending is the City's motion for summary judgment. (Doc. 12). For the following reasons, I deny the motion.

Background

A. Fresh Water Operator Position

(The Position Rose Wanted But Did Not Get)

In April, 2017, the City had four vacant water control room operator positions [1] for which, in May, 2017, it interviewed eight candidates, including Rose. (Doc. 13–10, PageID 535). The interview process comprised a structured oral interview, which featured "questions which each applicant is being graded on"; an informal oral interview, in which the interviewers tried to "get to know" the candidate; and a written exam. (Doc. 13–4, PageID 404; Doc. 13–10, PageID 535). Jeffrey Calmes, Water Department Administrator of Operations, testified in general that hiring decisions depend on a combination of the formal interview scores, the informal interview, and the candidate's experience. (Doc. 13–4, PageID 410).

Acting through Andrew McClure, the Administrator of the City's Collins Park Water Treatment Plant, the City made job offers to the second-highest-scoring candidate, who declined the position, and David Daniel, a forty-nine-year-old who had the fourth-highest score and accepted the offer. (*Id.*, PageID 536). [2]

Rose had the third-highest score on the "structured oral interview and written exam" (Doc. 13–10, PageID 535), but McClure did not make him an offer. In an October, 2017 memorandum asking for the City's Human Resources Division approval to hire Daniel, McClure wrote that "Alan Rose retired from the City of Toledo December 31, 2016." (*Id.*, PageID 536).

In December, 2017, McClure asked HR to fill the three remaining vacancies with the four lowest-ranked applicants, including Nicholas Daunhauer, a forty-three-year-old who scored 17.5 points lower than Rose. (Doc. 13–11, PageID 539). Seeming, again, to explain why Rose should not receive an offer, McClure wrote that "Alan Rose retired from the City of Toledo December 31, 2016." (*Id.*). Ultimately, the City hired only Daunhauer.

***2** Calmes, who participated in Rose's informal interview (Doc. 13–4, PageID 403, 408), testified that Rose was "not hired for the water control room operator position" because the Water Department was "looking for long term" hires only, and Calmes did not believe Rose would work long-term given his previous retirement. (*Id.*, PageID 413). Calmes admitted that he had "no way of knowing whether [Rose] planned on continuing to work for the City long term while collecting his pension[.]" (*Id.*, PageID 417–18).

At his deposition, McClure testified that the City hired David and Daunhauer because they had "experience as water treatment plant operators, they were working as water treatment plant operators and working towards licensure[.]" (Doc. 13–3, PageID 361). McClure acknowledged, however, that Rose, too, had the proper licensure, and neither David nor Daunhauer had experience working as an operator for the City. (Doc. 13–4, PageID 426).

B. Waste Water Operator Position

(The Position Rose Got But Did Not Want)

Besides seeking his old job, Rose had also applied for the position of "Water Reclamation Operator" in the Division of Water Reclamation, which the parties refer to as the "waste water operator position." (Doc. 13–12, PageID 541). In July,

2017, the City offered Rose the position, but he did not accept it. (*Id.*).

According to Rose, Jeremey Ray, a senior control room operator, called him the day after he received the waste water offer. (Doc. 13–2, PageID 305). Ray explained that Calmes had instructed him to let Rose know that Rose should "wait three to four weeks, and we'll bring you back over to water treatment." (*Id.*, PageID 306). Rose told Ray about his pending job offer, but Ray urged him not to go to waste water because it was "dirty." (*Id.*, PageID 309).

Because Rose preferred to work in "water treatment because [he] knew the job, and [had] good working relationships with people over there," he decided to turn down the waste water position, expecting that he would receive an offer for the fresh water position. (Doc. 13–2, PageID 309). The offer never came.

Standard of Review

"Summary judgment is appropriate under Fed. R. Civ. P. 56 where the opposing party fails to show the existence of an essential element for which that party bears the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The movant must initially show the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548. Once the movant carries its burden, the "burden shifts to the nonmoving party [to] set forth specific facts showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56 "requires the nonmoving party to go beyond the [unverified] pleadings" and submit admissible evidence supporting its position. *Celotex*, *supra*, 477 U.S. at 324, 106 S.Ct. 2548.

I accept the nonmovant's evidence as true and construe all evidence in his favor. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992).

Discussion

The City argues that it is entitled to summary judgment on Rose's discrimination claims for two reasons: 1) Rose failed to make a prima facie case of age discrimination (Doc. 12, PageID 52–54); and 2) there is no evidence that the City's stated reason for hiring the younger applicants, Daniel and Daunhauer, was pretextual. (*Id.*, PageID 54–56).

A. Prima Facie Case

[1] "To establish a prima facie case of age discrimination" under the ADEA and Ohio law," a plaintiff must show: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination." *Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 283 (6th Cir. 2012); *Moffat v. Wal-Mart Stores, Inc.*, 624 F. App'x 341, 345 (6th Cir. 2015).

***3** **[2]** "The burden at the prima facie stage is not an onerous one, and it is easily met." *Immormino v. Lake Hosp. Sys., Inc.*, 127 F. Supp. 3d 829, 835 (N.D. Ohio 2015) (Boyko, J.).

1. Adverse Employment Action

[3] The City does not dispute that Rose is a member of a protected class, nor does it deny that he was qualified for the fresh water Operator position. (Doc. 12, PageID 53).

Rather, it contends that "no adverse action was taken" against Rose because the City "extended a job offer to him" for "one of the two positions he applied for." (*Id.*). Regarding the fresh water operator position, the City maintains that Rose "was not offered that position due to other candidates ranking higher." (*Id.*, PageID 54).

These arguments have no merit.

First, there is no question that the City's refusal to hire Rose is an adverse employment action. The text of the ADEA provides that "[i]t shall be unlawful for an employer *to fail or refuse to hire* ... any individual ... because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis supplied). And controlling Sixth Circuit precedent establishes that, "[i]n the employment context, the term adverse action has traditionally referred to actions such as discharge, demotions, *refusal to hire*, nonrenewal of contracts, and failure to promote."

Sensabaugh v. Halliburton, 937 F.3d 621, 628 (6th Cir. 2019) (emphasis supplied).

Second, the City's argument that there was no adverse action given that the City decided that the younger candidates "rank[ed] higher" than Rose improperly conflates the prima facie analysis with the City's non-discriminatory reason for that adverse action.

[4] Our Circuit has "repeatedly cautioned district courts against considering the employer's alleged non-discriminatory reason when analyzing the prima facie case." *Loyd v. St. Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014). "[W]hen assessing whether a plaintiff has" carried his burden at the prima facie stage, "a court must examine the plaintiff's evidence independent of the non-discriminatory reason 'produced' by the defense as its reason for" the adverse employment action. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660–61 (6th Cir. 2000). Rose's evidence here – that the City refused to hire him for the fresh water operator position – suffices to prove an adverse action.

Third, Rose's decision to turn down the waste water position did not transform what was plainly an adverse employment action – the refusal to hire him for the fresh water position – into a non-actionable hiring decision. Rose applied for two jobs, the City refused to hire him for one of those jobs, and the statute and controlling case law are clear that a refusal to hire is an adverse action. Unsurprisingly, the City cites no authority to support its argument to the contrary. (Doc. 12, PageID 54; Doc. 16, PageID 557–58).

For these reasons, I find that Rose has established an adverse employment action.

2. Inference of Discrimination

[5] **[6]** "An allegation that the plaintiff was replaced by a younger individual supports an inference of discrimination only if the difference in age is significant." *Blizzard, supra*, 698 F.3d at 283. In the Sixth Circuit, "an age difference of six years or less between an employee and a replacement is not significant." *Grosjean v. First Energy Corp.*, 349 F.3d 332, 340 (6th Cir. 2003).

***4** **[7]** This is a failure-to-hire rather than a replacement case, but the principles in *Blizzard* and *Grosjean* confirm that Rose's evidence yields an inference of age discrimination.

The court in *Grosjean*, *supra*, 349 F.3d at 336, recognized that "[a]ge differences of ten or more years have generally been held to be sufficiently substantial to meet the requirement of the fourth part of age discrimination prima facie case." Here, the applicants whom the City hired for the fresh water operator position, Daunhauer and Daniel, were both more than ten years younger than Rose: Daunhauer was 43 (nineteen years younger), and Daniel was 49 (thirteen years younger).

What's more, Calmes testified that the City did not offer Rose the fresh water position because the City was interested only in those candidates who could work "long term." (Doc. 13–4, PageID 413). Calmes's only basis for supposing that Rose would not work long term was the fact of Rose's previous retirement, but Calmes admitted that he did not ask Rose about his willingness to work "long term." (*Id.*).

Viewed in the light most favorable to Rose, this evidence would permit a jury to find that the City assumed that Rose could not, or would not, work "long term" because of his age. I therefore conclude that Rose has satisfied the fourth element of his prima facie case.

B. Pretext

The City's motion contends that it did not hire Rose for the fresh water position because: 1) "other candidates rank[ed] higher" based on their interview scores; 2) due to his retirement, Rose was "a new employee who was only due consideration in the hiring process for the position he was interested" [*sic*]; and 3) the City offered him a different job that he turned down. (Doc. 12, PageID 55–56).

Rose contends that these reasons were pretexts for unlawful age discrimination.

[8] Rose may establish pretext by proving "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate [the refusal to hire], or (3) that they were insufficient to motivate [the refusal to hire]."

Blizzard, supra, 698 F.3d at 286.

1. No Factual Basis

[9] The no-basis-in-fact category of pretext challenges "implicates evidence that the proffered bases for the plaintiff's [adverse employment action] never happened." *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 349 (6th Cir. 2012).

[10] Invoking that line of attack here, Rose argues that the City's claim that Daunhauer and Daniel scored higher than he did is false. (Doc. 13, PageID 281). Rose points to evidence that he had the third highest overall score of the eight applicants for the position. (Doc. 13–10, PageID 585). After it was unable to fill the position with the two top-ranked candidates, Rose continues, the City bypassed him and offered the position to the fourth- and sixth-ranked candidates. (Doc. 13–11, PageID 538).

Rose also cites testimony from Andrew McClure that Rose's job offer for the waste water position was not "taken into consideration when determining whether to hire Mr. Rose" for the fresh water position. (Doc. 13–3, PageID 378).

Finally, regarding the City's determination to treat Rose as a "new hire," Rose points out that the City "fails to give any reason for why this would mean that other individuals would be selected over" him. (Doc. 13, PageID 281).

***5** This evidence, viewed in the light most favorable to Rose, could easily support a reasonable jury finding that the City's stated reasons for not hiring Rose were false and pretexts for age discrimination.

Rose had the third-highest score based on the structured interview and written exam. (Doc. 13–11, PageID 538). After the first- and second-highest-scoring candidates did not fill the position, the City offered the job, not to Rose, but to Daniel, who had the fourth-highest score, and Daunhauer, who had the sixth-highest score – and one that was nearly twenty points lower than Rose's. (*Id.*). Far from entitling the City to summary judgment, this evidence directly refutes the City's claim that it did not offer Rose the fresh water posting because his "scores ... did not put him at the top of the rankings." (Doc. 12, PageID 56).

To be sure, the application process also included an informal interview, and the City faults Rose for failing to "acknowledge the effect that [these] informal interviews had on the rankings." (Doc. 16, PageID 557). Yet the City cites no evidence tending to show how Rose performed during that interview or how David or Daunhauer did in their informal interviews – let alone evidence that Rose's performance was dismal enough that the hiring panel came to prefer the younger and seemingly less-qualified candidates.

Furthermore, the evidence is undisputed that Rose's offer for the waste water position, and his decision to turn it down, played no role whatsoever in the City's decision not to offer him the fresh water position. (Doc. 13–3, PageID 377–78). That this justification for refusing to hire Rose was false is the only conclusion a reasonable jury could draw.

Finally, as Rose points out, the City's decision to treat Rose as a "new hire" in the application process is, essentially, nonresponsive to Rose's pretext claim. David and Daunhauer were "new hires," too, having not previously worked for the City, yet the City hired them for the same position that Rose sought, despite their seemingly lower qualifications for the position.

Because genuine factual disputes exist on the pretext question, summary judgment is not appropriate.

2. Actual Motivation

Under the second category of pretext challenges, "the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant." *Carter v. Toyota Tsusho Am., Inc.*, 529 F. App'x 601, 610 (6th Cir. 2013) (internal quotation marks omitted).

Rose argues that the City's "proffered reason did not actually motivate [its] actions because its agents have provided shifting justifications" for the refusal to hire him. (Doc. 13, PageID 282). According to Rose, the summary-judgment motion is the first time that the City claimed to have relied on Rose's test score as the basis for not hiring him. (*Id.*).

In support, Rose observes that Calmes testified that the only basis for not hiring Rose was the Water Department's preference for applicants who could work "long term."

Rose also relies on McClure's deposition, where he testified that the City preferred Daunhauer and Daniel because they had experience as operators, were currently working as

operators, and were working toward their licensure.[3] (Doc. 13–3, PageID 360–61). Although McClure could not recall at his deposition if Rose's "interview scores had anything to do with why he wasn't ultimately hired" (*id.*, PageID 375), he was able to remember – a month-and-a-half later, when he swore out an affidavit in support of the City's motion for summary judgment – that the City did not hire Rose because "other candidates ranked higher" than him. (Doc. 12–6, PageID 264 at ¶8). Finally, McClure did recall at his deposition another reason on which the City does not now rely – "something about [Rose's] past performance" – as being the reason he wasn't hired. (Doc. 13–3, PageID 376).

***6** The City's reply brief does not address Rose's pretext argument or the evidence showing that different employees gave different reasons to justify the refusal to hire Rose. (Doc. 16, PageID 554).

Viewed in the light most favorable to Rose, this evidence would permit a reasonable jury to find that the City's proffered ground for not hiring Rose – because "his scores ... did not put him at the top of the rankings" – was incredible and that there was instead an illegal motivation at work. Rose had the third highest score based on the structured interview and written exam. (Doc. 13–11, PageID 538). Neither McClure nor Calmes, moreover, testified during their depositions that the City denied Rose the fresh water operator position because of his score. Indeed, both offered completely different reasons.

Lastly, the City's belated reliance on Rose's supposedly poor ranking – an explanation it withheld until the City filed its Rule 56 motion and a supporting affidavit from an employee who testified rather differently at his deposition – also supports Rose's pretext argument.

3. Insufficient Motivation

Finally, Rose contends that the City's stated reasons for refusing to hire him were insufficient to motivate that decision.

According to Rose, the collective bargaining agreement between the City and the union representing City workers obligated the City to "fill vacant positions with former permanent employees who were seeking reinstatement" before it could hire "individuals from outside the bargaining unit." (Doc. 13, PageID 19).

Besides applying for his former position as an operator, Rose also requested reinstatement to that position. The City approved that request and placed Rose "on the reinstatement list for Water Control Room Operator." (Doc. 13–7, PageID 526). As a result, Rose's name would be "supplied to division and/or agency heads for consideration for appointment to vacant positions based upon the priorities for filling vacancies in the appropriate labor agreement." (*Id.*).

Section 2117.42 of the CBA provides that:

> In the event an existing position becomes vacant, in a classification represented by [the union], it shall be filled by an employee working in a classification covered by this [CBA] in accordance with the following priorities before being filled from outside the bargaining unit ... Reinstatement of permanent employees in conformance with the procedure set for[th] in 2117.49, "Reinstatement."

(Doc. 13, PageID 284).

The City responds that Rose's argument rests on "an inaccurate reading of the CBA." (Doc. 16, PageID 561). But the City has not presented an argument that sets forth an accurate reading of § 2117.42 or how such a reading rebuts Rose's pretext argument. (*Id.*, PageID 561–62). Indeed, the City's reply brief does not cite or analyze the language of that provision.

Regardless, the City's claim that the CBA entitled Rose only to "consideration" for the vacant operator position is difficult to square with the plain language of § 2117.42. That provision seems to require that the City fill CBA-covered vacancies like the fresh water operator position with employees on the reinstatement list before turning "outside the bargaining unit." (*Id.*) (vacancies "shall be filled" by "Reinstatement of permanent employees" before hiring from "outside the bargaining unit"). It is undisputed that Rose was on the reinstatement list, and the City cites no evidence that David and Daunhauer were members of the bargaining unit.

***7** Because I have already found that genuine factual disputes exist as to pretext, I may overrule the City's motion without definitively resolving whether the CBA in fact required that the City hire Rose before hiring candidates who did not belong to the bargaining unit. If Rose anticipates introducing the CBA/hiring preference issue at trial, he may wish to consider seeking resolution of that issue by filing a pretrial motion in limine or the like.

Conclusion

It is, therefore,

ORDERED THAT:

1. The City of Toledo's motion for summary judgment (Doc. 12) be, and the same hereby is, denied.

2. The clerk of court shall forthwith set this case for a telephonic status/scheduling conference at which the parties should be prepared to discuss what further steps need to be taken to make this case ready for trial.

So ordered.

All Citations

--- F.Supp.3d ----, 2020 WL 110846

Footnotes

1 The parties refer to this position as the “fresh water” operator position.
2 The highest-scoring candidate “had been promoted” to a different position and did not receive an offer. (Doc. 13–10, PageID 536).
3 The City's motion does not rely on these rationales to defend the hiring of Daunhauer and Daniel over Rose.