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Maryland District Court
Case No. 1:02-cv-01665-MJG
Bezelik v. Hayden

Document 11



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THOMAS P. BEZELIK	*
Plaintiff	*
vs.	* CIVIL ACTION NO. MJG-02-1665
LT. GEN. MICHAEL V. HAYDEN	*
DIRECTOR,	
NATIONAL SECURITY AGENCY	*
Defendant	*

* * * * *

MEMORANDUM AND ORDER

The Court has before it Defendant's Motion for Summary Judgement [Paper 3] and the materials submitted by the parties related thereto. The Court finds a hearing unnecessary.

I. BACKGROUND¹

Plaintiff Thomas Bezelik ("Plaintiff" or "Bezelik") is a white male, born in 1947 who suffers from arthritis and back trouble employed by the National Security Agency ("NSA" or "Agency"). Defendant Lt. General Michael Hayden ("Defendant" or "Hayden"), who is sued in his official capacity, is the Director of the NSA. Plaintiff has been employed by the Agency since 1966. In December of 1994, Plaintiff was

¹ In the present summary judgment context, it is necessary to assume that the Plaintiff's version of the disputed facts is correct.

promoted to grade GG-13² and served as a Senior Engineering Specialist. Plaintiff was eligible for a promotion to GG-14 but was never promoted to that level. In 1998, Plaintiff, who was then fifty-one (51), was eligible for promotion to the position of Branch Chief but did not receive the promotion.

Plaintiff believed himself to be better qualified than the applicant who received the promotion, Robert Kramer ("Kramer"). Kramer was born in 1951. Kramer was a GG-12 when he applied for the promotion. Kramer held a B.S. in Business Administration. Plaintiff held an A.A. in Public Administration and numerous credit hours beyond that degree, including 150 hours of course credit from Capitol College and American Council of Education. Plaintiff also has 3200 hours of National Cryptologic School credits. Kramer had 1100 hours of National Cryptologic School credits.

Both Plaintiff and Kramer received a twelve (12) out of twelve (12) on the selection criteria evaluation. However, the Agency's Office of Equal Employment Opportunity ("OEEO") investigator noted that the management of Plaintiff's group felt that he lacked "team leader abilities" and that he had "difficulty getting along with the Business Managers who were

² GG-13 is the government pay grade and is the equivalent of GS-13.

assigned to his team." The investigator also noted that Plaintiff's group management "stated that Mr. Bezelik worked well with contractors and customers, but had difficulty with [] managers and co-workers." Complaint at ¶12.

Plaintiff filed a formal complaint alleging discrimination based on age, disability, and retaliation with the Agency's Office of Equal Employment Opportunity in March of 1998. OEEEO issued a decision and rejected the complaint in January of 1999. Plaintiff appealed the OEEEO's decision to the EEOC. The EEOC affirmed the OEEEO's decision and advised Plaintiff of his right to sue. Plaintiff filed suit in this Court on May 10, 2002.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The well-established principles pertinent to such motions can be distilled to a simple statement.

The Court may look at the evidence presented in regard to the motion for summary judgment through the non-movant's rose colored glasses, but must view it realistically. After so

doing, the essential question is whether a reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Shealy v. Winston, 929 F.2d 1009, 1012 (4th Cir. 1991).

III. DISCUSSION

Each of Plaintiff's claims are evaluated under the burden-shifting scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). Plaintiff must first establish a prima facie case. If Plaintiff is able to establish a prima facie case, Defendant must articulate a legitimate, nondiscriminatory reason for its action. If Defendant is able to articulate such a reason, the burden shifts back to Plaintiff to prove that Defendant's articulated reason was mere pretext for unlawful discrimination.

A. Age Discrimination (ADEA)

The ADEA was enacted to eliminate discrimination against individuals with disabilities and provides, in pertinent part,

All personnel actions affecting employees or applicants for employment who are at least 40 years of age . . . in executive agencies as defined in section 105 of Title 5 . . . shall be made free from any discrimination based on age.

29 U.S.C. § 633a. It is not disputed that the Agency is an executive agency as defined by the ADEA.

To establish a prima facie case of discrimination under the ADEA, Plaintiff must establish that 1) he belongs to the statutorily protected age group (over 40 years of age); 2) he applied for and was qualified for a position for which the Agency was seeking applicants; 3) despite his qualifications, he was rejected; and 4) he was rejected under circumstances giving rise to an inference of unlawful discrimination, including evidence that he was rejected in favor of a significantly younger applicant. O'Conner v. Consolidated Coin Caterers Corp., 517 US 308, 310, 313 (1996); Cramer v. Intelidata Technologies Corp., 168 F.3d 481, **2 (4th Cir. 1998)(Unpublished).

Plaintiff can establish the first three elements of his prima facie case. He was fifty-one (51) years old, qualified for the position of Branch Chief for which the Agency sought applicants, and was rejected from the position. He cannot, however, establish that he was rejected under circumstances giving rise to an inference of unlawful discrimination.

While the applicant selected, Kramer, was younger than Plaintiff, Kramer was not significantly younger than Plaintiff. In O'Connor, the Supreme Court stated that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination...." O'Connor 517 U.S. at 313. The Fourth Circuit has held that retention of workers who were "substantially younger" than the plaintiff is an element of the prima facie case for age discrimination in a reduction of workforce context. Dugan v. Albemarle County School Bd. 293 F.3d 716, 721 (4th Cir. 2002); Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 430 (4th Cir. 2000). Extending this holding to the promotion context, Plaintiff must establish that he was rejected in favor of a "substantially younger" applicant.

Kramer is four (4) years younger than Plaintiff. The Fourth Circuit held in Intelidata that five (5) years was not enough to support a finding of "substantially younger." While, there is no bright line test or a set age difference for the determination of "substantially younger" and while each decision must be based on the instant facts, Plaintiff has presented no evidence that this four (4) year age difference should support a finding of "substantially

younger." Therefore, Plaintiff has not established his prima facie case of discrimination.

Even if Plaintiff could establish his prima facie case, the burden would shift to Defendant to articulate a legitimate non-discriminatory rationale for its refusal to hire Plaintiff. Defendant's articulated reason for not giving Plaintiff the job was that Plaintiff was not the best qualified person for the job. Defendant contends that not only did Kramer have excellent qualifications but that Plaintiff's on-the-job performance was less than satisfactory. As the Fourth Circuit held in EEOC v. Western Electric Co., Inc., 73 F2d 1011, 1014 (4th Cir. 1983), Defendant is not required to prove the absence of a discriminatory motive. Defendant's burden is one of production which only requires the articulation of some legitimate reason for not promoting Plaintiff. The Defendant having articulated a legitimate non-discriminatory rationale, Plaintiff has the burden of proving that the articulated rationale was mere pretext.

To establish pretext, Plaintiff, must prove "both that the [Defendant's articulated] reason was false, and that discrimination was the real reason" that he was denied a

promotion. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). Plaintiff's proof of pretext is that he was imminently more qualified than Kramer. Plaintiff argues that he was better qualified than Kramer because Kramer only held a B.S. degree in Business Administration. Plaintiff held an Associates degree in Public Administration and had over 150 additional hours of course credit from Capitol College and American Council of Education. Plaintiff also had 3200 hours of National Cryptologic School credits as opposed to Kramer's 1100 hours. Additionally, Plaintiff was a GG-13 when he applied, while Kramer was a GG-12. Compl. at ¶12.

It is within the Agency's discretion to determine the requirements and standards by which it evaluates candidates. Plaintiff cannot dictate what should be considered for academic credit. The Agency considers degrees earned rather than credits or course hours. As such, Kramer was more qualified with a Bachelor's degree than Plaintiff was with an Associates degree.

Furthermore, Defendant presents evidence that Kramer had superior interpersonal skills to Plaintiff who had particular trouble interacting with the Chief, who would have been Plaintiff's immediate supervisor had he received the promotion. Plaintiff presents evidence of Letters of

Appreciation and other awards. This evidence, however, does not speak to Plaintiff's interpersonal skills or his ability to do the job for which he applied. In fact, Defendant notes that, while Plaintiff's work was very good with respect to completing contracts and working with customers, Plaintiff lacked leadership skills and did not work well with co-workers or management. Finally, it is important to note that Kramer had acted as the interim Branch Chief, which was an additional qualification Plaintiff lacked.

Plaintiff, must prove "both that the [Defendant's articulated] reason was false, and that discrimination was the real reason" that he was denied a promotion. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993); Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995).

Plaintiff has failed to prove that he was more qualified than Kramer and thereby that Defendant's articulated reason was false. Therefore, Plaintiff has failed to establish pretext.

Accordingly, as Plaintiff has failed to establish a prima facie case of age-based discrimination and has failed to establish that the articulated, legitimate, non-discriminatory rationale for Defendant's actions was mere pretext, Defendant is entitled to summary judgment on the age discrimination claim.

B. Disability (ADA)

Plaintiff alleged discrimination based on a disability in violation of the Americans with Disabilities Act ("ADA") and Section 501 of the Rehabilitation Act of 1973. The ADA was enacted to eliminate discrimination against individuals with disabilities and provides, in pertinent part,

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a). Entities covered by the ADA include employers, employment agencies, labor organizations, and joint labor-management committees. 42 U.S.C. § 12111(2). It is not disputed that Defendant is a covered entity.

As a threshold matter, it is for the Court to determine whether or not Plaintiff was disabled. Whether [Plaintiff] meets the definition of the statute, and therefore can bring a claim under the statute, is a question of law for a court, not a question of fact for a jury." Hooven-Lewis v. Caldera, 249 F.3d 259, 268 (4th Cir. 2001). While Hooven-Lewis was a Rehabilitation Act case, the holding applies to ADA cases.

"The standards used to determine whether an employer has discriminated under the Rehabilitation Act are the standards applied under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12111 et seq., and the provisions of sections 501 through 504, and 510 of the ADA, 42 U.S.C. §§ 12201-12204 and 12210. See 29 U.S.C. § 791(g)." Id. See also Ennis V. National Association of Business and Educational Radio, Inc. 53 F.3d 55, 57 ("To the extent possible, we adjudicate ADA claims in a manner consistent with decisions interpreting the Rehabilitation Act.")

To establish a prima facie case of discrimination under the ADA, Plaintiff must establish that 1) he was an individual with a disability as defined by the ADA; 2) Defendant had a vacant position for which Plaintiff applied; 3) Plaintiff was qualified for the position; and 4) Plaintiff was rejected under circumstances giving rise to an inference of unlawful discrimination. Bernstein v. St. Paul Companies, Inc., 134 F.Supp.2d 730, 732 (D.Md. 2001). To prove the first element of its prima facie case, Plaintiff must show that he is an individual with a disability within the meaning of the ADA. See 42 U.S.C. § 12112(a). The ADA defines "disability" as: 1) an actual mental or physical impairment that substantially limits one or more of the major life activities of an

individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment. Id. at § 12102(2).

Plaintiff contends that he is an individual with a disability as defined by the ADA. However, he has presented no evidence showing that he has an impairment, has a record of an impairment, or is regarded as having an impairment that "substantially limits" a major life activity. Major life activities are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Plaintiff has arthritis and back trouble which have been recognized by the Agency, i.e. he has a "handicapped" parking space. However, Plaintiff does not provide evidence, or even address, that he has been substantially limited in any major life activity. Therefore, Plaintiff has failed to establish a prima facie case of discrimination based on a disability.

Furthermore, as discussed above, Defendant has articulated a legitimate non-discriminatory rationale for its action; and Plaintiff has not proven pretext. Accordingly, Defendant is entitled to summary judgment on the disability claim.

C. Retaliation

To establish a prima facie case of retaliation, Plaintiff must show that: (1) he engaged in a protected activity; (2) the employer took an adverse employment action against him; and (3) a causal connection existed between the protected activity and the asserted adverse action." Von Guten v. Maryland, 243 F.3d 858, 863 (4th Cir. 2001); citing Bealle v. Abbott Labs, 130 F.3d 614, 619 (4th Cir. 1997).

Plaintiff can establish the first two elements of his claim. He engaged in the protected activity of filing an EEOC complaint. The adverse employment action was the failure to promote. Plaintiff, however, has failed to establish the third element of his claim. Plaintiff has not presented evidence to prove, or even discussed, any causal connection between his engaging in the protected activity and the adverse employment activity. Therefore, the Plaintiff has failed to establish a prima facie case of retaliation.

Furthermore, as discussed above, Defendant has articulated a legitimate non-discriminatory rationale for its action; and Plaintiff has not presented evidence to prove pretext and a retaliatory action. Accordingly, Defendant is entitled to summary judgment on the retaliation claim.

IV. CONCLUSION

For the foregoing reasons:

1. Defendant's Motion for Summary Judgment [Paper 3] is GRANTED.
2. Judgment shall be entered by separate Order.

SO ORDERED, on Wednesday, March 5, 2003.

/s/

Marvin J. Garbis
United States District Judge