

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEXANDER BOEHM : CIVIL ACTION
 :
 v. :
 :
 COLONIAL REGIONAL POLICE :
 DEPARTMENT : NO. 99-1913

MEMORANDUM AND ORDER

BECHTLE, J. MAY , 2000

Presently before the court is defendant Colonial Regional Police Department's ("Defendant") motion for summary judgment and plaintiff Alexander Boehm's ("Plaintiff") response thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Plaintiff brought this action against Defendant, alleging that Defendant did not hire him as a police officer based upon his racial and/or national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq.

Defendant is a police department responsible for a borough and two second class townships. Plaintiff sought employment with the police department in February 1998. Defendant's hiring process included a preliminary application, a written examination, a physical agility test and an oral interview. Background investigations were conducted on the top candidates. In his preliminary application, Plaintiff noted that he was fluent in Portuguese with a Brazilian dialect and has Spanish comprehension. Plaintiff sat for a written examination. Afterwards, Plaintiff was informed that he ranked first on the

list of potential applicants. Plaintiff successfully completed a physical agility test and was interviewed by a panel of officers. Following Plaintiff's oral examination, he was informed that he ranked third on the list of applicants, not accounting for those with veteran's preference points. After veteran's preference points were accounted for, Plaintiff ranked fifth.

Thereafter, background examinations of the top six candidates were conducted. Sergeant Roy Seiple ("Seiple") conducted Plaintiff's background investigation. As part of the investigation, Plaintiff was asked to provide a copy of his birth certificate. The birth certificate indicates that although Plaintiff was born in New Jersey, Plaintiff's parents were both born in Brazil. Seiple's investigation revealed both positive and negative comments from Plaintiff's former employers.¹ Following his investigation, Seiple prepared a report which was presented to Police Chief Daniel Spang ("Spang"). This report recommended that Plaintiff not be hired.

In May 1998, Spang prepared a list of names of prospective applicants to be presented to the regional police commission. The top applicant and two veterans were recommended for hire, and

¹ For example, Plaintiff's performance evaluations from LeHigh University Police noted that Plaintiff made minor errors in judgment, rarely acted independently and did only what the job required. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. Ex. K at 2.) The Chief of the Freemansburg Boro Police Department stated that Plaintiff "never panned out" to be a good police officer, did only enough work to get by and that he would not consider Plaintiff for rehire. Id. at 3. A former co-worker stated that Plaintiff was lazy and that he would not want to work with him again. Id.

received offers of employment. The top applicant, however, did not accept the offer of employment. In June 1998, a second list was prepared to be presented to the commission. This list included Plaintiff's name and the names of other applicants who had lower positional ranks. Plaintiff was not selected.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

In its motion for summary judgment, Defendant asserts that Plaintiff has not met his burden of proving that he was not hired because of his race or national origin. In the case of failure to hire or promote under Title VII, the plaintiff carries the initial burden of demonstrating the existence of a prima facie case by showing that: (1) he belongs to a protected class; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If plaintiff succeeds, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason for the non-consideration." Id.; see Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (describing burden shift); St. Mary's Honor Center v. Hicks, 509 U.S. 499, 506-09 (1993) (same). Plaintiff "must satisfy his ultimate burden of proving, by a preponderance of the evidence, that the defendant's proffered reason is not the 'true reason' for the decision, but instead is merely a pretext" for discrimination. Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 136 (3d Cir. 1997) (citing Hicks, 509 U.S. at 511.)² Thus, after

² In Hicks, the Court stated that a plaintiff-employee must prove by a preponderance of the evidence that the legitimate

the employer offers a nondiscriminatory reason for the employment action, the plaintiff "must then offer evidence of pretext to avoid summary judgment." Stoll v. Missouri Osteopathic Found., 68 F.3d 479 (8th Cir. 1995) (available at No. 95-1562, 1995 WL 590443, at **2 (8th Cir. Oct. 6, 1995)) (per curiam).³

In the instant case, assuming that Plaintiff has made a prima facie case of discrimination, Defendant has offered a nondiscriminatory reason for its employment action by asserting that only those applicants without negative comments in their background investigations were selected. (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 4.) Thus, Plaintiff must demonstrate the existence of evidence that would allow a jury to find that Defendant's proffered reason is pretext and that the real reason for Defendant's action was intentional discrimination. See Barone v. Gardner Asphalt Corp., 955 F.

reasons proffered by the defendant-employer were not its "true" reasons, but were a pretext for discrimination. Hicks, 509 U.S. at 507-08. The Court went on to state that "a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason." Id. at 516. Hicks cautioned that "it is not enough . . . to disbelieve the employer; the fact-finder must believe the plaintiff's explanation of intentional discrimination." Id. at 520.

³ Once an employer has demonstrated a legitimate reason for the employment action, the presumption of discrimination raised by the prima facie case is rebutted. Hicks, 113 S. Ct. at 2747. With the presumption rebutted, plaintiff "must demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination." Stoll, 1995 WL 590443, at **2 (citing Krenik v. County of Le Sueur, 47 F.3d 953, 958 (8th Cir. 1995)).

Supp. 337, 345 (D.N.J. 1997) (dismissing claim of age discrimination and stating that "once [Defendant] articulates a legitimate and nondiscriminatory reason for the termination, the burden shifts back to [Plaintiff] not only to rebut [Defendant's] evidence but also to adduce evidence which shows that discrimination was more likely than not to have been a motivating or determinative cause of his termination") (citations omitted).

Here, Plaintiff asserts that an inference of discrimination may be made because Defendant allegedly violated the applicable Civil Service Regulations. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 7.)⁴ Plaintiff contends that Defendant "violated the rule of three" by extending offers of employment to two applicants who ranked beneath him. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 5.)⁵ Defendant asserts that

⁴ Plaintiff's Complaint does not explicitly allege a violation of the Civil Service Statutes as an independent cause of action or as an alleged instance of discrimination based on race or national origin.

⁵ Under the statute to which Plaintiff apparently refers:

[e]very position or employment in the competitive class . . . shall be filled only in the following manner: The appointing officer shall notify the civil service commission of any vacancy in the service which he desires to fill, and shall request the certification of eligibles. The commission shall forthwith certify, from the appropriate eligible list, the names of the three persons thereon who received the highest averages at examinations held under the provisions of this act. The appointing officer shall, thereupon, with sole reference to the relative merit and fitness of the candidates, make an appointment from the three names so certified. . . .

it "follow[ed] civil service as a general guideline," but also contends that it is not, in fact, governed by the Civil Service Act. (Spang Dep. at 18-19; Def.'s Reply Mem. of Law in Supp. of Mot. for Summ. J. at 1.) Rather, Defendant contends that it followed its own policies and procedures with regard to Plaintiff's application for employment. (Spang Dep. at 19; Def.'s Reply Mem. of Law in Supp. of Mot. for Summ. J. at 1.)⁶

Plaintiff cites no authority to support the proposition that Defendant is governed by the Civil Service Regulations to which Plaintiff apparently refers. To the contrary, Article II, entitled "Civil Service in General," by its terms applies to "cities of the second class." 53 P.S. § 23431. Both Plaintiff and Defendant acknowledge that Defendant is a police department made up of a borough and second class townships, not a city of the second class. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 2; Def.'s Reply Mem. of Law in Supp. of Mot. for Summ. J. at 1.)⁷ Further, in Fraternal Order of Police v. City

⁶ In accordance with those policies and procedures, Defendant asserts that it did not hire Plaintiff because "only those without negative comments in their background investigation[s] were selected." (Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 4.)

⁷ Cities "containing a population of one million or over shall constitute the first class. Those containing a population of two hundred and fifty thousand and under one million shall constitute the second class." 53 P.S. § 101. "Townships of the first class are those having a population of at least three hundred inhabitants to the square mile, which are now established as townships of the first class, or which may be created townships of the first class under laws relating to townships of the first class. All townships that are not townships of the first class or home rule townships are townships of the second

of Pittsburgh, the court recognized that the general civil service law protection that provides for appointments from competitive class with ranking through examination was repealed as to employees and bureaus of police in cities of second class. Fraternal Order of Police v. City of Pittsburgh, 644 A.2d 246, 251 (Pa. Commw. Ct. 1994). The court concludes that Defendant is not bound by the Civil Service guidelines to which Plaintiff refers.

The court finds that Plaintiff cannot rely on an alleged violation of non-binding regulations to create a genuine issue of material fact that Defendant's proffered reasons for its employment decision were pretext and that its real reason was intentional discrimination. Moreover, Plaintiff offers no evidence to rebut Defendant's assertion that it offered employment only to those applicants without negative information in their background investigations.

Plaintiff also asserts that an inference of discrimination may be made because Plaintiff's national origin was communicated to Police Chief Spang, who then did not recommend Plaintiff for employment. (Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 7-8.) Plaintiff offers neither support for this assertion nor evidence to suggest that his national origin was communicated

class." 53 P.S. § 65201. "When a new township is created either by consolidation of two or more townships or reestablishment of a township of the first class as a township or by annulment of a charter of a borough, the new township shall be classified as a township of the second class." 53 P.S. § 65204.

to Spang. Rather, the record indicates that Seiple's report did not attach Plaintiff's birth certificate, and Spang testified that he had no knowledge of Plaintiff's national origin or heritage until after he learned of Plaintiff's discrimination claim. (Seiple Dep. at 27-28; Spang Dep. at 19-20.)

Thus, Plaintiff has presented neither direct nor circumstantial evidence of discriminatory intent to overcome Defendant's asserted nondiscriminatory motive. Where a third-stage showing of pretext is not made, "there is insufficient evidence of intentional discrimination and defendant is entitled to judgment as a matter of law." Stoll, 68 F.3d 479, 1995 WL 590443, **2 (holding that employee must submit evidence of pretext to avoid summary judgment); Krenik, 47 F.3d at 958-59 (stating that to survive summary judgment, plaintiff must "demonstrate the existence of evidence of some additional facts that would allow a jury to find that the defendant's proffered reason is pretext and that the real reason for its action was intentional discrimination"); Bodenheimer v. PPG Ind., Inc., 5 F.3d 955, 957 (5th Cir. 1993) (granting summary judgment for employer where employee failed to submit proof of discriminatory intent).⁸ Plaintiff has failed to create a genuine issue of

⁸ See also Perdomo v. Browner, 67 F.3d 140, 145 (7th Cir. 1995) (reversing district court's order of summary judgment for employer because employee raised triable issue of fact as to pretext); York v. Brown, No. 92-7035, 1995 WL 520396, at *3 (7th Cir. Aug. 30, 1995) (holding that "(t)o defeat a summary judgment motion, the employee need produce only enough evidence from which a rational factfinder could infer that the company's proffered reasons were pretextual"); Washington v. Garrett, 10 F.3d 1421,

material fact as to whether Defendant's articulated reason for its employment decision was pretextual. Thus, the court will grant Defendant's motion for summary judgment.

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment will be granted.

An appropriate Order follows.

1434 (9th Cir. 1993) (denying summary judgment because plaintiff made showing of pretext which entitles her to reach jury); Tomka v. Seiler Corp., 66 F.3d 1295, 1309 (2d Cir. 1995) (denying summary judgment in retaliatory discharge case where employee submitted evidence of discriminatory intent).

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DEPARTMENT	:	NO. 99-1913

ORDER

AND NOW, TO WIT, this day of May, 2000, upon consideration of defendant Colonial Regional Police Department's motion for summary judgment and plaintiff Alexander Boehm's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of defendant Colonial Regional Police Department and against plaintiff Alexander Boehm on all counts.

LOUIS C. BECHTLE, J.