

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

WILLIAM BROPHY : CIVIL ACTION  
Plaintiff :  
 :  
v. :  
 :  
CITY OF PHILADELPHIA POLICE : NO. 03-CV-4139  
DEPARTMENT and CITY OF :  
PHILADELPHIA :  
Defendants :

Norma L. Shapiro, S.J.

July 28, 2004

MEMORANDUM AND ORDER

Plaintiff, William J. Brophy ("Brophy"), alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b) and the Pennsylvania Human Relations Act, ("PHRA"), 43 Pa. C.S. §951 et seq., filed this action on July 15, 2003. Defendant, the City of Philadelphia, moving for summary judgment, argues Brophy's ADEA and PHRA claims are barred as a matter of law.

Background

Brophy is seventy-six (76) years old, and was formerly employed by the Philadelphia Police Department as a Police Officer, Detective and Sergeant, with almost ten years of service. After he voluntarily left City employment, he served as a Special Agent with the Federal Bureau of Investigation, a

Police Commissioner of two police departments, and as regional security director for a national retailer and a major local hospital. For approximately ten years prior to his current application to the City of Philadelphia Police Department ("Police Department"), Brophy served in a civilian position with the Camden County Sheriff's Office.

On February 23, 2000, at the age of 73, Brophy submitted an application to the Police Department for the position of Philadelphia Police Officer Recruit. He subsequently took the written and oral exams, and submitted to the medical evaluations and background investigations. On January 26, 2001, he was informed he would not be hired because he did not meet the one year Philadelphia residency requirement. He denies he did not meet the residency requirement, because while still working in New Jersey, he had become estranged from his wife and moved to Philadelphia in 1998.

On February 28, 2001, Brophy filed a complaint with the Pennsylvania Human Relations Commission ("PHRC"). The matter was dually filed with the EEOC under the Charge Number 17F2001-016939. The complaint alleged that the continued background investigation and other actions by the City were discriminatory and harassing actions based on his age. Following an investigation by the PHRC, the City agreed to accept Brophy into the "next class offered by the Police Department" after he had

again passed a polygraph and physical examination. Plaintiff passed the exams and was appointed to the Philadelphia Police Academy ("the Academy") on October 15, 2001. Based on the agreement to hire, Brophy's EEOC/PHRC claim was closed.

He alleges that when he entered the Academy, he was entitled to a "Waiver of Training" under the Municipal Police Officer Education and Training Act, 37 P.S. §203.12 ("The Act"). The Act allows waiver of certification standards, in lieu of participating in the full Academy training program, for police officers trained prior to 1974 with more than five years of service. An individual officer's department is solely responsible for submitting a waiver application to the Municipal Police Officer Education and Training Commission. Brophy contends he qualified for waiver but the City refused to submit a waiver application on his behalf.

When Brophy was admitted to the Academy in October 2001, the City of Philadelphia had no written policy regarding waivers, and each application was decided on a case-by-case basis. According to the Academy's Captain, Arthur Grover, at the time plaintiff entered the Academy, a waiver of training was granted to a police recruit only if the recruit had been a prior member of the Philadelphia Police Department, and/or the recruit had been a municipal officer within the past few years. Because it had been twenty-six years from the time Brophy had been a police officer

on the streets until he entered the Academy, the City declined to submit a waiver application on his behalf.

Brophy was 74 years old when he entered the Philadelphia Police Officer Recruit training class. He alleges he was singled out for harassment and discrimination because of his age. First, Brophy received significant media attention for his attempts to rejoin the Department. As a result, he was ridiculed in front of his classmates, spoken to privately by Academy administrative officials and required to sign confidentiality agreements.

Brophy alleges he was frequently singled out or disciplined when other students were not. Brophy was among the first of the recruits to clean toilets, was spoken to in a demeaning manner before his peers on repeated occasions by an academy instructor, Police Officer Halasa, and frequently disciplined for lateness and cheating which he denies.

On March 29, 2002, Brophy was informed that he did not pass the night-firing firearms examination. Following his failure, he was assured that he would have the opportunity to pass the examination after remedial training and could graduate as scheduled.

On June 5, 2002, Brophy's class had its final physical examination. Brophy was weighed, and was tested in sit-ups, bench press, and stretching. The class was also required to run 1.5 miles by required times on a matrix based on gender and age.

Exh. 15, Academy Physical Requirements Matrix. The age groups were in ten year increments: those recruits 60 years of age or older were required to run the 1.5 miles in 16:07 minutes. Id. Brophy's time was 18:05 minutes.

Brophy was then informed that he would be terminated for failing two of the Academy requirements, dismissed from the training class, and denied the opportunity to be hired by the Police Department. On June 12, 2002 he dually filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and the Pennsylvania Human Rights Commission ("PHRC"). Brophy's charge of discrimination states he was entitled to a waiver of training and failing him on the firearms and running tests were a pretext for age discrimination. On April 21, 2003, the EEOC issued a notice of Brophy's right to sue.

## **Discussion**

### **A. Jurisdiction**

Section 626(d) of the ADEA requires, as a prerequisite to suit in federal court, that a prospective plaintiff first file a timely charge with the EEOC to permit informal methods of conciliation, conference and persuasion. 29 U.S.C. § 626(d); Whalen v. W.R. Grace & Co., 56 F.3d 504, 506 (3d Cir. 1995). The federal court's jurisdiction is limited to claims that are either included in an EEOC [or PHRC] charge or are based on conduct

subsequent to the charge which is 'reasonably related' to that alleged in the charge. Owen v. Computer Sciences Corp., 1999 U.S. Dist. LEXIS 12635 (D.N.J. Feb. 2, 1999)(quoting Stewart v. United States Immigration and Naturalization Service, 762 F.2d 193, 198 (2d Cir. 1985)). A plaintiff may not assert matters in a suit in federal court outside the scope of an EEOC or PHRC charge. See Thomas v. Ethicon, Inc., 1994 U.S. Dist. LEXIS 5773 (E.D. Pa. 1994).

In response to Defendant's Motion for Summary Judgment, Brophy references a number of claims included in his earlier PHRC charge. These claims include alleged discrimination in the hiring process preceding his admission to the Academy. That prior charge of discrimination was voluntarily terminated when he gained admission to the Academy, so those claims are not before the court. The court's jurisdiction is limited to claims included in Brophy's second charge of discrimination filed with the EEOC and PHRC: (1) he was entitled to a waiver of training; and (2) failing him on the firearms and running tests were pretext for age discrimination.

**B. Defendant's Motion to Join the Commonwealth of Pennsylvania**

The City has moved to join the Commonwealth of Pennsylvania

as an indispensable party. Fed. R. Civ. P. 19(a) provides: "a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction...shall be joined as a party in the action if...in the person's absence complete relief cannot be accorded among those parties."

The City asserts that the Commonwealth of Pennsylvania is an indispensable party because Brophy alleges the policies and procedures of the Officer Recruit training class created a harassing and discriminatory environment causing him injury. However, Brophy's Complaint does not allege the standards promulgated by the Commonwealth resulted in a discriminatory impact, but rather that a discriminatory and harassing environment was created by those running the Academy. Brophy does not seek relief from the Commonwealth, and does not ask that any law or regulation of the Commonwealth be changed. The Motion to Join the Commonwealth of Pennsylvania is denied.

### **C. Motion for Summary Judgment**

Moving for summary judgment, the City argues that Brophy's ADEA and PHRA claims are barred as a matter of law.

#### ***Standard of Review***

A party is entitled to summary judgment "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See, Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-61 (1970). The moving party can satisfy this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 323-25.

Once the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to make a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id., at 325. The nonmoving party "may not rest upon the mere allegations or denials of [his] pleading," Fed. R. Civ. P. 56(e), and must come forward with "specific facts showing that there is a *genuine issue for trial*." Matsushita Elec. Industrial Co., Ltd. V. Zenith Radio Corp, 475 U.S. 574, 587 (1986). "[T]he mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-moving party on the issue."

Petrucci v. Bohringer & Ratzinger, 46 F. 3d 1298, 1308 (3d Cir. 1995).

***Maximum Age***

The City first argues that Brophy has failed to state a claim under the ADEA. The ADEA makes it unlawful for an employer to refuse to hire or to discharge a person on the basis of age. 29 U.S.C. §623(a)(1). The ADEA was held applicable to state and local governments. EEOC v. Wyoming, 460 U.S. 226, 243 (1983). Congress then amended the ADEA allowing states to refuse to hire a police officer on the basis of age if a state or local law permitted such a restriction and the individual had attained the age limit by March 3, 1983. 29 U.S.C. §623(j)(1)(A). This section expired on December 31, 1993, but in 1996, Congress reenacted it with retroactive effect to December 31, 1993. In relevant part, 29 U.S.C. §623(j) provides:

Employment as a firefighter or law enforcement officer. It shall not be unlawful for an employer to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a law enforcement officers and the individual has attained -

(A) the age of hiring in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or

refusal to hire under applicable State or local law enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996]; or

(ii) if applicable State or local law was enacted after the date of enactment of the Age Discrimination in Employment Amendments of 1996 [enacted Sept. 30, 1996] and the individual was discharged, the higher of--

- (I) the age of retirement in effect on the date of such discharge under such law; and
- (II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this Act.

It is clear from the legislative history of the 1996 ADEA amendments to the ADEA that the objective was to allow age as a factor in the hiring of police officers and firefighters because these groups have unique employment requirements. See, 142 Cong. Rec. S 11922 (1996).

Pursuant to §7-400 of Philadelphia's Home Rule Charter, Civil Service Regulation 11.17 was established on June 6, 1957. In its original form, the Regulation provided that no person who had reached 70 years old could be appointed to a civil service position. The Regulation was amended, effective July 20, 1982 to abolish the maximum age limit of 70 except for the positions of police officer, firefighter, corrections officer, deputy sheriff, and matron. The maximum age for police officers was specified as 35 years; this regulation was in effect at the time Brophy

initially applied to the Philadelphia Police Department.

Brophy contends that the City has not proven that the maximum age requirement was a bona fide hiring plan not designed to evade the purposes of the act. He argues there is no evidence the City actually complied with this regulation. Deposition testimony from the City's representatives states that no age maximum policy was in effect at either time Brophy applied to be a Police Recruit. At some point in 2002, a 40 year old age maximum was enacted.

There is a genuine issue of material fact whether the maximum age policy was in effect at the time Brophy was discharged from the Academy (and therefore not hired by the Department). However, because the City's stated reason for not hiring Brophy was that he failed two of the Academy's training requirements, the existence of a maximum age policy is not dispositive to the resolution of Brophy's claims.

#### ***Qualification for the Position***

The City argues that Brophy has failed to satisfy his burden of proof. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the United States Supreme Court articulated a burden-shifting framework for consideration of claims under Title VII. The McDonnell Douglas analysis applies to ADEA claims, Narin v. Lower Merion Township Sch. Dist., 206 F. 3d 323, 331 (3d Cir.

2000) and PHRA claims are also analyzed under the McDonnell Douglas standard. Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1084 (3d Cir. 1995). See also Dorsey v. Pittsburgh Assocs., 90 Fed. Appx. 636, 638 (3d Cir. 2004)

Under McDonnell Douglas, to state a prima facie case for age discrimination, a plaintiff must establish that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the employer filled the position with a person who was sufficiently younger to create an inference of age discrimination. Narin, 206 F. 3d at 331. The burden then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for its action. McDonnell Douglas, 411 U.S. at 802. "Finally, should the defendant carry this burden, the plaintiff then must have 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." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999) (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53(1981)).

The City concedes Brophy is a member of the protected class, but alleges his evidentiary burden is otherwise unmet. Brophy did suffer an adverse employment action (he was dismissed from the Academy and denied the opportunity to be hired as a Police

Officer Recruit) and other younger individuals were hired for the position of Police Officer Recruit, but there is significant question about Brophy's qualification for the position.

The City contends Brophy cannot demonstrate he was a qualified Police Officer Recruit. Brophy does not challenge the Academy requirements themselves as discriminatory, but argues that they were applied in a discriminatory manner to him because he was entitled to a Waiver of Training.

Qualifications are considered under an objective standard. Sempier v. Johnson & Higgins, 45 F. 3d 724, 729 (3d Cir. 1995). Brophy concedes the City had no written policy regarding waivers, and waivers were decided on a case-by-case basis at the time of his entrance to the Academy. The statute, 37 P.S. §203.12, states the criteria necessary for an officer to be *eligible* for a police department to submit an application for a waiver. The statute does not create a mandatory requirement that the department submit a waiver application, or that the application be accepted, for *anyone* meeting those criteria. Even if he were otherwise eligible, Brophy was not *entitled* to a waiver. Brophy testified that because the problems are more complex in today's society, the training now is much more intensive than that he received in 1953. Tr., Brophy Deposition, at 99. The training at the Academy covered numerous subject areas not covered by his 1953 training. Id. It is objectively reasonable that because it

had been twenty-six years since he had been a police officer on the streets, the City would decline to submit a waiver application on his behalf. Absent a waiver of training, Brophy was required to complete all the Academy's requirements in order to be hired as a Police Officer Recruit. Because Brophy has failed to demonstrate he was qualified for the position of Police Officer Recruit the City is entitled to summary judgment on Brophy's ADEA and PHRA claims.

### ***Pretext***

If Brophy had established a prima facie case of age discrimination, the burden would shift to the City to offer a "legitimate, nondiscriminatory reason" for its personnel decision. Boykins v. Lucent Technology, 78 F. Supp. 2d 402, 409-410 (E.D. Pa. 2000). The City states the reason for Brophy's termination was: (1) his failure to pass the firearms and running requirements; (2) no failed area can be remediated prior to the completion of training under the Act; and (3) failure of two requirements is grounds for dismissal from the Academy. Brophy contends that these alleged failures were pretext for discrimination on the basis of age.

Pretext is not demonstrated by showing simply that the employer was mistaken. Ezold v. Wolf, Block, Schorr and Solis-

Cohen, 983 F. 2d 509, 531 (3d Cir. 1992). Instead the record is examined for evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons. Josey v. John R. Hollingsworth Corp., 996 F. 2d 632, 638 (3d Cir. 1993). The burden is on the plaintiff to submit evidence which:

1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Fuentes v. Perskie, 32 F. 3d 759, 762 (3d Cir. 1994).

The Municipal Police Training and Education Act, 37 Pa. Code § 203.11, enumerates the qualification requirements for police officers hired by police departments of the Commonwealth. Among the many requirements are that applicants:

F) Complete the basic training course approved by the Commission with a minimum grade as established by the Commission. The Commission will publish a notice in the Pennsylvania Bulletin and in the Commission newsletter whenever the minimum grade on each tested area of examination changes.

(I) Applicants not achieving the minimum grade in any tested area shall repeat the failed training in that area before being eligible to take the examination in that tested area at a Commission-certified school. If the applicant fails to achieve the minimum grade on the applicant's second attempt, the applicant shall be required to successfully retake and pass the entire basic police training course to qualify for certification.

(II) Applicants not achieving the minimum grade in two

separate tested areas during one basic police training course shall be required to retake and pass the entire basic police training course in order to qualify for certification.

37 Pa. Code §203.11(11)(F). The minimum passing grade is 75% for each testing area, and the City states Brophy scored less than 75% on the low light night firearms test. Id.; Tr., Brophy Deposition, at 115.

Another requirement is that the applicant:

Be evaluated to determine physical fitness using the standards developed by the Cooper Institute for Aerobics Research in Dallas, Texas. Each applicant shall score no lower than the 30th percentile of the Cooper standards, which coincides with the 30th percentile of the general population, in each of the five required evaluations to be eligible for employment. A person will not be enrolled in a recruit training program at a police academy certified by the Commission unless the person has obtained a score in the 30th percentile or higher for the person's age and gender as specified in the Cooper standards for each of the five evaluations.

37 Pa. Code §203.11(8). One of the five evaluations is a 1.5 mile run, and under the Cooper standards, men 60 years and older must complete the run in 16:07 minutes. Brophy concedes that he did not meet the minimum requirement for the 1.5 mile run.

Brophy argues that he did not actually fail two training requirements because he was never given the opportunity to review his firearms score, his score was incorrectly computed by the City, and that he was assured the opportunity to remediate his "failure" prior to graduation but was not given such an

opportunity. Brophy testified that he signed a certification of his failure of the low light night firearms score only because Captain Grover assured him he would be able to take the firearms test again. Tr., Brophy Deposition, at 112. But Brophy presents no evidence that the score was incorrectly computed, or that he received the minimum passing grade. Although the statute provides applicants not achieving the minimum grade in any tested area shall repeat the failed training in that area before being eligible to take the examination, Brophy presents no evidence that he requested to repeat the training or was denied such opportunity.

The statute explicitly provides applicants who do not achieve the minimum passing grade of 75% in two separate tested areas during one basic police training course shall be required to retake and pass the entire basic police training course in order to qualify for certification. Because Brophy fails to make a factual showing sufficient to establish the existence of an element essential to his case, for which he would bear the burden of proof at trial, summary judgment is appropriate. Celotex, 477 U.S. at 325. Because Brophy did not meet his burden in proving the City's rationale for his termination was pretextual, the City is entitled to summary judgment on Brophy's ADEA and PHRA claims.

***Conclusion***

For the reasons stated above, summary judgment will be granted.

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

WILLIAM BROPHY : CIVIL ACTION  
Plaintiff :  
 :  
v. :  
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CITY OF PHILADELPHIA POLICE : NO. 03-CV-4139  
DEPARTMENT and CITY OF :  
PHILADELPHIA :  
Defendants :

ORDER

AND NOW, this 28<sup>th</sup> day of July, 2004, upon consideration of Defendant's Motion for Joinder of the Commonwealth of Pennsylvania (Paper #14) and response thereto, and Defendant's Motion for Summary Judgment (Paper #19) and response thereto, it is hereby ORDERED that:

1. Defendant's Motion for Joinder is **DENIED**;
2. Defendant's Motion for Summary Judgment is **GRANTED** in favor of the City of Philadelphia Police Department and the City of Philadelphia, and against William Brophy.

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Norma L. Shapiro, S.J.