

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

OPINION and
ORDER

04-C-984-C

NORTHCENTRAL TECHNICAL COLLEGE
DISTRICT BOARD OF TRUSTEES,

Defendant.

William Mattek spent three years working for defendant Northcentral Technical College as Director of defendant's Medford, Wisconsin campus. In January 2004, defendant decided to merge the Medford and Spencer, Wisconsin campuses and create a full-time West Region Director position that would eliminate Mattek's position. Mattek was interviewed for the new position but the committee hired another candidate and discharged him. In this civil action for injunctive and monetary relief, plaintiff Equal Employment Opportunity Commission contends that defendant did not hire Mattek for the new position because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. Jurisdiction is present under 28 U.S.C. § 1331.

This case is before the court on defendant's motion for summary judgment. Defendant's motion will be granted because plaintiff has failed to present sufficient evidence from which a reasonable jury could infer that defendant's stated reasons for Mattek's termination were pretextual.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Defendant Northcentral Technical College is a vocational and adult education institution with its main campus in Wausau, Wisconsin, and regional campuses in Spencer, Phillips, Antigo, Wittenburg, and Medford, Wisconsin. At the age of 62, William Mattek was hired to begin working as director of defendant's Medford campus, beginning January 2001.

B. Mattek's Work History at the College

While Mattek was employed as director of the Medford campus, 50% of his job was to manage the campus, 20% was to teach courses in marketing, human resources, and customer and consumer credit and 30% was to sell contracted educational and training

services to local businesses and industries. Mattek recruited students, taught a course each semester and worked with local companies to establish training programs for computer networks, management, and supervisory management. Mattek managed 5 to 6 Medford campus staff members and 4 instructors. As the Medford campus director, Mattek was involved in the County Board Education Committee, the Medford Area Council of Safety, Taylor County Prevention Council, Taylor County Education Committee and the learning center for Hispanic workers at Weather Shield in Medford.

At the time Mattek was hired, Deb Marg had been working for defendant as Director of the Spencer campus since January 1996. Janet Newman, the College's Vice President of Learning, supervised Mattek and Marg. In Mattek's 2003 evaluation, Newman stated that Mattek had fully met expectations for the year, was enthusiastic about international education, was a presenter at the WTCS Summer Institute on International Curriculum, made two global presentations to Ukraine delegations and made a presentation on the Middle East to students. He was credited also with contributing to college-wide efforts and taking the lead on a farmstead rewiring project. Overall enrollment for the Western Region improved in 2003.

C. Merging of the Medford and Spencer Campuses

In January 2004, defendant decided to consolidate its Medford and Spencer campuses

and place them under one full-time regional director. On February 25, 2004, Newman met with Mattek and Marg to tell them about defendant's plan to consolidate their positions and to discuss the job description for the new West Region Director position. Newman told Mattek and Marg how the selection process would proceed and noted that at least one of them would need to find other employment for the following year. She informed them that there would be other positions and opportunities available with defendant.

Defendant posted the position of West Region Director and advertised for applicants in March 2004. The job posting listed the following qualifications for the position:

Master's degree and two years of full-time teaching is required. Two years of experience in a supervisory-leadership role and experience with public relations – i.e. promotion, public speaking, advocacy is preferred. Evidence of good communication skills and responsible management of financial, human and physical resources. Computer literate in using software applications, databases, and e-mail. Must be able to arrange own transportation to and from variety of locations. Ability to work flexible hours. To maintain or establish residency in the West Region preferred. Must be able to meet Wisconsin Technical College System certification requirements.

The West Region Director's job description was almost identical to the job description for the position for which Mattek had been hired in 2000. That job description had listed the following qualifications for the position:

Bachelor's degree and two years of full-time teaching experience or related experience required. Two years experience in a supervisory/leadership role and experience with public relations – i.e., promotion, public speaking, advocacy, is preferred. Evidence of good communication skills and responsible management of financial, human and physical resources. Computer literate

in using basic software applications, databases, and e-mail. Must be able to arrange own transportation to and from a variety of locations. Ability to work flexible hours. To maintain or establish residency in the West Region preferred. Must be able to meet Wisconsin Technical College System certification requirements.

The differences between the Medford campus director's job duties and those of the West Region Director were that the West Region Director would be allowed to devote more time to selling contracted educational and training services to local business and industry and that these sales would occur in two communities instead of one. Also, the West Region Director would manage two separate campuses in two separate communities and would need a master's degree. Finally, Newman wanted the West Region Director to be a good public speaker and to be good at sales.

The West Region Director's position was almost identical to the positions Mattek and Marg already held. However, defendant anticipated that the West Region Director would have no teaching duties and would focus instead on administration of the two campuses and place an increased emphasis on selling contracted business and industry services in the two communities. Occasionally however, the newly hired West Region Director taught continuing education courses and contracted training courses.

D. Mattek's Qualifications

Mattek wanted the position of West Region Director and was qualified for the

position. He had received his bachelor's degree in Marketing from Marquette University in 1961 and an MBA from Marquette in 1973. Before joining Northcentral Technical College, he had worked in international sales and marketing for Rexnord Corporation for 21 years and had spent two years as an international sales manager, consultant, and vice-president of administration with another company. In addition, he had taught Business, Insurance, and Human Resources at Spencerian Business College and Concordia University before becoming defendant's Medford campus director.

E. The Hiring Process

Janet Newman recruited a seven-member committee to conduct interviews and rank candidates for the West Region Director position. If there was no consensus, Newman would check references and make the final decision. The committee consisted of individuals employed by defendant at various levels and positions as well as members of the Medford and Spencer communities. The names, positions of employment, and ages of the committee members (at the time of the interviews) are as follows:

Janet Newman, the College's Vice President of Learning, age 51;
Kelly Fischer, the College Foundation's executive director, age 62;
Kate Clodjeaux, former College E-unit Operational Leader, age 45;
Robert Martin, the College's North Region Director, age 61;
Jean VanGrinsven, the College's administrative assistant for business and industry services, age 57;
David Michael Bormann, Weather Shield, age 56; and

Dan Schwantes, Vice President of Heritage Bank in Spencer, age 55.

Thirty-one people applied for the West Region Director position. Seven applicants were chosen for telephone interviews conducted by Newman, Fischer and Clodjeaux. Five of these seven applicants were selected for in-person interviews by the full screening committee. Approximately one week before the interview committee convened to conduct the in-person interviews, panel members received the candidates' application materials, which included cover letters, resumes, and transcripts for each candidate. On April 30, 2004, the committee interviewed the following five applicants individually: William Mattek, Deb Marg, Steven Bitzer, Hank Roehrich, and David Shadinger.

Newman met with the committee members the morning of the in-person interviews and gave them each a packet of information, including the West Region Director job description and a list of interview questions that she had prepared. The pre-written questions were designed to elicit information from the candidate regarding his or her (1) experience and education; (2) leadership and facilitation/teamwork; (3) sales experience; (4) training/workforce development experience; (5) customer service orientation; (6) communication skills; (7) goal orientation; (8) computer literacy; and (9) interest in the job. Before the interviews with the full committee, the candidates were given a laptop computer and a half hour to provide a written response to a scenario and told to bring their response with them to the in-person interview. The committee members then took turns asking each

applicant a question from the prepared list of questions. The questions Mattek was asked in the interviews were appropriate for the position. He was not asked any inappropriate questions.

At the end of the interviews, the committee members ranked their top two choices. All but one of the members of the committee ranked Steven Bitzer first and Deb Marg second. Committee member Dan Schwantes ranked Deb Marg first and Steven Bitzer second. After the committee's discussion regarding the ranking, Dan Schwantes still believed Deb Marg was the best person for the position. However, the general consensus was to recommend Bitzer for the position. Relying on this recommendation, Newman offered the position to Bitzer and he accepted the job.

F. Bitzer's Qualifications

Bitzer was ranked as the top candidate on the basis of his qualifications, which included management experience in several customer-centered organizations, experience building sales and strong public speaking and communication skills. He had experience as a leader in a team environment at a technical college. In addition, he was willing to relocate to the West Region. As an instructor at Northeast Technical College, Bitzer had taught Hotel and Restaurant Management, helped plan courses, taught satellite courses, and was a member of Northeast Technical College's Hotel and Restaurant Management Program

team. Also, he helped plan courses and developed customized training in food service sanitation and dining room management.

During the telephone interview Kelly Fischer had questions about what Bitzer did to build the customer base at Northeast Technical College, but her questions were answered during the face-to-face interview. Jean VanGrinsven noted that several of Bitzer's answers to questions were unsure and seemed to ramble. However, she believed overall that Bitzer was very energetic and had good marketing ideas. Newman had concerns with Bitzer's eye contact and presentation during his face-to-face interview. Bitzer's reference from Northeast Technical College told Newman that Bitzer was not a dynamic speaker but that people would listen to him. The reference said further that Bitzer would need to grow into sales. Newman recognized that this comment was not made by someone who knew Bitzer as a sales person or would be familiar with his sales skills.

G. The Candidates' Ages

Of the five candidates for the College's West Region Director's position selected for face-to-face interviews, Steven Bitzer was the only candidate under 40 years old. Deb Marg was 47 years old at the time of the interviews. Two other candidates, Roehrich and Shadinger, were more than 40 years old according to the information provided in their resumes. Roehrich received his bachelor's degree in 1979, his master's degree in 1996, and

his Ph.D. in 2003. Shadinger received his bachelor's degree in 1973 and his master's degree in 1977.

H. Newman's Remark

Newman told Mattek that she had offered the position to a "young" person from Sturgeon Bay and he accepted the position. However, Newman said she did not perceive Bitzer as a young person.

OPINION

The Age Discrimination in Employment Act makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). This protection extends to employees who are at least 40 years old. § 631(a). To make out a violation the ADEA, a "plaintiff's age must have actually played a role in [the employer's decision making] process and had a determinative influence on the outcome." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141 (2000).

A plaintiff may prove age discrimination directly or indirectly through the burden-shifting method established by the Supreme Court in McDonnell Douglas Corp. v Green,

411 U.S. 792 (1973). Chiaromonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997); Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (McDonnell Douglas framework applies in ADEA cases). Under either the direct or indirect method, summary judgment is inappropriate if plaintiff offers evidence from which an inference of discrimination may be drawn. Miller v. Borden, Inc., 168 F.3d 308, 312 (7th Cir. 1999).

Defendant has moved for summary judgment on the ground that there is no evidence that could lead a reasonable jury to conclude that the candidates' ages had any influence on the interview committee's hiring recommendation. Plaintiff does not argue that direct evidence of age discrimination exists. Instead, both parties focus their arguments on the indirect or burden-shifting method of proof.

A. Indirect Method

Under the indirect method of proving unlawful discrimination, plaintiff has the initial burden to establish a prima facie case. Ransom v. CSC Consulting, Inc., 217 F.3d 467, 470 (7th Cir. 2000). If plaintiff makes out a prima facie case, he is entitled to "a presumption that the employer unlawfully discriminated against the employee." EEOC v. Our Lady of the Resurrection Medical Center, 77 F.3d 145, 148 (7th Cir. 1996) (quoting St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993)). Once plaintiff has met his burden, defendant has the burden of rebutting the presumption by coming forward with a legitimate,

nondiscriminatory reason for the discharge. Pitasi v. Gartner Group, Inc., 184 F.3d 709, 716 (7th Cir. 1999). If defendant meets its burden, plaintiff must demonstrate that there is a genuine issue of material fact whether defendant's stated reason for plaintiff's termination is pretextual in order to defeat a motion for summary judgment. Hudson v. Chicago Transit Authority, 375 F.3d 552, 561 (7th Cir. 2004). Although the burden of production shifts under the indirect method, the ultimate burden of persuasion rests with plaintiff. Pitasi, 184 F.3d at 716.

1. Prima facie case

Under the indirect method, Mattek must "first present a prima facie case of discrimination by establishing that he (1) was a member of the protected group; (2) sought a position or a transfer for which he was qualified; (3) was not hired; and (4) a substantially younger person who was similarly situated was hired." Sembos v. Philips Components, 376 F.3d 696, 700 (7th Cir. 2004). Defendant does not dispute that plaintiff has successfully presented a prima facie case of age discrimination. First, Mattek was a member of a protected class because he was 65 years old at the time of the interview. 29 U.S.C. § 631(a). Second, Mattek was qualified for the West Region Director position; he satisfied all of the prerequisites for the position; and defendant admits that he was given serious consideration. In addition, he received a satisfactory evaluation in 2003 while performing a similar job for

defendant. Third, Mattek was not hired for the position. Last, the position was given to Steven Bitzer, who was under forty years old at the time of the interview. Since Mattek was at least 25 years older than Bitzer, Bitzer was substantially younger than Mattek. EEOC v. Bd. of Regents of the University of Wisconsin System, 288 F.3d 296, 302 (7th Cir. 2002) (“Our decisions have defined ‘substantially younger’ as 10 years younger.”). I conclude that plaintiff has made out a prima facie case of age discrimination.

2. Legitimate, nondiscriminatory reason

Because plaintiff has established a prima facie case, the burden now shifts to defendant to produce a legitimate nondiscriminatory reason for the adverse action. Pitasi, 184 F.3d at 716. Defendant’s stated reason for not hiring Mattek is that there were at least two candidates whom the hiring committee thought were more qualified for the position and the top candidate accepted the position. When the “burden” shifts to the employer, this “burden is one of production, not persuasion: it can involve no credibility assessment.” Reeves, 530 U.S. at 142. In this case, defendant’s reason is sufficient to satisfy defendant’s burden and shift the onus back to plaintiff to raise an issue regarding pretext. Timm v. Mead Corp., 32 F.3d 273, 275 (7th Cir. 1994) (legitimate reason need only be nondiscriminatory and sufficient to justify the challenged action).

3. Pretext

A plaintiff can prove pretext through direct evidence that shows that an employer is lying or through indirect evidence that shows that the employer's reasons are not factually supported, were not the real reason for the adverse action or were not sufficient to prompt the adverse action. Zaccagnini, 338 F.3d at 676; Vukadinovich v. Board of School Trustees of North Newton School Corp., 278 F.3d 693, 699-700 (7th Cir. 2002). Plaintiff attempts to present both direct and indirect evidence that defendant's reason for not hiring Mattek was pretextual, but fails on both counts.

a. Direct evidence of pretext

Plaintiff argues that the comment Newman made to Mattek about offering the position to a "young" person from Sturgeon Bay is direct evidence of discrimination. "We have found a statement to be direct evidence of discriminatory intent where the statement was made around the time of and in reference to the adverse employment action." Olson v. Northern FS, Inc., 387 F.3d 632, 635 (7th Cir. 2004). See also Hunt v. City of Markham, Ill., 219 F.3d 649, 652 (7th Cir. 2000). However, the type of statement must be one that "expressed discriminatory feelings" from which "it may be possible to infer that the decision makers were influenced by those feelings in making their decision." Hunt, 219 F.3d at 652-53. Newman's statement is not direct evidence of discrimination because it was

made after the hiring process and because it was merely a description of Bitzer that did not express discriminatory feelings or animus. Newman's comment is different from the type of comment typically considered direct evidence of age discrimination, such as the comment at issue in Olson, 387 F.3d at 634, where plaintiff was told that his age made him undesirable in the business world.

b. Indirect evidence of pretext

Next, plaintiff argues that indirect evidence of pretext exists. First, it argues that defendant's contention that it hired Bitzer because he was more qualified for the position is unworthy of belief because Mattek was far more qualified than Bitzer. Plaintiff supports this argument by comparing Mattek's and Bitzer's qualifications. Although Mattek has a long list of work experience, federal courts "do not sit as a superpersonnel department where the disappointed applicants or employees can have the merits of an employer's decision replayed to determine best business practices." Blise v. Antaramian, 409 F.3d 861, 867 (7th Cir. 2005). "Where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicant's competing qualifications does not constitute evidence of pretext 'unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.'"

Millbrook v. IBP, Inc., 280 F.3d 1169, 1180 (7th Cir. 2002) (quoting Deines v. Texas Dept. of Protective and Regulatory Services, 164 F.3d 277, 279 (5th Cir. 1999)).

In this case, the differences between Mattek and Bitzer are not so favorable to Mattek that reasonable people would find that Mattek was clearly better qualified for the position. It is reasonable to conclude that Mattek and Bitzer met the prerequisites for the position because they were selected for face-to-face interviews. Mattek had 21 years of experience in international sales and marketing, two years' experience as an international sales manager and experience as a consultant in international business. Also, he taught at the Spencerian Business College and Concordia University before spending three years as Director of the Medford campus.

The undisputed facts reveal relatively little about Bitzer's experience prior to obtaining the West Region Director position. He was an instructor at Northeast Technical College, where he taught Hotel and Restaurant Management, helped plan courses, taught satellite courses and was a member of Northeast Technical College's Hotel and Restaurant Management Program team. He helped plan courses and developed customized training in food services and sanitation and dining room management. Plaintiff contends that Bitzer's skills were obviously weaker, especially since they were confined to the food services industry.

Both Mattek and Bitzer's past experiences could have led them to develop skills that

the interview committee believed were transferable to the West Region Director position. For example, Bitzer had experience with planning and developing training and the West Region Director would be focusing more time on the sale of educational and training services. Plaintiff suggests that Mattek's satisfactory evaluation in 2003 for an almost identical position with defendant is proof of his qualifications for the job. However, a satisfactory performance evaluation does not prove that Mattek had superior qualifications for the position. In addition, the interviewing committee was basing each candidate's qualification on the following criteria: (1) experience and education; (2) leadership and facilitation/teamwork; (3) sales experience; (4) training/workforce development experience; (5) customer service orientation; (6) communication skills; (7) goal orientation, (8) computer literacy; and (9) interest in the job. There is no evidence about Mattek and Bitzer's qualifications in each of these areas that would enable this court to second guess the interviewing committee's judgment. Plaintiff has failed to show that Mattek was clearly better qualified for the position.

Next, plaintiff argues that defendant's reason for hiring Bitzer is not credible because Bitzer's qualifications were in dispute during the interview process. First, plaintiff notes that Fischer was skeptical of what Bitzer had added to the customer base at Northeast Technical College following her telephone interview with him. However, it is undisputed that any questions she had regarding Bitzer's contributions to the customer base were adequately

answered in his face-to-face interview. Next, plaintiff notes that VanGrinsven believed that Bitzer's answers to questions were unsure and seemed to ramble. However, it is undisputed that she believed that Bitzer was energetic and had good marketing ideas. Plaintiff states also that Schwantes believed that Marg's communication skills were better than Bitzer's, so he did not know how Bitzer received the offer. Unfortunately for plaintiff, Schwante's belief was not proposed as a fact and will not be considered. This court's Procedure to be Followed on Motions for Summary Judgment I.B.4, states clearly that only proposed facts will be considered. Plaintiff notes also that VanGrinsven believed that Marg had the best interview, yet she ranked Bitzer ahead of Marg. Once again, this information was not proposed as a fact. Last, plaintiff notes that Newman had concerns with Bitzer's eye contact and presentation during his face-to-face interview.

Although defendant presents many positive comments from members of the interviewing committee about Bitzer's qualifications and negative comments from members of the interviewing committee about Mattek's qualifications, these comments were not considered because they were not made the subject of proposed findings of fact. Thus, the court is left with a statement by Newman that she had concerns with Bitzer's eye contact and presentation during his face-to-face interview. However, this statement is not enough by itself to raise doubts about the truthfulness of the interview committee's belief that Bitzer was the most qualified candidate for the position.

The issue is not whether Bitzer deserved a lower assessment but the honesty of the committee members in their belief that he deserved the ranking that he was given. Russell, 51 F.3d at 69. Plaintiff must be able to raise a factual issue over whether discrimination was the real reasons for Bitzer's higher rating. St. Mary's, 509 U.S. at 512. The interview committee used the pre-written questions to evaluate each candidate's qualifications for the position. None of the nine objectives on which the questions were based correlated to age. In addition, it is undisputed that Mattek was not asked any inappropriate questions during the interview process. Thus, nothing suggests that the evaluative criteria itself was discriminatory. Also, there is no other evidence to suggest that the committee members' ratings were pretext for age discrimination. The hiring decision was based on the rankings of seven committee members. Six committee members ranked Bitzer as their most qualified candidate and ranked Marg second. The other committee member ranked Marg first and Bitzer second. All of the committee members thought that at least two other candidates were more qualified for the position than Bitzer. Plaintiff has adduced no evidence to show the committee members' assessment of the candidates was affected in any way by the ages of the candidates.

Plaintiff's next argument is that Bitzer was the only candidate who was not in the protected age group, so there is a reasonable inference that the interview committee hired him because of his age. Defendant argues that the reasonable inferences suggest that the

interviewing committee did not discriminate based on age. For instance, the average age of the committee member themselves was 55.3 years old and Mattek was hired by defendant when he was 62. Even with inferences drawn in favor of plaintiff, it is not enough that Bitzer was younger than the other candidates. The fact that Bitzer was substantially younger than Mattek amounts only to evidence of a prima facie case of discrimination where, as in this case, there is no evidence that Mattek's qualifications were far superior. Millbrook, 280 F.3d at 1180.

In addition, plaintiff argues that defendant has falsely stated that one of the reasons they did not hire Mattek is that he would not move to the Medford area. The majority of plaintiff's support for this argument includes unproposed facts that cannot be considered. The one relevant fact that is proposed is that one of the reasons Bitzer was hired is that he was willing to move to Medford. However, since the job description stated residency in the West Region was preferred, there is nothing suspicious about Bitzer's satisfaction of this recommended prerequisite. There is no evidence that Bitzer's residency in the area effected the committee's evaluation of Mattek in any way.

Last, plaintiff argues that there are questions of fact relating to the intent and credibility of Janet Newman. Bitzer was chosen for the West Region Director because of his management experience in customer-centered organizations, experience in building sales, strong public speaking and communication skills, being a lead in a team environment at a

technical college and his willingness to relocate to the West Region. However, plaintiff argues that Newman, the decisionmaker, ignored the fact that Bitzer's own references indicated that he was not a dynamic speaker and would need to grow into sales. This indicates that Newman ignored Bitzer's faults which suggests that his age may have been the reason he was hired.

This argument does not raise a genuine issue of material fact for multiple reasons. First, although Newman would have been the final decisionmaker if the interview committee did not come to a consensus, the committee recommended Bitzer for the position so she did not have to act as the final decisionmaker. In addition, although Bitzer's reference stated that he was not a dynamic speaker, he said also that people listened to him. This suggests that Bitzer possessed good communications skills. Also, although the reference stated that Bitzer would need to grow into sales, Newman recognized that this comment was not made by someone who knew Bitzer as a sales person or would be familiar with his sales skills. Once again, when taken in context, these statements do not raise a genuine issue about Newman's credibility.

In sum, plaintiff has not raised a genuine issue of material fact that the reason defendant submitted for not hiring Mattek was pretextual.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendant Northcentral Technical College District Board of Trustees is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 26th day of October, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge