

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MARGARET WELCH

C. A. No. 25144

Appellant

v.

NORTON CITY SCHOOL DISTRICT
BOARD OF EDUCATION, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2008-10-7031

Appellees

DECISION AND JOURNAL ENTRY

Dated: December 15, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} After 35 years, Margaret Welch retired from her position as a guidance counselor at Norton High School. She then applied for the vacant position. Following a round of interviews, a selection committee narrowed the candidates to Jessica Williams and Ms. Welch. After a second round of interviews, Superintendent David Dunn recommended Ms. Williams to the Norton City School District Board of Education. The Board hired Ms. Williams to the position. Ms. Welch sued the Board and Mr. Dunn, alleging age discrimination. The trial court granted summary judgment to the Board and Mr. Dunn, concluding that there was no evidence that the Board's reason for hiring Ms. Williams was a pretext for discrimination. We reverse because a genuine issue of material fact exists regarding whether the Board articulated a legitimate, non-discriminatory reason for hiring Ms. Williams and whether the reason Mr. Dunn gave for recommending Ms. Williams to the Board was the true reason.

BACKGROUND

{¶2} In the spring of 2008, Ms. Welch told the high school's principal, Rolland Gerstenmaier, that she wanted to retire and seek re-employment with the school. According to her, Mr. Gerstenmaier said that he hoped she would apply because he would like to have her back.

{¶3} After consulting Mr. Gerstenmaier about the hiring process, Mr. Dunn decided that there would be two rounds of interviews before different committees. The committee conducting the first round would consist of mostly high school staff members. The committee conducting the second round would include more central office employees. The first committee narrowed the field from four candidates to Ms. Welch and Ms. Williams. The committee members for the second round were Mr. Dunn, Mr. Gerstenmaier, assistant school principal Ryan Shanor, director of curriculum Sharon Herchik, director of special education Valerie Riedthaler, gifted and special coordinator Janine Janke, and director of technology Angie Wagler.

{¶4} Both candidates did well at their second interview. According to Mr. Dunn, after the interviews were over, the committee discussed the candidates. He went around the table, asking what everyone thought. He said that the committee members thought that "[w]e know what we're getting with [Ms. Welch], but I go with [Ms. Williams]." According to him, although the decision was unanimous, he asked if anyone had any concerns, and, after no one raised any concerns, he said "[o]kay, what I'm hearing is we're going with [Ms. Williams]."

{¶5} At her deposition, Ms. Herchik testified that, after the interviews, she remembered Mr. Shanor commenting that, "[y]ou know what you get with [Ms. Welch]." She testified that there was little discussion about who to hire and then Mr. Dunn went around the room asking

everyone who they wanted for the position. According to Ms. Herchik, everyone said that they wanted Ms. Williams.

{¶6} Mr. Shanor testified at his deposition that, after the interviews, the committee discussed the candidates. He commented that both of them did well, but Ms. Welch was “the known commodity.” He did not recall everyone going around the room and picking one of the candidates. According to him, after they were done talking, Mr. Dunn told them that he was going to check Ms. Williams’s references and that, if they checked out, he would recommend her to the Board. Mr. Shanor testified that it was Mr. Dunn’s decision to recommend Ms. Williams.

{¶7} According to Ms. Wagler, after the interviews, there was some discussion about the candidates and someone said that, “at least with [Ms. Welch], you know what you are getting.” She testified that there was no vote taken, but that Mr. Dunn summarized from the discussion that they were leaning toward Ms. Williams. Ms. Wagler said that Mr. Dunn asked them if they had any objections to Ms. Williams and no one objected.

{¶8} Ms. Riedthaler testified that, during the discussion period, some of the committee members noted that Ms. Williams gave the answers they were seeking. According to her, everyone in the room favored Ms. Williams, but there was no formal vote.

{¶9} Ms. Janke testified that, after some general discussion about the candidates, they went around the room and said what they thought. She testified that Mr. Gerstenmaier had concerns about Ms. Williams’s experience and indicated that he preferred Ms. Welch for the position. She testified that, when it was her turn to speak, she told the committee that it was a difficult decision and that she could not choose one over the other. According to her, Mr. Dunn was not in the room when the committee decided on Ms. Williams. After he was informed of

their decision, he told them that he would check out Ms. Williams's credentials and that, if they checked out, he would recommend her to the Board.

{¶10} According to Mr. Gerstenmaier, during the discussion period, Ms. Herchik noted that, "[w]ith [Ms. Welch], you know what you're going to get." He interpreted that as a statement in favor of Ms. Welch. He testified that the committee's consensus was that Ms. Welch was the stronger candidate. She was a known commodity, while Ms. Williams was new and had never done the job before. He testified that Mr. Dunn stepped out of the room for a period of time, but, when he reentered, the committee told him their decision. Mr. Dunn told them, however, that "he was going to need to take another direction with this." Mr. Dunn announced that Ms. Williams would be his choice for counselor and that was the end of the meeting.

AGE DISCRIMINATION

{¶11} Ms. Welch's assignment of error is that the trial court incorrectly granted the Board and Mr. Dunn's joint motion for summary judgment. In reviewing a ruling on a motion for summary judgment, we apply the same standard that the trial court is required to apply in the first instance: whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Parenti v. Goodyear Tire & Rubber Co.*, 66 Ohio App. 3d 826, 829 (1990).

{¶12} Under Section 4112.02(A) of the Ohio Revised Code, it is illegal "[f]or any employer, because of the . . . age . . . of any person, . . . to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment" Under Section 4112.14(A), "[n]o employer shall discriminate in any job opening against any applicant . . . aged forty or older who is physically able to perform the duties

and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee.”

{¶13} “In the absence of direct evidence of discrimination, a plaintiff alleging age discrimination must establish a prima facie case using indirect evidence, by demonstrating (1) that [s]he is a member of a protected class; (2) that [s]he was qualified for the position in question; (3) that [s]he suffered an adverse employment action despite [her] qualifications; and (4) that [s]he ‘was replaced by . . . a person of substantially younger age.’” *Craddock v. Flood Co.*, 9th Dist. No. 23882, 2008-Ohio-112, at ¶12 (quoting *Coryell v. Bank One Trust Co. N.A.*, 101 Ohio St. 3d 175, 2004-Ohio-723, at paragraph one of the syllabus). “If the plaintiff successfully establishes a prima facie case of age discrimination, the employer must articulate a legitimate, nondiscriminatory justification for the employment action. The plaintiff may then prove by a preponderance of the evidence that the justification articulated by the employer is a pretext for discrimination. At all times, however, ‘the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff’ remains with the plaintiff.” *Id.* at ¶13 (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citations omitted)).

{¶14} The parties do not dispute that Ms. Welch established a prima facie case of discrimination. She was a member of the protected class, was qualified for the position, was not hired to the position, and someone substantially younger was hired to it instead.

{¶15} Regarding whether the Board articulated a legitimate, nondiscriminatory justification for its hiring decision, there does not appear to be any evidence in the record to indicate why it chose Ms. Williams over Ms. Welch. According to the Board’s motion for summary judgment, Mr. Dunn “made a recommendation to the Board at its regular meeting on

June 30, 2008, that [Ms.] Williams be employed in the position of Guidance Counselor In turn, the Board of Education approved [his] recommendation, and [Ms.] Williams was employed effective August 25, 2008.” The motion cited “Plaintiff’s Ex. 14” in support of its contentions. There is, however, no exhibit 14 to the motion for summary judgment. While there are a number of “attachments,” the last is “attachment 11.” There are no affidavits or depositions from any of the board members indicating the reason the Board chose Ms. Williams over Ms. Welch. There is also no transcript of the June 30, 2008, board meeting at which the Board, allegedly, adopted Mr. Dunn’s recommendation. In addition, we note that, even if Mr. Dunn were competent to testify about the Board’s reason for its decision, he was not asked at his deposition about what happened at the board meeting. We, therefore, conclude that the trial court incorrectly determined that the Board set forth a legitimate reason for hiring Ms. Williams over Ms. Welch.

{¶16} Regarding whether Mr. Dunn articulated a legitimate, nondiscriminatory reason for recommending Ms. Williams instead of Ms. Welch, we note that Mr. Dunn testified at his deposition that it was the consensus of the hiring committee that he should recommend Ms. Williams to the Board. Because he met his burden, Ms. Welch had to present evidence regarding whether his alleged justification was merely a pretext for discrimination. See *Craddock v. Flood Co.*, 9th Dist. No. 23882, 2008-Ohio-112, at ¶13.

{¶17} “Pretext may be proved either by direct evidence that [an unlawful] animus motivated the [action] or by discrediting the employer’s rebuttal evidence.” *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm’n*, 66 Ohio St. 2d 192, 198 (1981). “[R]ejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Frantz v. Beechmont Pet Hosp.*, 117 Ohio App. 3d 351, 360 (1996). “[N]o

additional proof of discrimination is required.” *St. Mary’s Honor Ctr.*, 509 U.S. at 511 (quoting *Hicks v. St. Mary’s Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)).

{¶18} Ms. Welch submitted the depositions of Ms. Janke and Mr. Shanor, who testified that the committee was not unanimous in favor of Ms. Williams. Mr. Shanor also testified, contrary to Mr. Dunn’s assertion, that Mr. Dunn did not take a survey or vote of the committee members’ opinions at their meeting. Mr. Gerstenmaier testified that, not only was Ms. Williams not the committee’s unanimous choice, it actually thought “that [Ms. Welch] was the strongest candidate.” According to Mr. Gerstenmaier, Mr. Dunn did not adopt the committee’s selection, but decided “to take another direction,” which was to recommend Ms. Williams instead.

{¶19} Viewing the evidence in a light most favorable to Ms. Welch, there is a genuine issue of material fact regarding whether the reason Mr. Dunn gave for recommending Ms. Williams was the true reason. If a trier of fact concluded that Mr. Dunn recommended Ms. Williams even though the committee thought Ms. Welch was the stronger candidate, it could infer that discrimination was the real reason for the recommendation. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

{¶20} A genuine issue of material fact exists regarding whether the Board had a legitimate, nondiscriminatory reason for hiring Ms. Williams over Ms. Welch and whether the reason Mr. Dunn gave for recommending Ms. Williams was the true reason. We, therefore, conclude that the trial court incorrectly granted the Board and Mr. Dunn’s motion for summary judgment. Ms. Welch’s assignment of error is sustained.

CONCLUSION

{¶21} Genuine issues of material fact exist regarding the reason the Board hired Ms. Williams and whether the reason Mr. Dunn gave for recommending that the Board hire Ms.

Williams was the real reason. The judgment of the Summit County Common Pleas Court is reversed, and this matter is remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellees.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

SANDRA J. ROSENTHAL, attorney at law, for appellant.

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