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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF ALABAMA
SOUTHERN DIVISION

LAWRENCE PAYNE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:10-cv-2988-TMP
	)	
	)	
ONEONTA CITY BOARD	)	
OF EDUCATION,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

This cause is before the court on the motion for summary judgment filed December 7, 2011, by the defendant, Oneonta Board of Education ("the Board"). Defendant seeks dismissal of all of plaintiff's claims. This matter has been fully briefed, and the court has considered the evidence and arguments set forth by both parties. The parties have not consented to the exercise of jurisdiction by the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c); accordingly, the court submits this report and recommendation.

SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(a), summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying

those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting former Fed. R. Civ. P. 56(c)). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. Celotex, 477 U.S. at 322-23. There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 323.

Once the moving party has met his burden, Rule 56 "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324 (quoting former Fed. R. Civ. P. 56(e)). The nonmoving party need not present evidence in a form necessary for admission at trial; however, he may not merely rest on his pleadings. Celotex, 477 U.S. at 324. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a 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 322.

After the plaintiff has properly responded to a proper motion for summary judgment, the court must grant the motion if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52; see also Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 745 n.11 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249 (citations omitted); accord Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. Anderson, 477 U.S. at 254; Cottle v. Storer Communication, Inc., 849 F.2d 570, 575 (11th Cir. 1988). Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The non-movant need not be given the benefit of every inference but only of every reasonable inference. Brown v. City of Clewiston, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988).

FACTS

Viewing the pleadings in the light most favorable to the non-moving party, in this case the plaintiff, the following facts are relevant to the instant motion.

The plaintiff, Lawrence Payne, is an African American male who is more than 40 years old. Payne worked for the Alabama Department of Transportation ("ALDOT") for more than 20 years as a maintenance worker. He worked as a "flagman" directing traffic around construction areas, and he also cleaned toilets, mopped floors, and performed other janitorial duties at ALDOT facilities. He retired from ALDOT in 2003.

In 2004 or 2005, Payne spoke with Jack Housch, superintendent of the Board. Payne told Housch that he wanted to work for the Board. He told Housch that he was receiving retirement pay from the state retirement system, but that he had chosen an option that did not provide benefits for his wife if he died before she did. He wanted to change the option, but had been informed by state retirement officials that he could not do so unless he was working for a state agency, and had worked for that agency for six months.[1] Housch advised Payne that there were no openings at that time, but that he could file an application. He further said he would "see to [Payne] getting a job" once there was an opening. Payne visited Housch again within six months, and was again advised that there were no openings at that time. Housch again said he would see about getting Payne a job when there was an opening. About two weeks later, Payne went to see Ed Parrish, the principal at Oneonta

[1] From this conversation, Housch concluded that plaintiff wanted to work only for six months, and then would resign. Plaintiff disputes that this was his intent, but he does not dispute that Housch truly believed it.

Elementary School, to inquire about being hired. Parrish told Payne that he would "see that [Payne] get[s] a job."[2]

Payne submitted an application for employment with the Board on or about June 27, 2006. He identified his previous work experience as "maintenance" with the ALDOT from 1980 through 2003. He checked, as jobs for which he was applying, "custodial/janitorial," "lunchroom worker," and "maintenance." On October 19, 2006, the Board posted an announcement that a vacancy existed for a "custodian/janitorial worker." Payne was interviewed by Parrish and an assistant principal, Leslie Self. Parrish and Self also interviewed Patricia Leathers, a 54-year-old white female, for the position. Leathers' resume did not reflect any janitorial work. Parrish asked her about her duties at various jobs, however, and found that she had performed janitorial work for four years while employed by Central Supply and had been a caregiver to two small children for six years, which also involved cleaning. Parrish described the job of custodian as "[b]asically cleaning the buildings and also [] dealing with kids." He said he wanted to hire the person with the most janitorial experience, but he also said he was concerned that Payne only wanted to work for six months. Parrish

[2] Both Housch and Parrish deny that they promised Payne a job, and say they merely invited him to apply. It is undisputed that neither man had the unilateral power to hire any employee, and that such decisions were made by the Board. For purposes of summary judgment, however, the court accepts as true Payne's assertions that both men assured him they would "see to" hiring him. Plaintiff has not alleged, however, any claim of breach of contract that might arise from such a "promise" or "misrepresentation." The court treats the statements as irrelevant to whether the hiring decisions were discriminatory; although, if anything, such statements would tend to show that neither Parrish nor Housch harbored any discriminatory intent toward Payne.

recommended, and the Board ultimately hired, Leathers for the custodian position. Payne was notified by letter dated October 30, 2006, that the position had been filled.[3]

Payne submitted a second application with the Board in January 2007. That application, in addition to the information provided on the first application, listed an earlier position he had held at Blue Bell, a clothing manufacturer, where he had performed "peace [sic] work."

On February 28, 2007, the Board advertised openings for four lunchroom worker positions. The advertisement stated that experience in food service was "desirable." Jackie Nix, the school's nutrition supervisor, interviewed Payne for these positions. Payne did not have any experience in food service. Payne told Nix that he needed to work for a few months in order to get his retirement benefits in proper order. Nix recommended, and the Board ultimately hired, younger females for all four positions. Two are Caucasian, one is Asian, and one is African-American.[4] All four had worked as substitutes in the school lunchroom, and two also had worked in other food service positions.

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[3] The plaintiff concedes that any discrimination claim he may have arising from the job vacancy that was filled in 2006 is time-barred because he did not timely file a claim relating to that hiring decision. Plaintiff asserts, however, that the decision-making involved in that hiring is relevant to his claims of discrimination in the Board's failure to hire him in 2007. The court recites these facts only to set forth the sequence of events, and not because there exists any viable claim arising from the 2006 hiring decision.

[4] The African-American lunchroom worker, Tommie Cook, was not "renewed" after her first year at the school, and the plaintiff argues that the non-renewal of Cook also is evidence of race discrimination by the Board against African Americans. Plaintiff further argues that Nix's prejudice is shown by the fact that she first recommended Lisa Carder, who is Caucasion, for the job filled by Cook. Plaintiff asserts that Nix was therefore discriminating against the African American applicants. The Board rejected Carder, however, and Cook ultimately was hired for the position. These facts, while creating some question about Nix's motives, perhaps, create more doubt as to whether Nix could be considered a decisionmaker, since it is clear that the Board rejected her recommendation for Carder, and the Board chose an African American candidate.

In May 2007, the Board posted a job opening for a custodian/janitorial position. Payne was again given an interview. Payne interviewed with Parrish and five women. He was asked about his experience, and told the interviewers that he had cleaned bathrooms for ALDOT and another former employer. Another applicant, Becky Lochamy, submitted a resume that indicated she had worked for 10 years in custodial work. She listed two persons for whom she had worked cleaning their homes. Parrish recommended Lochamy for the job. She was then 49 years old, and is a white female. The Board hired Lochamy.

All of the Board's positions for which Payne applied were filled by younger females. Only one of the positions Payne applied for was filled by an African American. Payne asserts that he was not hired because the defendant discriminated against him in violation of the ADEA based upon his age and in violation of Title VII on the basis of his gender and race.[5]

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[5] Plaintiff also asserts, as evidence of discrimination, that a bus driver employed by the Board told plaintiff that he wouldn't be hired because the Board "didn't want a black man." Defendant moved to strike the assertion (doc. 27) on grounds that it is hearsay and inadmissable pursuant to Federal Rule of Evidence 801(c) . Plaintiff opposed the motion, filing an affidavit identifying the bus driver by name, and arguing that the statement was an admission by a party/opponent, and therefore an exception to the hearsay rule as set forth in Federal Rule of Evidence 801(d)(2)(D). The Board filed a motion to strike the affidavit (doc. 30). Plaintiff filed a response, asserting that the bus driver made the statement as the Board's agent or employee on a matter within the scope of the employment relationship. Where a statement is made by an employee, absent some demonstration that the employee was speaking as an agent or acting in a managerial or supervisory position, the Board cannot be bound by his statement. Zaben v. Air Products & Chemicals, Inc., 129 F.3d 1453, 1455-56 (11th Cir. 1997). Accordingly, the motions to strike are GRANTED. Thus, this statement is not considered as part of the evidence in relevant to the motion.

DISCUSSION

Defendant seeks summary adjudication of all of plaintiff's claims. Defendant asserts that, even if plaintiff has proven a *prima facie* claim of age, race, or gender discrimination, he has failed to show that the stated, non-discriminatory reason for failing to hire plaintiff was pretext and that the real reason was violative of Title VII or the ADEA.

A. *Prima Facie* Showing of Discrimination Based On Race and Gender

The Eleventh Circuit Court of Appeals has noted that, "[i]n a traditional failure-to-hire case, the plaintiff establishes a *prima facie* case by showing that: (1) he was a member of a protected class; (2) he applied and was qualified for a position for which the defendant was accepting applications; (3) despite his qualifications, he was not hired; and (4) after his rejection the position remained open or was filled by a person outside his protected class. Schoenfeld v. Babbitt, 168 F.3d 1257, 1267 (11th Cir. 1999), citing Welborn v. Reynolds Metals Co., 810 F.2d 1026, 1028 (11th Cir.1987) (per curiam). The court agrees with plaintiff that Payne has met the burden of establishing a *prima facie* case. He has demonstrated that he is a member of the protected classes, that he was qualified for and sought the positions open for janitor and lunchroom worker, that he was not hired, and that the positions were given to females of a different race.[6]

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[6] Defendant argues that plaintiff did not bring his claims relating to the lunchroom position to the EEOC and that he was not "qualified" for the lunchroom job because he lacked experience in food service. The court finds both of these arguments to be unpersuasive. Payne did include information about the lunchroom positions when he filed his EEOC charge. Further, the job description indicated that food service experience was desirable, but failed to require such experience. His lack of experience in food service may evidence which applicant was "more qualified," but does not render him unqualified for purposes of the *prima facie* showing.

B. *Prima Facie* Showing of Discrimination Based on Age

The Age Discrimination in Employment Act prohibits employers from discriminating against employees over the age of forty on the basis of their age. 29 U.S.C. §§ 623(a)(1), 631(a). Age discrimination claims brought pursuant to the ADEA are analyzed under the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973), which is used in evaluating claims brought pursuant to Title VII. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); Jameson v. Arrow Co., 75 F.3d 1528, 1533 n. 3 (11th Cir.1996). As with the race and gender claims, the court finds that Payne has made a *prima facie* showing that he was discriminated against on the basis of age: he has shown that he applied, was qualified, was rejected, and that the positions went to younger applicants.

C. Pretext

Even though plaintiff has succeeded in making a *prima facie* showing of various types of prohibited discrimination, the presumption of discrimination that is raised by the *prima facie* showing may be rebutted if the employer offers a legitimate, nondiscriminatory reason for the employment action. To satisfy this burden, "the employer need only produce admissible evidence which would allow the trier of fact to rationally conclude that the employment decision had *not* been motivated by discriminatory animus." Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997), quoting Texas Dept. Of Comm. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 1096, 67 L. Ed. 2d 207 (1981) (emphasis added). Once the nondiscriminatory reason is articulated, the burden shifts to the plaintiff to show that the reason is either not worthy of belief, or that, in light of all the

evidence, a discriminatory reason more likely motivated the decision than the proffered reason. Standard v. A.B.E.L. Servs. Inc., 161 F.3d 1318, 1331-33 (11th Cir. 1998) reh'g and reh'g *en banc* denied, 172 F.2d 884 (11th Cir. 1999), citing Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997), cert. denied, 118 S. Ct. 685, 139 L. Ed. 2d 632 (1998). He must show not only that the articulated reason is false, but also that the true reason for not hiring him was discriminatory. See Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1228 (11th Cir. 1993). It is not the duty of this court to evaluate whether the decision not to hire plaintiff was fair or wise; employers are free to make unfair or unwise employment decisions so long as they do not violate anti-discrimination statutes. See Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991).

In this case, plaintiff offers no evidence that any decisionmaker held any discriminatory animus toward older workers, males, or African Americans. Such evidence, often seen in discrimination cases, lends support to a contention that the proffered reason is not worthy of belief. In this case, both plaintiff and defendants treat Parrish, in the context of the custodial job, and Nix, in the context of the lunchroom jobs, as the decisionmakers,[7] and there is no evidence that either of these people exhibited or acted upon any discriminatory animus. This case does not rely on offhand

[7] Although it is undisputed that the decisions were ultimately made by the Board, it does appear that the recommendations of Nix and Parrish were generally followed. In any event, not only is there no evidence that Parrish harbored any ill will toward any protected group, there also is no evidence that any Board member had any discriminatory animus. To the extent that the plaintiff argues that Nix demonstrated animus in that she did not originally recommend Cook, who is African American, for the lunchroom position, that argument is unpersuasive in showing that the Board acted in a discriminatory manner because the Board did *not* follow Nix's recommendation in that instance and did hire Cook. Moreover, Nix's problems with Cook that led to her non-renewal are not race specific; the mere fact that an African American employee was not renewed after complaints about cell phone use and other employment issues does not – without significantly more – create any inference of discrimination.

remarks, jokes, or innuendo to support claims of discrimination. Instead, Payne's case clearly hangs on his contention that the defendant has stated that the legitimate, non-discriminatory reason for its hiring decisions for the custodial job and the lunchroom positions was that the hired applicants were better qualified than Payne. Because Payne relies solely on his arguments relating to his qualifications for the jobs, his claims survive the motion for summary judgment only if he has demonstrated that the stated reason is a pretext, and that the real reason for the hiring decision was an illegal motive. To do so, he must show that the articulated conclusion that the hired applicants were better qualified than plaintiff is simply not true or not worthy of belief.

It is well settled that the burden of demonstrating that the defendant's proffered reason is a pretext cannot be met "simply by showing that [plaintiff] is more qualified" than the applicant that was hired. Johnson v. City of Mobile, 321 Fed. Appx. 826, 832 (11th Cir. 2009). "A plaintiff cannot establish pretext merely by showing he or she was better qualified than the hired candidate; the plaintiff must show the hiring decision was made because of an illegal motive." Hillemann v. University of Central Florida, 167 Fed. Appx. 747, 749 (11th Cir. 2006). Instead, a plaintiff must show that the disparity in qualifications "is so great that a reasonable factfinder could infer that [the defendant] did not believe [the hired applicant] to be better qualified. Johnson, 321 Fed. Appx. at 832, quoting Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 (11th Cir. 2001). The level of disparity that plaintiff must show has been described as "of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." Johnson v. AutoZone, Inc., 768 F. Supp. 2d 1124, 1149 (N.D. Ala.

2011), quoting Tippie v. Spacelabs Medical, Inc., 180 Fed. Appx. 51, 56 (11th Cir. 2006).[8] An employer's reason cannot be successfully challenged "as long as the reason is one that might motivate a reasonable employer." Johnson, 768 at 1150, quoting Pennington v. City of Huntsville, 261 F.3d 1262, 1267 (11th Cir. 2001). See also Roper v. Foley, 177 Fed. Appx. 40, 48 (11th Cir. 2006).

The court finds that plaintiff has offered no evidence that the reason given for hiring the younger females was pretextual, or that the real reason was based on age or race or gender. The evidence offered by the defendant demonstrates that the Board found that the women hired for the lunchroom jobs, all of whom had at least some experience in food service, were better qualified than Payne, who had spent 23 years working in maintenance for the ALDOT. Although food-service experience was described only as "desirable," the hired applicants were measurably more qualified than Payne, who had no food-service experience. Certainly, a reasonable employer could have found that an applicant who had some experience in food service more qualified for a food service job than someone with no experience.

While the custodial job may present a slightly closer question, the Board has demonstrated that it found Lochamy's 10 years of working in janitorial positions rendered her better qualified than Payne's 23 years of working in maintenance for the ALDOT. The court declines to find that Payne's experience with the ALDOT flagging traffic and cleaning restrooms was "of such weight and

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[8] While it is clear that the Supreme Court has rejected Eleventh Circuit precedent from Cofield that described the test for qualifications as having to be so great as to "slap you in the face," the level of disparity required for a showing of pretext remains extremely high. Ash v. Tyson Foods, Inc., 546 U.S. 454, 126 S Ct. 1195, 163 L. 2d 1053 (2006); see also Higgins v. Tyson Foods, Inc., 196 Fed. Appx. 781 (2006).

signficance" that no reasonable employer could have chosen Lochamy, who had performed janitorial work for 10 years, for the position. Certainly some jobs require many years of experience before an applicant can be deemed qualified; however, mopping, sweeping, and cleaning cannot reasonably be viewed as duties that require multiple years of practice. It is reasonable to conclude that a person who has cleaned for 10 years is just as well-qualified for a janitorial position as someone who has cleaned for 20 years. The difference in years of experience simply does not suggest a disparity of such weight and significance that a reasonable employer would necessarily chose plaintiff.

Further, an additional factor not related to age, gender, or race, impacted Payne's qualifications in a negative way. From the perspective of a reasonable employer, the court cannot say that a decisionmaker's understanding (even if mistaken) that the plaintiff wanted to work for only six months would not have entered into the employer's evaluation of a candidate's qualifications.[9] The hiring process itself entails a significant amount of time, effort, and expense, that reasonable employers seek to minimize by hiring applicants they believe can work well for them for a long time. Employers simply do not want to go through a hiring process every six months. For this reason, a

[9] The parties argue at great length about whether plaintiff said he would not work more than six months, and that he, in fact, wanted to work for several years. However, the undisputed testimony is clear that he told Housch and Nix that he wanted to work for six months so that he could change the option on his retirement benefit plan, and that he told Housch that he would agree to resign in six months. They believed that the statement indicated (and who wouldn't?) that Payne wanted to work only for six months. The plaintiff does not actually challenge the veracity of the beliefs; rather, plaintiff argues that their impression of Payne's intentions were not accurate. Even if House and Nix were wrong about the length of time that Payne wanted to work, it was not unreasonable for them to factor that into a decision about who was most qualified for the position.

reasonable, non-discriminatory employer may well find less attractive an applicant the employer has reason to believe will not remain long in the position.

In short, plaintiff has failed to produce any evidence that shows that the stated reasons for hiring the younger females for the four lunchroom positions and the 2007 janitorial position were not the real reasons, or that the real reasons for the hiring decisions were related in any way to age, race or gender. Accordingly, the motion for summary judgment as to plaintiff's claims is due to be granted.

RECOMMENDATION

Based upon the foregoing undisputed facts and legal conclusions, the magistrate judge RECOMMENDS that the motion for summary judgment filed by the defendant (doc. 12) be GRANTED, and that plaintiff's claims against this defendant be DISMISSED WITH PREJUDICE.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

DATED the 14th day of December, 2012.

T. MICHAEL PUTNAM
U.S. MAGISTRATE JUDGE