

DECEMBER 2019 LAW REVIEW

GENDER & AGE DISCRIMINATION CLAIM IN PARK PROMOTION

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In the case of *Boger v. New York State Office of Parks, Recreation and Historic Preservation*, 2019 U.S. Dist. LEXIS 110321 (ND. N.Y. 7/2/2019), Plaintiff Boger was denied a promotion to the Park Manager 1 position at Verona Beach State Park by her employer New York State Parks. In so doing, Boger claimed "Defendant NYS Parks and its supervisory employees had discriminated against her on the basis of age and gender " because "the position was offered to three younger and less-qualified males." Accordingly, Boger alleged NYS Parks had violated Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA").

FACTS OF THE CASE

In 2015, Boger was a forty-nine year old female employee of Defendant NYS Parks. Boger was first employed at NYS Parks from January 1998 to January 2005 as Park Worker 1/Office Manager at Delta Lake State Park. From October 2005 to April 2006, Boger worked as Park Worker 1/Office Manager at Glimmerglass State Park. In April 2008, NYS Parks rehired Boger as Park Worker 3/Office Manager at Harriman State Park. In December 2012, Boger received a promotion and worked as Park Supervisor 1 at Walkway Over the Hudson State Historic Park. In October 2012, Boger transferred to James Baird State Park as Park Supervisor 1. In April and May of 2015, NYS Parks notified Boger about the opening for the civil service position of Park Manager 1 at Verona Beach State Park.

When a New York state agency had an opening for a civil service position, civil service rules provided an agency could seek candidates from (1) the "open-competitive list," which includes any individual who took the applicable examination, and (2) the "transition list," which includes any current employee of the agency. In addition, a "Rule of Three" established the candidate pool for the hiring of each civil service position. Under the Rule of Three, state agencies could only consider the individuals with the three highest test scores on the civil service examination.

Boger had taken the civil service examination for the Park Manager 1 position prior to 2008 and received a score of eighty-five, making her eligible on both the open-competitive list and the transition list pursuant to the Rule of Three.

The interview panel for the Park Manager 1 position at Verona Beach Park was comprised of three NYS Parks employees, two females (Mitchell, age 54) and Tully (age 48) and one male (Morisette, age 38). Mitchell was the Assistant Regional Director; Tully and Morisette each held Park Manager positions.

The interview panel (Mitchell, Tully, and Morisette) conducted interviews of candidates on the transition list on May 27 and 28, 2015. Boger did not interview on May 27 or May 28, 2015 due to a clerical error which had omitted her name from the transition list. Following the interviews, the panel's first choice for the Park Manager 1 position was a fifty year old female who could not

DECEMBER 2019 LAW REVIEW

be appointed because her score on the civil service examination was not high enough. Boger later challenged the assertion by NYS Parks that the panel's first choice for the position was an older female because there was "no contemporaneous of such preference."

On June 30, 2015, Boger contacted Mitchell to inquire as to why she had not been interviewed for the Park Manager 1 position. Mitchell then recognized that Boger had been omitted from the transition list and scheduled an interview for July 10, 2015.

Following the July 10, 2015 interview, Tully, Mitchell, and Morisette discussed Boger's candidacy for the Park Manager I position. During this discussion, Tully told Mitchell and Morisette about an incident while she was acting as Boger's supervisor at Delta Lake State Park where Boger used profanity and argued with a park patron.

After Boger's interview and the discussion with Tully and Morisette, Mitchell spoke with NYS Parks Regional Director Robert Hiltbrand, who was responsible for approving the candidate recommended by the interview panel. Mitchell told Hiltbrand that Boger's interview went well, but Morisette and Tully had concerns about hiring Boger.

Hiltbrand then called NYS Parks Employee David Barone on the phone who recommended against hiring Boger. There was no written record of this conversation and Barone later testified that "the central purpose of his conversation with Hiltbrand concerned NYS Parks machinery" and their discussion of Boger was "probably less than a minute" in length.

On July 20, 2015, NYS Parks provided an updated list of candidates who could be interviewed for the Park Manager 1 position. Mitchell, Tully, and Morisette conducted interviews of the additional candidates from this updated list on July 30, July 31, and August 5, 2015. The same set of interview questions was used for all applicants for the Park Manager 1 position.

The Park Manager 1 position was first offered to Robert Galuski, who refused to accept the offer. From 2009 until the date of the interview, Robert Galuski, age thirty-two, was a plumber at the Capital Facilities Construction Crew of NYS Parks ("CFCC"). Prior to working at the CFCC, Galuski was employed by Galuski Plumbing and Heating as a plumbing and HVAC contractor.

The position was then offered to Brett Dunn, who also refused to accept the offer. From 1997-2005, Dunn worked at Lorenzo State Historic Site as maintenance staff. From 2005 until his interview for the Park Manager 1 position, Dunn had worked as an electrician and locksmith at the CFCC. From the record, it appeared that neither Galuski nor Dunn had any park supervision experience.

The third offer for the Park Manager 1 position was made to Hawley Carr, who accepted. Hawley Carr, age thirty-nine, had eight years of supervisory park supervision as Park Worker 3 at Long Point State Park. NYS Parks notified Boger in writing that she was not chosen for the Park Manager 1 position. Boger had minimal or no interaction with the panel prior to her interview and had not witnessed any of them making "discriminatory remarks nor engage in discriminatory behavior against women or people over the age of forty."

SUMMARY JUDGMENT STANDARD

In response to Boger's claims of discrimination, NYS Parks brought a motion for summary judgment which asserted there was "no evidence to support the conclusion that Plaintiff's age or gender played any role in Defendants' hiring decision and that Plaintiff's claims should be dismissed in their entirety."

As noted by the federal district court: "Courts are cautious in granting summary judgment in employment discrimination cases where the employer's intent is at issue, because direct evidence of an employer's discriminatory intent is rare and must often be inferred from circumstantial evidence." That being said, the federal court would still require a plaintiff to provide "more than conclusory allegations to resist a motion for summary judgment." Accordingly, to avoid having summary judgment granted to NYS Parks, the court would require Boger to "offer some hard evidence" showing her version of the events was "not wholly fanciful."

GENDER DISCRIMINATION

As cited by the federal district court, Title VII "makes it unlawful for an employer to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e—2(a)(1). To sufficiently allege an initial (i.e., *prima facie*) case of "discriminatory failure to promote" under Title VII, the court would require Boger to show the following:

- (1) she is a member of a protected class;
- (2) she applied and was qualified for a job for which the employer was seeking applicants;
- (3) she was rejected for the position; and
- (4) the position remained open and the employer continued to seek applicants having plaintiff's qualifications.

In this particular instance, NYS Parks contended that Boger had failed to allege sufficient facts to support her claim for a discriminatory failure to promote. Accordingly, NYS Parks had to "produce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action."

NYS Parks had claimed Boger's "prior inappropriate interactions with park-patrons" established a non-discriminatory reasons for the decision not to promote Boger. Boger's former supervisor, Tully, testified that Morisette had encountered an NYS Parks Officer (Dapson) concerning an incident at Delta Lake State Park where Boger used profanity towards a park-patron and demanded the arrest of such patron. Since "customer service must be at the forefront of the Park Manager 1's daily responsibilities," the federal district court agreed with NYS Parks that this type of incident would constitute a legitimate, non-discriminatory reason for the decision not to hire Boger. The federal district court further noted that "hostility in the workplace was a legitimate, non-discriminatory reason for an adverse employment action."

NYS Parks also claimed a legitimate non-discriminatory reason for not hiring Boger was based on the recommendation by NYS Parks employee David Barone to Regional Director Robert

Hiltbrand. The federal district court agreed that "negative recommendations or references may reasonably result in a candidate not receiving an offer of employment."

DISCRIMINATION PRETEXT

Having found NYS Parks had "articulated two legitimate, non-discriminatory reasons for the decision not to recommend Plaintiff for the Park Manager 1 position," the court then considered whether "a reasonable jury could conclude that the nondiscriminatory reason offered by the defendant is a pretext for discrimination." To establish a pretext for discrimination, the court noted Boger would have to show an employment decision motivated by non-discriminatory reasons also included at least one "prohibited factor." That being said, the court acknowledged: "Conclusory and speculative allegations will not suffice to demonstrate discriminatory intent."

According to the federal district court, to defeat the pretrial motion for summary judgment, evidence of pretext could include "temporal proximity, together with other evidence such as inconsistent employer explanations." In addition, the court found a pretext for discrimination "may also be shown by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate non-discriminatory reasons for its action." Further, the court found "an employer's disregard or misjudgment of a plaintiff's job qualifications may undermine the credibility of an employer's stated justification for an employment decision."

When a plaintiff seeks to prevent summary judgment based on the discrepancy in qualifications ignored by an employer, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."

In the opinion of the federal district court, the evidence in this particular case supported Boger's contention that NYS Parks may have disregarded her credentials:

It is evident that Plaintiff was qualified for the Park Manager 1 position given her roughly fifteen years of relevant employment at five NYS Parks, including supervisory experience and extensive safety training. Further, Defendant Mitchell testified at his deposition that Plaintiff was qualified for the position.

Moreover, the federal district court noted the first two candidates who had declined the position, a plumber and an electrician, lacked any park supervisory experience. In contrast, the third candidate who accepted the position had "held a supervisory position as Park Worker 3 for eight years and prior to that worked as a Park and Recreation Aide 4."

While Boger was better qualified than the first two candidates, the federal district court found the discrepancy in qualifications on its own did not provide conclusive evidence of pretext. That being said, the court noted this discrepancy could still be indicative of pretext:

An employer's explanation of its reasons must be clear and specific in order to

DECEMBER 2019 LAW REVIEW

afford the employee a full and fair opportunity to demonstrate pretext. A subjective evaluation, besides being clear and specific, must also be honest... [E]mployers may use subjective criteria during the hiring process so long as those judgments are not made with discriminatory intent.

In this particular instance, the court found the reasons NYS Parks had offered were "clear and specific" reasons for the decision not to hire Boger. On the other hand, the court noted Boger had raised "credibility issues with respect to the honesty of Defendants' evaluation which may permit a reasonable trier-of-fact to find that Defendants' reasons were pretext for discrimination." According to the court, one of these clear and specific reasons for denying Boger the promotion was "an incident at Delta Lake State Park where Plaintiff used profane language towards a park patron." The court noted, however, that this incident "took place about ten years before Plaintiff's interview."

Moreover, following Boger's complaint to the EEOC, an email to fellow interview panel member Mitchell, Tully referred to this incident as "*just one example* of when I witnessed Kathy using vulgarity in the workplace." While noting that Boger is generally pleasant to work with and performs her job well, Tully concluded that "it's just when customers have complaints that I think she takes things personal and loses control."

However, in Tully's deposition, she referred to the incident as a "singular isolated event" and described that "it was isolated, it was the only one" and she "had absolutely nothing else negative to say" about Boger. Further, when asked by Mitchell if Boger "deserved a shot," Tully had said "yeah." Further, Mitchell had testified that Tully had suggested to Robert Hiltbrand that the alleged incident was "long ago," and Boger's candidacy should still be considered.

Based upon this contradictory pretrial evidence, the federal district court determined: "A reasonable trier of fact [i.e., jury] may find that Defendants' first reason is unworthy of credence considering it was characterized as a 'singular isolated event,' and occurred at least ten years prior to the hiring process."

In addition, Mitchell had further testified that the "deciding factor" with respect to the hiring decision was "the negative recommendation of David Barone made to Robert Hiltbrand." David Barone, however, had stated that "the central purpose of his phone conversation with Hiltbrand concerned an issue with NYS Parks equipment" and the discussion of Boger's candidacy lasted "probably less than a minute." Moreover, Barone and Boger had "worked together at NYS Parks for approximately three weeks." In the opinion of the federal district court, based upon this pretrial evidence, a reasonable jury could find that "reliance on a recommendation that was less than one minute in length, from an individual who only worked with Plaintiff for such a short time a decade in the past may be unworthy of credence."

Given the "superiority" of Boger's qualifications over the first two candidates offered the position, and "credibility issues" with the non-discriminatory reasons offered by NYS Parks for not promoting Boger, the federal district court concluded the pretrial evidence would permit a reasonable jury to find "the non-discriminatory reasons proffered by Defendants were pretext for discrimination." Accordingly, the federal district court denied the motion for summary judgment

by NYS Parks on Boger's Title VII claim.

AGE DISCRIMINATION

As cited by the federal district court, the ADEA was created "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. It is unlawful under the ADEA "for an employer to "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.

In order to proceed with a claim of age discrimination under the ADEA, the plaintiff must demonstrate that (1) she was in the protected age group of forty years or older; (2) she was qualified for the position at issue; (3) she suffered an adverse employment action; and (4) the identified adverse action occurred under circumstances giving rise to an inference of discrimination.

In this particular instance, the federal district court found Boger's ADEA claim had satisfied the first three prongs of these requirements because she was over forty years of age, was qualified for Park Manager 1 position, and suffered an adverse action when she was denied promotion.

According to the court, in satisfying the fourth prong and raise an inference of age discrimination, Boger could show the denied promotion was given to "a significantly younger person." The court found Boger had met this requirement because the position was initially offered to candidates who were seventeen and ten years younger than Boger.

Moreover, to succeed on her age discrimination claim under the ADEA, the court noted that Boger "must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action' and not just a contributing or motivating factor." In other words, "but-for" her age, Boger would have been promoted to the Park Manager 1 position.

Having determined Boger was "significantly better qualified" than the two younger candidates who were initially offered the position, the federal district court, once again, found "credibility issues exist with respect to the non-discriminatory reasons" offered by NYS Parks for not promoting Boger. As a result, the federal district court denied the motion for summary judgment on Boger's ADEA claim.

Having denied the NYS Parks motions for summary judgment, further trial proceedings would be conducted in which Boger would have an opportunity to prove her claims of gender and age discrimination before a jury.

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DECEMBER 2019 LAW REVIEW

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