UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

RUTH ELY GILLIAM,	)	
	)	
Plaintiff,	)	Case No. 2:01CV00083
	)	
v.	)	**OPINION**
	)	
LEE COUNTY SCHOOL BOARD,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Terry C. Kilgore, Wolfe, Williams & Rutherford, Gate City, Virginia, for Plaintiff; Steven R. Minor, Elliott Lawson & Pomrenke, Bristol, Virginia, for Defendant.

In this employment discrimination case, the magistrate judge has recommended that the defendant's motion for summary judgment be granted in part and denied in part. Both parties have filed objections to the recommendations. Based on my de novo review, I will sustain the defendant's objection and enter final judgment in favor of the defendant.

I

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record,[1] are as follows.

The plaintiff, Ruth Ely Gilliam, has been an employee of the Lee County School Board ("School Board") since 1978. In 1984 she became a guidance counselor and worked at various schools in the county. In 1999 she was promoted by the School Board to Director of Special Services, an administrative position in the school system.

The largest school in Lee County is Lee High School. In March of 2000, one of Lee High School's guidance counselors retired. The vacancy created was advertised to be filled, but there were no applicants. At that time the plaintiff had the most experience as a guidance counselor of any employee in the school system except for one other counselor at Thomas Walker High School. At a board meeting on July 31, 2000, board member Bill Willis proposed to transfer the plaintiff from Director of Special Services to the guidance position at Lee High School. Willis had been one of only two members also on the board in 1999 and at that time he had voted

[1] The parties have submitted portions of discovery depositions. In addition, the defendant has submitted declarations of witnesses with exhibits.

to promote her. The motion to transfer the plaintiff passed by a split vote, with Willis, Cecil Sumpter (the board chairman), and Ty Harber voting "yes" and James Graham and John Marion voting "no." The Superintendent of Schools, Dr. Dan Wilder, recommended against the transfer.

Because the plaintiff was not transferred to her new position by April 15, under state law[2] she was entitled to be paid at the higher salary of her former position for the 2000-2001 school year. However, effective July 1, 2001, her salary was reduced commensurate with her new position. At the time the plaintiff was transferred, board members did not realize that her salary would eventually be reduced.

Because of the plaintiff's transfer, the board was faced with selecting a new Director of Special Services. There were six applicants, including the plaintiff and Dorothy McNeil, the niece of Sumpter, the board chairman. At its meeting on August 14, 2000, the board voted to hire Robert E. Widener, Jr., a teacher and former chairman of the Lee High School Special Education Department. Board members Harber, Marion and Graham voted to promote Widener, while Willis voted against promoting him. Sumpter abstained, apparently because of his niece's application for the job. Dr. Wilder, the superintendent, recommended to the board that Widener be selected. Sumpter's niece later was hired to work in a position under Widener.

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[2] *See* Va. Code Ann. § 22.1-294.D (Michie 2000).

At the time he was selected, Widener was forty-three years old and the plaintiff was fifty-three. Since the present board took office in 2000, four women over forty years of age and one man over forty have been promoted from teaching positions to administrative positions. Since that time, the plaintiff has been the only employee transferred from an administrative position to a teaching position.

While school board elections in Virginia are nonpartisan,[3] board members Willis and Sumpter are identified as being Democrats and Marion and Graham as Republicans. Harber is not identified with either political party.

On February 2, 2001, the plaintiff submitted a charge of discrimination to the Virginia Council on Human Rights and the federal Equal Employment Opportunity Commission, contending that her demotion had been on account of her sex, age and political affiliation. That charge was eventually dismissed and this suit followed.[4] Following discovery, the defendant School Board filed the present motion for summary judgment, which motion was referred to the Honorable Pamela Meade Sargent, United States Magistrate Judge, to conduct necessary proceedings and

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[3] *See* Va. Code Ann. §22.1-57.3.E (Michie 2000) (providing that school board candidates are to be nominated by petition only).

[4] The plaintiff's causes of action are based on Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 2002), the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621-633a (West 1999 & Supp. 2002), and 42 U.S.C.A. § 1983 (West 1994 & Supp. 2002).

submit a report and recommendation. On November 8, 2002, the magistrate judge submitted her report, recommending that the motion for summary be granted in part and denied in part. Both parties filed timely objections to the report, which objections have been argued and submitted for decision.

II

Where, as here, objection has been made to a magistrate judge's report and recommendation on a dispositive matter, "the district judge to whom the case is assigned shall make a de novo determination . . . of any portion of the magistrate judge's disposition to which specific written objection has been made ." Fed. R. Civ. P. 72(b).

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 "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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

III

The magistrate judge recommended that summary judgment be entered in favor of the defendant on the plaintiff's claim of political discrimination. The magistrate judge found that there was no evidence from which a jury could find that the plaintiff was perceived by the board to have any particular political affiliation. I agree. In addition, there is no evidence that her replacement, Widener, was so perceived. Whatever the political makeup of the board, there has been no showing that political affiliation was a causal factor in the plaintiff's transfer. *See Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 663-64 (3d Cir. 2002) (holding that the plaintiff must prove that the public employer knew of plaintiff's political persuasion and was motivated by this knowledge in making an adverse employment decision).

It is true that board member Harber agreed in his deposition that "sometimes" the board "split on party lines" over job applicants (Harber Dep. 8) and that board member Graham testified that "political alliances" have "probably" affected personnel decisions (Graham Dep. 32). However, the fact remains that no evidence exists that the plaintiff's transfer was affected by politics and there is evidence to the contrary. Board member Willis, a Democrat, voted for the plaintiff when she was selected in 1999 for the administrative job. Indeed, she was selected by unanimous vote of that board. Moreover, board member Harber, an independent, voted to transfer her in 2001. Neither Willis or Sumpter voted for the plaintiff's replacement, Widener.

For these reasons, I will overrule the plaintiff's objection to the magistrate judge's decision on this issue.

IV

The magistrate judge found that summary judgment on the plaintiff's claim of sex and age discrimination was precluded because there was sufficient evidence that the board's reason for transferring the plaintiff—namely, that she was best qualified for the vacant counselor's position and was needed there more than in her current

administrative position—was pretextual. The School Board objects to this finding and for the reasons hereafter set forth, I will sustain that objection.[5]

There is no direct evidence of discriminatory intent in this case. Accordingly, to establish a circumstantial claim of employment discrimination, the plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the job and her job performance was satisfactory; (3) she was removed from her position by the employer; and (4) she was replaced by a male or someone of younger age. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once a prima facie case is established, the burden shifts to the defendant to produce evidence that shows a "legitimate, nondiscriminatory reason" for its actions. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981). If the defendant meets this burden, the burden then shifts back to the plaintiff to show that the reason proffered by the defendant was false and was a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 514-15 (1993).

The magistrate judge correctly determined that the plaintiff has established a prima facie case and that the School Board has produced evidence of a legitimate and

[5] The magistrate judge also held that the plaintiff had adequately exhausted her administrative remedies, but in view of my decision on the merits, it is unnecessary for me to consider the defendant's objection to this finding.

nondiscriminatory reason for its action. The question is whether there is sufficient evidence of pretext.

In order to determine whether sufficient evidence of pretext has been shown, I should examine the "totality of the circumstances" in the case. *EEOC v. Sears, Roebuck & Co.*, 243 F.3d 846, 852 (4th Cir. 2001). Weak evidence of pretext, coupled with strong evidence that no unlawful discrimination occurred, entitles the employer to judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

The magistrate judge found evidence of pretext because the board did not follow the recommendation of the superintendent when it transferred the plaintiff to the guidance counselor's position. The magistrate judge also found support for pretext because the plaintiff's job performance as Director of Special Services was, by all accounts, highly satisfactory. *See Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 831 (11th Cir. 2000) (holding that strength of prima facie case may support evidence of pretext).

With respect, I disagree with the magistrate judge's determination. The fact that the board did not agree with Dr. Wilder's recommendation is not dispositive. There is no evidence of the frequency with which the school superintendent's personnel recommendations are not followed by the School Board. In addition, I

agree with the defendant that the fact that the plaintiff was doing a good job in her administrative position is not evidence of pretext in this case. The board has never claimed that it transferred the plaintiff because of her unsatisfactory job performance. It was because, in the board's judgment, she was needed more as a school counselor, a job that she had also excelled at. As noted by the defendant, there were plenty of applicants for administrative jobs, but no applicants for the vacant counselor's position. She had the most experience of any available employee in that field, and a majority of the board decided that it was more important that she serve there than in her current administrative position.

Of course, the board may have been wrong. Perhaps it should have continued to look for an applicant for the counselor's job, hoping that someone would turn up before school started later that summer. But the School Board's determination cannot be second-guessed, so long as it was not based on an impermissible factor such as sex or age. *See Jiminez v. Mary Washington College*, 57 F.3d 369, 377 (4th Cir. 1995) ("Title VII is not a vehicle for substituting the judgment of a court for that of the employer.")

Moreover, this weak evidence of pretext is overcome by positive evidence that no unlawful discrimination occurred. The younger male who replaced the plaintiff was not supported by those board members, Willis and Sumpter, who voted to

transfer her and the board members who voted against transferring her, Marion and Graham, voted to replace her with the younger male. Only one board member, Harber, voted both to transfer her and to replace her with Widener. The votes of individual members of the board thus belie any pattern of intentional discrimination.

Two of the board members , Willis and Marion, voted to promote the plaintiff in 1999. Willis voted to transfer the plaintiff and Marion voted to replace her with Widener. Since these two board members supported her only two years before, there is an inference that they had no discriminatory intent for their later action. *See Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991).

There is evidence that board chairman Sumpter, and perhaps board member Willis, did not vote for the younger male, Widener, because they instead wanted to select Sumpter's niece, a female over forty years of age.[6] Other transfers to administrative positions by this board have been of females over forty, other than Widener.

For these reasons, I find that the plaintiff has not met her burden of proof as to her claim of discrimination based on sex or age and that the magistrate judge's recommendation ought not to be accepted.

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[6] Nepotism, of course, is not a violation of Title VII unless it is based on race or religion. *See Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990).

V

In summary, I agree with the magistrate judge that the plaintiff has failed to show that she was the victim of political retribution or patronage and I disagree with the magistrate judge that the plaintiff has produced a genuine issue of material fact as to whether the School Board intentionally discriminated against her on account of her sex or age. Accordingly, I will grant summary judgment in favor of the defendant. A separate judgment consistent with this opinion is being entered herewith.

DATED: December 30, 2002

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United States District Judge