

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2007-00583

EDWARD B. NIZWANTOWSKI,
Plaintiff

v.

PEABODY SCHOOL DISTRICT,
Defendant

**DEFENDANT PEABODY SCHOOL DISTRICT'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, Peabody School District (“Peabody”), hereby submits this memorandum in support of its motion for partial summary judgment dismissing plaintiff’s claims for age discrimination stemming from Peabody’s decision to not hire plaintiff, Edward Nizwantowski (“Nizwantowski”) as the head football coach for the positions posted for the 2005 and 2007 seasons. Specifically, Peabody asserts that plaintiff’s claims are barred because he has failed to comply with the provisions of M.G.L. c. 151B, § 5, which require the plaintiff to exhaust all administrative remedies prior to pursuing a claim in the Superior Court. Consequently, Peabody is entitled to summary judgment as a matter of law because the Court does not have subject matter jurisdiction to hear plaintiff’s claims of age discrimination in connection with the football coaching positions.

UNDISPUTED FACTS

For the purposes of this summary judgment motion only, Peabody accepts the following facts as true.

This case arises out of Peabody's alleged unlawful discrimination of the plaintiff in violation of M.G.L. c. 151B § 4 and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. ("ADEA") (See Statement of Undisputed Facts ("SOF") at ¶ 1). Plaintiff contends that Peabody engaged in unlawful discrimination in violation of M.G.L. c. 151B § 4 and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, et seq. ("ADEA") in its hiring decisions. (SOF at ¶ 2).

Nizwantowski served as the head baseball coach at Peabody Memorial High School ("Peabody High School") from 1987 through the 2004 season. (SOF at ¶ 3). Nizwantowski was required to go through an application process in order to apply for the position of head baseball coach for the 2005 season. (SOF at ¶ 4). As part of the application process, Nizwantowski submitted a letter and resume and was interviewed by a screening committee who selected him as one of two finalists to interview with the Principal, Patrick Larkin. (SOF at ¶ 5). After Nizwantowski interviewed with Mr. Larkin, he was informed that he would not be rehired for the head baseball coach position. (SOF at ¶ 6).

On February 15, 2005, Nizwantowski, who was then 58 years old, filed a charge with the Massachusetts Commission Against Discrimination ("MCAD Charge") alleging that Peabody's decision to not hire him as the head baseball coach for the 2005 season was a violation of M.G.L. c. 151B, § 4 and the ADEA. (SOF at ¶ 7). In the MCAD Charge, Nizwantowski asserted he was the baseball coach for 18 years and that during this time he never had to apply for the coaching position; however, when the school hired a new principal in June of 2004, he was required to apply for the baseball position. (SOF at ¶ 8). Although Nizwantowski claimed he was "well qualified for [the] position . . . a younger man (Mark Bettencourt) age 32 was hired in [his] place" because the newly hired principal wanted to "get rid of [him] because of [his] age." (SOF

at ¶ 9). On July 11, 2006 the MCAD found probable cause supporting plaintiff's claims regarding his allegations against Peabody for age discrimination as a result of its decision to not hire Nizwantowski as the head baseball coach. (SOF at ¶ 10).

After Nizwantowski filed the MCAD Charge, Peabody High School began accepting applications for the head football coach position for the fall 2005 season. (SOF at ¶ 11). Nizwantowski went through a similar hiring process as he had with the open baseball position. Specifically, he submitted a resume and interviewed with the football screening committee, which was made up of approximately five individuals. (SOF at ¶ 12). The football screening committee decided not to recommend Nizwantowski as a finalist and he, therefore, did not interview with Mr. Larkin. Instead, Peabody hired Paul Uva, who was five years younger than Nizwantowski, to serve as the head football coach for the 2005. (SOF at ¶ 13).

Approximately twenty-five months after filing the MCAD Charge, Nizwantowski filed the instant complaint in this Court on March 26, 2007. (SOF at ¶ 14). In his Superior Court complaint, Nizwantowski asserts he was wrongfully denied the position of head baseball coach for the 2005 season when Mark Bettencourt, a younger allegedly less qualified candidate was selected to fill the position. (SOF at ¶ 15). Nizwantowski also asserts that Peabody discriminated against him on the basis of age when it "failed to re-hire plaintiff for the position of head football coach, hiring Paul Uva, who is younger than plaintiff by more than five years." (SOF at ¶ 16). He contends that Peabody "failed to re-hire plaintiff for both positions based on plaintiff's age in violation of law." (SOF at ¶ 17).

After the instant complaint was filed, Mr. Uva resigned from his position as head football coach and as a result, there was a coaching vacancy for the 2007 season. (SOF at ¶ 18). Nizwantowski again applied for the head football coach position and interviewed with the

football screening committee during the late winter or early spring of 2007. (SOF at ¶ 19). Nizwantowski was notified around April 6, 2007 that he was not selected as the finalist for the football coach position. (SOF at ¶ 20).

Nizwantowski was deposed on two separate days regarding the basis for his allegations that Peabody discriminated against him in its hiring decisions for the football coach positions for the 2005 and 2007 seasons, among other things. Specifically, Nizwantowski was asked:

Q: “Mr. Nizwantowski, do you contend that the City of Peabody intentionally discriminated against you because of your age?”

A: Yes, I do.

(SOF at ¶ 21).

Since Nizwantowski asserts in his complaint that Peabody committed age discrimination as a result of its decision to not hire him as the head football coach for the 2005 season, counsel asked plaintiff the following under oath:

Q: Why do you think that age was a factor in the decision to hire Mr. Uva?

A: Why was age?

Q: A factor, why do you believe age was a factor in the decision to hire Mr. Uva over you?

A: Like I mentioned earlier, when you do your job effectively and efficiently over the course of time and they hire somebody younger than you, it would lead me to think there’s nothing but discrimination.

...

Q: . . . Given the fact that he [Mr. Uva] too is over 50 years old at the time he got the position, is there anything about his hiring that you believe was the product of age discrimination?

A: Nothing, but what I just said earlier.

(SOF at ¶ 22).

Although it was not asserted in the complaint, at his deposition when asked whether Nizwantowski is “contesting in this lawsuit that [he] was improperly denied the football coaching position” and was “discriminated against by not being hired in 2006 or 2007 for the football position,” when Mr. Woodbury was hired, Nizwantowski stated “I believe I was discriminated against at all times.” (Exhibit B at p. 35). Nizwantowski stated:

“I did my job effectively, I did my job efficiently. I never had a bad evaluation, whether it be coaching or teaching, my dedication, my loyalty to the community, to the children that I served. When you do things like that and they replace you with a younger person who doesn’t meet your qualifications, it leads me to believe that they discriminated against me.”

(SOF at ¶ 23) (emphasis added).

Nizwantowski did not amend the MCAD Charge or file a new charge with the MCAD to assert the new claims against Peabody for age discrimination stemming from its decision to not hire him as the head football coach for the 2005 and 2007 seasons before filing the instant complaint on March 26, 2007. (SOF at ¶ 24).

LEGAL ANALYSIS/ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits demonstrate that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56; Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983). Further, the Supreme Judicial Court has ruled that a party moving for summary judgment on a claim in which the opposing party will have the burden of proof at trial, is entitled to summary judgment if it demonstrates through pleadings, depositions, answers to interrogatories, admissions, and

affidavits, unmet by countervailing materials, that the opposing party “has no reasonable expectation of proving an essential element of that party’s case.” Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). To succeed on a summary judgment motion, the moving party “need not negate, that is disprove, an essential element of the claim of the party on whom the burden of proof at trial will rest.” Id. at 714. Rather, the moving party need only show that proof of the essential element is unlikely to be forthcoming. Id.

B. Plaintiff’s Claims for Discrimination For Peabody’s Decision to Not Hire Him As the Football Coach for the 2005 and 2007 Season Are Barred As He Has Failed to Exhaust All Administrative Remedies, Pursuant to M.G.L. c. 151B, § 5.

Plaintiff’s claim that Peabody unlawfully discriminated against him because of his age in its decision to not hire him as the head football coach for the 2005 and 2007 seasons is barred as a matter of law because Nizwantowski failed to file a complaint with MCAD as a predicate to filing the instant complaint. As a result, this Court does not have subject matter jurisdiction to hear plaintiff’s claim because Nizwantowski failed to exhaust all administrative remedies, pursuant to M.G.L. c. 151B, § 5. Accordingly, summary judgment must enter for the Peabody School District on the plaintiff’s claim regarding the football positions.

It is well-settled that a discrimination claimant must fully exhaust his administrative remedies to be able to maintain a judicial claim. 29 U.S.C. § 626(d)(2); M.G.L. c. 151B, § 5. Integral to this requirement is that the claimant file an administrative complaint with the Equal Employment Opportunity Commission (“EEOC”), within 180 days of the alleged act of discrimination, in order to bring a private claim for age discrimination under the ADEA. 29 U.S.C. § 626(d)(2). In states such as Massachusetts that have their own discrimination law, however, the charge must be filed with the EEOC within 300 days of the alleged act of

discrimination. Kale v. Combined Ins. Co. of Am., 861 F.2d 746, 750 (1st Cir. 1988); Ciccone v. Textron, Inc., 651 F.2d 1, 2 (1st Cir. 1981) (per curiam), cert. denied, 101 S. Ct. 3052 (1981).

Similarly, as a predicate to bringing a civil action in the Superior Court, a claimant must file a complaint of unlawful discrimination with the MCAD within six months of the last alleged act of discrimination. M.G.L. c. 151B, § 5. The filing requirement has a dual purpose. First, it is meant to provide the agency with an opportunity to investigate and conciliate the claim of discrimination. Second, the filing requirement provides notice to the defendant of a potential suit. Carter v. Comm'r of Corr., 43 Mass. App. Ct. 212, 217 (1997), quoting Conroy v. Boston Edison Co., 758 F. Supp. 54, 57 (D.Mass. 1991). Consequently, those purposes would be frustrated if the claimant were permitted to allege one thing in the MCAD complaint only to allege something entirely different in the ensuing civil action. While the law does not mandate a “perfect fit” between a claimant’s MCAD charge and subsequent judicial complaint, it does impose certain boundaries. The scope of the subsequent civil proceeding, therefore, is strictly limited to matters alleged in the administrative complaint. Windross v. Vill. Auto. Group, Inc., 71 Mass. App. Ct. 861, 864 (2008).

Massachusetts courts have strictly construed these provisions, and it is well settled that failure to satisfy the requirements of M.G.L. c. 151B mandates dismissal of the complaint. Charland v. Muzi Motors, 417 Mass. 580, 586 (1994); Tardanico v. Aetna Life & Cas. Co., 41 Mass. App. Ct. 443, 444 (1996)(“resort to judicial process is not available to a party claiming age discrimination . . . unless that party has first lodged a complaint of unlawful discrimination with the MCAD within six months of the occurrence of the discriminatory event”); Jancey v. School Comm. of Everett, 421 Mass. 482, 497-498 (1995); Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 512-513 (1985), *S. C.*, 397 Mass. 1004 (1986)(employee’s complaint dismissed for

failure to follow the procedures set forth in G. L. c. 151B); Cherella v. Phoenix Technologies Ltd., 32 Mass. App. Ct. 919, (1992).

Although plaintiff filed the MCAD Charge on February 15, 2005 alleging that Peabody engaged in unlawful discrimination in its decision to not hire him as the head baseball coach position because of his age, the MCAD Charge did not address plaintiff's claims of discrimination stemming from Peabody's decision to not hire him as the head football coach for the 2005 and 2007 seasons. (SOF at ¶7-10). In the MCAD Charge, Nizwantowski asserted he was the baseball coach for 18 years and that during this time he never had to apply for the coaching position; however, when the school hired a new principal in June of 2004, he was required to apply for the baseball position. (SOF at ¶ 8). Although Nizwantowski claimed he was "well qualified for [the] position . . . a younger man (Mark Bettencourt) age 32 was hired in [his] place" because the newly hired principal wanted to "get rid of [him] because of [his] age." (SOF at ¶ 9). On July 11, 2006 the MCAD found probable cause supporting plaintiff's claims regarding his allegations against Peabody for age discrimination as a result of its decision to not hire Nizwantowski as the head baseball coach. (SOF at ¶ 10). Despite his charge being open at the MCAD for over two years, Nizwantowski never sought to amend that charge to assert the new claims of age discrimination now being claimed for the football coach position.

Nizwantowski filed the instant complaint on March 26, 2007. (SOF at ¶ 14). After the instant complaint was filed, Mr. Uva resigned from his position as head football coach and as a result, there was a coaching vacancy for the 2007 season. (SOF at ¶ 18). Nizwantowski again applied for the head football coach position and interviewed with the football screening committee during the late winter or early spring of 2007. (SOF at ¶ 19). Nizwantowski was notified around April 6, 2007 that he was not selected as the finalist for the football coach

position. (SOF at ¶ 20). In addition to asserting he was wrongfully denied the position of head baseball coach for the 2005 season, Nizwantowski contends in the Superior Court complaint that Peabody discriminated against him on the basis of age when it “failed to re-hire plaintiff for the position of head football coach, hiring Paul Uva, who is younger than plaintiff by more than five years.” (SOF at ¶ 16)(emphasis added). Despite his claims in this suit, Nizwantowski never filed a new charge with the MCAD alleging age discrimination in connection with the football coaching position.

The claims asserted in the instant complaint and Nizwantowski’s testimony about those claims make clear that plaintiff contends Peabody unlawfully discriminated against him because of his age in its decision to not hire him as the head football coach for the 2005 season. Further, although it was not asserted in the complaint, because it had not yet occurred, Nizwantowski now claims that Peabody unlawfully discriminated against him because of his age in its decision not to hire him as the head football coach for the 2007 season. At his deposition, in response to questions as to whether he is “contesting in this lawsuit that [he] was improperly denied the football coaching position” and was “discriminated against by not being hired in 2006 or 2007 for the football position,” Nizwantowski without equivocation, stated that he believed he was victim of age discrimination when the defendant hired younger coaches who were less qualified.

(Exhibit B at p. 35)(emphasis added). Nizwantowski, Specifically, Nizwantowski stated:

“I did my job effectively, I did my job efficiently. I never had a bad evaluation, whether it be coaching or teaching, my dedication, my loyalty to the community, to the children that I served. When you do things like that and they replace you with a younger person who doesn’t meet your qualifications, it leads me to believe that they discriminated against me.”

(SOF at ¶ 23).

Because Nizwantowski has alleged that he was discriminated against because of his age for the coaching positions for which no MCAD charge was filed, these claims must be dismissed as this Court does not have subject matter jurisdiction to entertain plaintiff's claims regarding the football positions. Accordingly, summary judgment must enter for the Peabody School District.

Conclusion

WHEREFORE, Peabody School District requests the Court enter summary judgment as a matter of law because plaintiff's claims for age discrimination stemming from Peabody's decision to not hire plaintiff as the head football coach for the 2005 and 2007 seasons are barred because he has failed to comply with the provisions of M.G.L. c. 151B, § 5, which require the plaintiff exhaust all administrative remedies prior to pursuing a claim in the Superior Court.

The Defendant,
PEABODY SCHOOL DISTRICT
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Dated: November 4, 2008

CERTIFICATE OF SERVICE

I, Peri B. Karger, hereby certify that on this 19th day of August, 2008, I served the foregoing by hand to:

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