

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 270-5-17 Rdcv

Gary A. Alibozek,
Plaintiff

v.

General Electric Company,
Defendant

DECISION ON MOTION FOR SUMMARY JUDGMENT

Gary Alibozek is an employee of General Electric (“GE”), working at its Rutland facility. In October 2014, he applied for a promotion, but was passed over in favor of a younger man. He sued, alleging breach of an implied employment contract, breach of the covenant of good faith and fair dealing, and age discrimination. The court previously dismissed the good faith and fair dealing claim. GE now seeks summary judgment on the remaining claims. For the reasons set forth below, the court grants the motion.

Discussion

I. Background

A. Legal Standard

The standard on a motion for summary judgment is so familiar that ordinarily the court need not recite it. Here, however, the extent to which the parties have met their respective burdens bears heavily on the court’s determination of the issues presented. Thus, the courts sets those burdens forth below.

Under V.R.C.P. 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass’n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an

issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P’Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence must be admissible. *See* V.R.C.P. 56(c)(2),(4); *Gross v. Turner*, 2018 VT 80, ¶ 8 (“Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts.”). The court must view all evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Importantly here—where the parties disagree on an array of facts—only facts that can affect the outcome of the litigation are material. *E.g.*, *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14, 200 Vt. 125 (citing *In re Estate of Fitzsimmons*, 2013 VT 95, ¶ 13, 195 Vt. 94). More importantly in this case, only a genuine dispute as to those facts will foreclose summary judgment. V.R.C.P. 56.

B. Facts

Here, there is no dispute as to the following basic facts. Mr. Alibozek was 51 years old when he and others applied for an L-20 machining position at the Rutland GE facility. Another applicant, James Werbinski, was in his early 40s, and was well junior, in time of service, to Mr. Alibozek. Both were interviewed, along with at least one other candidate. After the interview process, GE awarded the promotion to Mr. Werbinski.

The parties also agree that GE has an employee manual titled the “Rutland Employee Job and Movement Practices” (the “Manual”), covering certain policies and practices. The parties have provided the court only the “Rutland Employee Job and Movement Practices” portion of the Manual. The “Definitions” page of this part of the Manual states that “Plant Job Polling/Job Opening . . . is accomplished by our Polling/Job Opening process.” Rutland Employee Job and Movement Practices 52, Ex. 1 to Pl.’s Opp. to Summ. J. The “Polling” process is irrelevant here; “Polling” is the “[p]ractice used to move from shift to shift.” *Id.* The “Plant Job Openings” process is set forth in full below:

In Operations L18 jobs are awarded by seniority.

In instances when a job opening is filled through the interview process, you must provide complete information about your background and qualifications (Resume) as they relate to the open position or the application **will not** be accepted.

Examples of jobs that would require an interview would include some L-18 jobs, not part of operations, L-20 jobs and higher positions.

Final decisions are reached by the interview selection team from that Business after interviewing process has been completed.

An employee must be physically able to perform the available job or be able to perform the job with reasonable accommodation and *not be on an active DML*.

New hires on their one year probation are not eligible for polling/job openings.

Employees must be on active payroll to be eligible for open positions.

Employees who do not perform at an acceptable level in the job after reasonable training and coaching will be returned to their prior shift and position or a role similar to the one they left.

Id. at 53 (emphasis and italics in original).

The balance of the material facts are disputed. The dispute, however, is not “genuine.” See *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356 (“In determining whether there is a genuine issue as to any material fact, we will accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material.”). GE has met its initial burden of demonstrating the absence of dispute as to its version of the facts. While Mr. Alibozek “disputes” these facts, he has failed to support his assertions with admissible evidence. Thus, the following supplemental facts must also be deemed undisputed for the purpose of this motion.

To the extent that the Manual sets forth anything that could be said to prescribe an interview process, Mr. Alibozek has failed to adduce any evidence to suggest that GE did not follow that process in filling the October 2014 L-20 machining position. At the time, as noted above, Mr. Alibozek was 51 years old. The other candidates were Mr. Werbinski, age 42; Thomas Woodbury, age 60; and Mark Coburn, age 52. There is no suggestion that any of the applicants did not “provide complete information about [his] background and qualifications”; that any was not “physically able to perform the available job”; or that any was not “on active payroll.” While Mr. Alibozek asserts that

Mr. Werbinski was not eligible, because he was still in his one-year probation period, that assertion lacks evidentiary foundation.¹

Following the same process it used for other non-exempt positions of L-20 or higher, GE assembled a seven-person interview team. The team was split into two panels, each of which interviewed all four candidates. The interview panels included both exempt and non-exempt employees—both older and younger than Mr. Alibozek—and the hiring manager. There is no suggestion that the “final decision” was not “reached by the interview selection team . . . after [the] interviewing process ha[d] been completed.” Rather, after the interview, each panel gave each candidate a score from one to five on technical capability, ability to solve problems, ability to lead others, ability to integrate into the team, tenacity, and communication skills. Mr. Werbinski received the highest total score and the highest score on two of the six criteria; Mr. Alibozek received the lowest total score. Members of the panel were also asked to rank their top two choices for the opening. Each member ranked Mr. Werbinski first or second, none ranked Mr. Alibozek.² In depositions, panel members testified that Mr. Werbinski was already working in the same area as the L-20 opening, familiar with machines used in the position, and would require less training than Mr. Alibozek. As a result of this process, GE awarded the position to Mr. Werbinski.

II. Analysis

A. Breach of Implied Employment Contract

GE seeks dismissal of Mr. Alibozek’s claim of breach of implied employment contract on two grounds: first, for failure to establish an enforceable implied contract; and second, assuming a contract is found, for failure to establish a breach of that contract. Mr. Alibozek contends that GE failed to follow its Manual by discounting his seniority, promoting Mr. Werbinski while he was still in his one-year probation period, failing to have a human resources official supervise the

¹ In his deposition, Mr. Werbinski stated, “I got hired at GE in 2013.” Dep. of James Werbinski 13:8, Ex. 4 to Plaintiff’s Statement of Disputed Facts. The hiring process having occurred in 2014, Mr. Alibozek asserts, without further foundation, that Mr. Werbinski was still in his probation period. This assertion, however, overlooks the undisputed fact that Mr. Werbinski started work at GE in January 2013. Def.’s Supp. Statement of Undisputed Material Facts, ¶¶ 1–2. The position at issue having been posted in October 2014, Mr. Werbinski was no longer in his probation period.

² One of the applicants withdrew after the interview process. Thus, each of the panel members ranked Mr. Alibozek third—last among the remaining candidates.

interview process, and failing to preserve interview notes. Pl.’s Mem. in Opp’n 3–8. Further, Mr. Alibozek claims that at minimum, GE’s Manual is so ambiguous as to require jury determination of whether it constituted an implied employment contract. *Id.* at 3, 9.

In Vermont, employment relationships are presumptively at-will, but can be unilaterally modified by an employee manual laying out personnel policies or practices. *Taylor v. Nat. Life Ins. Co.*, 161 Vt. 457, 464–65 (1993). “[W]here an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced.” *Id.* at 464 (quoting *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 892 (Mich. 1980)). “[A]n employer does not bind itself to act in a particular way if it merely expresses vague goals or values; it must include sufficiently definite terms to be bound by those policies.” *Cate v. City of Burlington*, 2013 VT 64, ¶ 17, 194 Vt. 265. In order for additional protections to vest, the policies must be “definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer’s intent to bind itself General statements of policy will not meet the requirements of a unilateral contract.” *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 20 (1995).

Comparing the parties’ motions, statements of fact, and evidentiary materials, Mr. Alibozek fails to come forward with evidence sufficient to establish that the GE manual modified the at-will relationship—at least in a way that would support a claim of breach on the facts of this case. At most, the Manual sets forth a policy of filling L-20 jobs through an “interview process.” It fails to set forth “sufficiently definite terms” to prescribe a particular practice for the interview process. It is completely silent on the subjects of seniority, constitution or supervision of the interview committee, and note-taking and -preservation. In short, the Manual clearly and unambiguously does not operate to modify the at-will arrangement to impose the obligations that Mr. Alibozek claims GE breached.

Neither has Mr. Alibozek come forward with competent, admissible evidence that GE had—much less communicated to its employees—any policy or practice of considering seniority when awarding L-20 jobs. With respect to his claims as to the constitution of the interview committee or the preservation of notes, his only competent evidence comes from another GE employee, Patrick Cioffi, who participated in two promotion selection processes, each more than ten years prior to the process at issue here. Aff. of Patrick Cioffi ¶ 4, Ex. 3 to Pl.’s Opp. to

Summ. J.³ Mr. Cioffi averred that in each process a Human Resources person “managed the meetings where employees would cast their votes for the candidate(s) they preferred,” and “collected the ballots and tallied the candidates’ ratings.” *Id.* ¶ 5. Two instances, removed by at least a decade from the process at issue, fall far short of establishing a policy or practice in effect at the time of the promotion process at issue here.

Viewing the evidence in the light most favorable to Mr. Alibozek, the Manual can be read as a broad representation that L-20 openings would be filled by an interview process; that only employees currently on the active payroll, beyond their one-year probationary period, and physically able to perform the job would be eligible; that all applicants would be required to submit a resume showing complete background and qualifications; and that final decisions would be made by the interview team after the interview process. The undisputed facts set forth above make clear that GE did not cross any of these lines. Thus, the court need not decide whether these representations were “sufficiently definite” to bind GE. *See Cate*, 2013 VT 64, ¶ 17. In short, if there was an implied contract, the undisputed evidence establishes that GE did not breach it.

As a last gasp on the implied contract claim, Mr. Alibozek contends that the Manual is sufficiently ambiguous to leave the question of whether it altered the employment relationship to a jury. The interpretation of an unambiguous employee manual is a proper matter for summary judgment. *Dillon v. Champion Jogbra, Inc.*, 175 Vt. 1, 6 (2002). But if the manual is consistent with both at-will employment and an interest in additional protections, the issue of whether it modifies the employment relationship goes to the jury. *Id.* at 6–7 (finding ambiguous an employee manual containing both a disclaimer that the manual did not constitute an employment contract as well as categories of violations of company policy and required actions by managers).

This argument does not avail Mr. Alibozek, for two reasons. First, he fails to identify any contradiction arising to the level of the employee manual in *Dillon*. The manual there contained a prominent disclaimer that the policies and procedures set forth were not a part of the employment contract. *Id.* at 3. The policies within the manual, however, set forth an elaborate and comprehensive system of progressive steps to be taken in the event of a disciplinary procedure. *Id.* at 7. Further, the language of the manual was mandatory, and the employer’s

³ Mr. Alibozek testified that in his 14 years at the Rutland GE plant, he had been involved in the interview process only as a candidate. Dep. of Gary Alibozek 13:8–17, Ex. 2 to GE’s Statement of Undisputed Material Facts (“SUMF”). As such he is patently not competent to testify as to the procedures followed by the selection committee.

actions in consistently applying it reinforced the belief that the employer sought to bind itself. *Id.* (“It provides that ‘[t]he Corrective Action Policy *requires* management to use training and employee counseling to achieve the desired actions of employees.’ ”). The Court found that the disclaimer’s inconsistency with the substance of the manual could send a mixed message to employees, so summary judgment was not proper. *Id.* at 8–9.

In contrast, here the Manual more nearly “expresses vague goals or values,” *Cate v. City of Burlington*, 2013 VT 64, ¶ 17, or “[g]eneral statements of policy,” *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 20 (1995), than sets forth the kind of “elaborate system” that allowed the *Dillon* Court to find an ambiguity. While the Manual is distributed to each GE Rutland employee, it clearly and unambiguously does not provide a comprehensive overview of the interview and promotion process. In fact, many steps described by the interview panel members—the six factors they considered, their scoring and ranking candidates, and the voting process—are not even mentioned in the Manual. In contrast to the manual in *Dillon*, GE’s Manual uses no mandatory language imposing any obligation on the employer—unless the broad statement that “[f]inal decisions are reached by the interview selection team . . . after interviewing process has been completed” can be read as some kind of requirement. The remaining provisions of the Manual that bear on the job opening process impose eligibility requirements, which operate more on applicants than GE. Employees could not have been confused by the Manual, since it neither purported to be comprehensive nor—at least as far as appears on the evidence before the court—did it contradict any other policies or procedures. In short, there is no ambiguity such as would preclude deciding the implied contract claim on summary judgment.

Second, even if Mr. Alibozek had succeeded in demonstrating an ambiguity, the most a jury could properly find on the evidence he has adduced is the set of requirements set forth above: that L-20 openings would be filled by an interview process; that only employees currently on the active payroll, beyond their one-year probationary period, and physically able to perform the job would be eligible; that all applicants would be required to submit a resume showing complete background and qualifications; and that final decisions would be made by the interview team after the interview process. Also as noted above, however, there is no evidence to suggest that GE violated any such “requirement.”

Thus, there is no permissible interpretation of the Manual that would support a finding of breach.

B. Age Discrimination

GE also seeks to dismiss Mr. Alibozek's claim for age discrimination for failure to make out the prima facie case, and in the alternative, for failure to show pretext. Vermont has adopted the *McDonnell Douglas* framework for analyzing age discrimination claims. Under this approach, the plaintiff first has the burden of establishing a prima facie case. *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 24, 176 Vt. 356. To do so, the plaintiff must demonstrate: (1) status as a member of a protected group; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances surrounding the adverse employment action that permit an inference of discrimination. *Id.* ¶ 25. "The evidentiary burden required of the plaintiff at this stage is a relatively light one," and is meant to screen out "the most patently meritless claims." *Id.* ¶ 24. If the plaintiff can make out the prima facie case, a presumption of discrimination arises and the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* ¶ 26 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The burden is merely one of production; the burden of persuasion remains with the plaintiff at all times. *Id.* If the employer meets its burden, "the presumption of discrimination disappears, and the evidentiary burden shifts back to the plaintiff to demonstrate that the employer's justification is mere pretext for discrimination." *Id.* ¶ 27. If the plaintiff cannot, then summary judgment for the employer is proper. *Id.* ¶ 32.

Given the benefit of all reasonable doubts and inferences, Mr. Alibozek has met his relatively light burden on the first step of the *McDonnell Douglas* analysis. The parties dispute only factor four of the prima facie case—whether the circumstances permit an inference of discrimination. Mr. Alibozek has sufficiently met his burden on this factor by showing that GE filled the L-20 position with Mr. Werbinski, who is nine years younger than Mr. Alibozek, and the youngest candidate of the four interviewed. *E.g.*, *Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 129 (2d Cir. 1996) ("Plaintiff did make out a prima facie case for her other promotion claims by showing that she is a member of a protected class, a black female; that she applied for the positions; that she was qualified for the positions; and the positions were filled by a white male and a white female."); *Kwon v. Univ. of Vt. & State Agric. Coll.*, 912 F. Supp. 2d 135, 144 (D. Vt. 2012) ("The evidentiary burden to establish the prima facie case is minimal and replacement

by an individual outside the protected class is sufficient.”). Thus, the presumption of discrimination arises, and it is up to GE to rebut it.

GE, too, has met its burden of production. GE asserts that it promoted Mr. Werbinski because his job and interview performance were superior to Mr. Alibozek’s. This is a “legitimate, nondiscriminatory reason.” *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). GE has produced substantial evidence in support of this assertion, including both candidates’ interview scores, Ex. 19 to GE’s SUMF, and deposition testimony from various panel members as to how they ranked the candidates, *e.g.*, Ex. 21 to GE’s SUMF. The interviewers specifically contrasted Mr. Werbinski’s familiarity with the type of new machines used and work done at the L-20 position against Mr. Alibozek’s relative inexperience with both. *E.g.*, Ex. 23 to GE’s SUMF. Simply put, GE has produced competent evidence that Mr. Werbinski was better suited to the L-20 position than Mr. Alibozek.

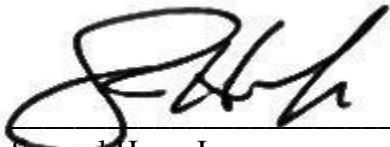
GE having proffered a legitimate reason for its choice, with evidence to support that proffer, the burden shifts back to Mr. Alibozek to demonstrate that GE’s reason is pretextual. Mr. Alibozek need not “come forward with evidence of the ‘smoking gun’ variety,” *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 22, 200 Vt. 125 (quoting *Resare v. Raytheon Co.*, 981 F.2d 32, 42 (1st Cir. 1992)). Rather, a plaintiff can show pretext by “by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions” in the employer’s proffered reason. *Id.* (quoting *Zann Kwan v. Andalex Grp., LLC*, 737 F.3d 834, 846 (2d Cir. 2013)). While Mr. Alibozek’s original evidence may have been sufficient to bear the low burden of the prima facie case, it is insufficient to show pretext. Nor are Mr. Alibozek’s assertions that GE invented its criticisms of Mr. Alibozek post hoc sufficient. This argument is tautological at best—in essence, Mr. Alibozek claims that GE’s reasons are pretextual because they are pretext. Unsupported by evidence, Mr. Alibozek’s allegations are just that—allegations. *See Alpstetten Ass’n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979) (“the person advancing the claim may not rest upon his mere allegations”). As our Court has said, a court “may not second-guess an employer’s non-discriminatory business decisions, regardless of their wisdom.” *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 35, 176 Vt. 356 (quoting *Williams v. N.Y.C. Dep’t of Sanitation*, No. 00 Civ. 7371(AJP), 2001 WL 1154627, at *18 (S.D.N.Y. Sept. 28, 2001)). Mr. Alibozek having failed to

produce any credible evidence tending to show that GE's reason for not hiring him was pretextual, this court declines to second-guess GE's decision.⁴

ORDER

As shown above, GE has met its initial burden of demonstrating the absence of genuine dispute of material fact. In response, Mr. Alibozek, as the party with the burden of proof, has failed to come forward with competent, admissible evidence to support his claims. The material facts, accordingly, are undisputed; on those facts, GE is entitled to judgment as a matter of law on both remaining claims. GE's Motion for Summary Judgment is **granted**; Mr. Alibozek's First and Third Counts are **dismissed with prejudice**. The court having previously dismissed Mr. Alibozek's Second Count, the clerk will now enter **judgment for GE** on all claims. GE's counsel shall prepare and submit the form of judgment required by V.R.C.P. 58.

Electronically signed on February 14, 2019 at 12:04 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge

⁴ The only evidence that Mr. Alibozek submits that arguably bears in any degree on the question of pretext is his employment history, which he asserts made him better qualified him for the position than Mr. Werbinski. From this he would have the court infer that GE's proffered reasons for preferring Mr. Werbinski (and, evidently, another applicant) over him must have been pretextual. This, however, is not evidence of pretext; it is instead a bald invitation to second-guess GE's decision. Particularly where all seven interview panel members unanimously determined Mr. Alibozek to be the least qualified of the three remaining candidates, the court declines this invitation.