

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

REBECCA STERLING

PLAINTIFF

v.

Case No. 4:19-cv-00025 KGB

**THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF ARKANSAS, et al.**

DEFENDANTS

OPINION AND ORDER

Plaintiff Rebecca Sterling applied for a position at the University of Arkansas - Pulaski Technical College (“UAPTC”). Ms. Sterling alleges in her amended complaint that she was denied this position because of her age, association with a person with a disability, and use of leave under the Family Medical Leave Act (“FMLA”), 29 U.S.C. § 2615, *et seq.* (Dkt. No. 2, ¶¶ 29–37). She brings this suit against the Board of Trustees of the University of Arkansas (“Board of Trustees”), the members of the Board of Trustees in their official capacities, Dr. Bentley Wallace in his individual and official capacities, and UAPTC, alleging violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, *et seq.*; the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*; the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621, *et seq.*; and the FMLA (Dkt. No. 2, ¶¶ 2–3). Before the Court is defendants’ motion for summary judgment (Dkt. No. 8). Ms. Sterling filed a response (Dkt. No. 14), and defendants replied (Dkt. No. 15). For the reasons discussed below, the Court grants in part and denies in part defendants’ motion for summary judgment (Dkt. No. 8).

I. Factual Background

Unless otherwise noted, the following facts are taken from defendants’ statement of material facts not in dispute and Ms. Sterling’s response to defendants’ statement of material facts not in dispute (Dkt. No. 10; Dkt. No. 14-2).

Ms. Sterling is 59 years old and is a full-time faculty instructor in the Business Department at UAPTC (Dkt. No. 10, ¶ 1). UAPTC became a part of the University of Arkansas system on February 1, 2017, at which point the Board of Trustees of the University of Arkansas assumed control over UAPTC (*Id.*, ¶ 46). Ms. Sterling was hired originally by UAPTC as a keyboarding instructor in the Business Department in August 2012 (*Id.*, ¶ 2). Beginning in 2014, Ms. Sterling and a co-worker were selected by a committee to cochair the Business Department (*Id.*, ¶ 3). She later assumed temporary duties as Interim Dean of the Department after the Provost left in late 2016 (*Id.*, ¶ 4). In January 2018, UAPTC underwent a reorganization of its academic departments and reduced five dean positions to three (*Id.*, ¶ 5). Ms. Sterling was notified that her dean position would be eliminated effective June 30, 2018 (*Id.*). Ms. Sterling was invited to apply for one of the new dean positions but felt she would not be qualified (*Id.*, ¶ 6). She was also informed that she could return to a faculty teaching position (*Id.*). Ms. Sterling has no unfavorable evaluations or disciplinaries in her personnel file (*Id.*, ¶ 47).

In April 2018, Ms. Sterling learned of a job announcement for a nonacademic staff position—the Coordinator of Community Education (“Coordinator”)—which was open to both internal and external applicants (*Id.*, ¶ 7). Ms. Sterling was interested in the position in part because it would pay \$48,000 for a twelve-month appointment instead of \$40,450 for a nine-month appointment in her faculty position, which had been renewed for the 2019–20 term (*Id.*, ¶¶ 14–16).

Dr. Wallace was the hiring official for the Coordinator position (*Id.*, ¶ 8). At the time of the job posting, Dr. Wallace was Vice Chancellor responsible for the non-credit instructional operations of the college, which included all workforce and non-credit education, non-credit community education, and management of the business and industry center, where the Coordinator

position is housed (*Id.*, ¶ 9). The position description was developed by Dr. Wallace and listed essential criteria and preferred qualifications (*Id.*, ¶ 10). This was the third time he had hired for this position (*Id.*, ¶ 25). The essential job functions and preferred qualifications listed in the job announcement had evolved over time to reflect Dr. Wallace's expectations and vision of the position (*Id.*, ¶ 26). Dr. Wallace was then selected to fill a new dean position as Dean of the School of Professional and Technical studies in July 2018 (*Id.*, ¶ 11). He continued supervising the Coordinator position until the Director of Workforce Development was hired the following October (*Id.*).

Ms. Sterling submitted a transfer form and her application materials, along with over 40 other applicants (*Id.*, ¶ 17). Human Resources then screened the applications for minimum qualifications and that field was narrowed to six individuals for interviews, which included Ms. Sterling (*Id.*, ¶ 18). Dr. Wallace selected the persons to interview and initially did not include Ms. Sterling (Dkt. No. 14-2, ¶ 18). Another hiring committee member, Elizabeth Reves, added Ms. Sterling to the list to be interviewed (*Id.*) Also serving on the hiring committee were Somerly Mustin, Verkeytia Long, and a representative from Human Resources, Reba Treece (now Reba Melton) (Dkt. No. 10, ¶ 19).

The interviews were held over two days, May 8–9, 2018 (*Id.*, ¶ 21). On May 2, 2018, Ms. Sterling emailed Dr. Wallace asking if she could reschedule her interview spot from May 8, stating that she would be attending a “cancer doctor’s appointment” with her mother (*Id.*). Dr. Wallace expressed his sympathy and agreed to interview her another time (*Id.*, ¶ 22). Ms. Sterling later responded that she could make the original interview time, so her interview remained scheduled for May 8, 2018 (*Id.*).

Ms. Sterling took FMLA leave during the time period of May 8, 2018, which had been approved by her supervisor, Marla Strecker (*Id.*, ¶ 23). Defendants claim that the only person on the interview committee with knowledge of Ms. Sterling’s FMLA leave was the HR representative, Ms. Melton, who had filed the FMLA paperwork (*Id.*, ¶ 24). Ms. Sterling claims that Dr. Wallace knew that Ms. Sterling had at least planned to take leave for an FMLA qualifying condition and therefore had engaged in a protected activity (Dkt. No. 14-2, ¶ 21).

Each member of the interviewing committee was provided with copies of the application materials for each candidate along with a scoring rubric, as per university practice (Dkt. No. 10, ¶ 25). Dr. Wallace had determined the questions that were included on the rubric (*Id.*, ¶ 26). Interviewers scored each candidate from 0–50 for a total possible score of 250 (*Id.*, ¶ 29). Dr. Wallace scored Ms. Sterling lower than the other interviewees with a score of 34 and scored Kristin Howell, a 36-year-old who was ultimately selected for the position, highest with a score of 46 (*Id.*). Ms. Melton scored the candidates almost the opposite of Dr. Wallace, giving Ms. Sterling a perfect score of 50 and Ms. Howell a 37 (*Id.*, ¶ 30). The three remaining members of the interview committee all scored Ms. Sterling higher than Ms. Howell (Dkt. No. 14-2, ¶¶ 62–64). The final composite scores were Ms. Sterling at 224 and Ms. Howell at 215 (Dkt. No. 10, ¶ 28). Defendants contend that hiring is based on a consideration of everything received during the hiring process and that there is no policy at UAPTC that mandates that the highest scoring applicant be hired to the position (*Id.*, ¶¶ 31–32). Ms. Sterling disputes this contention, arguing that there was a policy stating a preference for hiring from within, that the procedure was to hire the top scoring candidates, and that Dr. Wallace violated policy by acting subjectively and ignoring the committee (Dkt. No. 14-2, ¶¶ 31–32). Ms. Sterling notes that even Dr. Wallace testified that “we don’t have singular people making decisions typically.” (*Id.*, ¶ 32).

The parties are not in agreement as to what happened following the interviews. Defendants claim that the hiring committee did not arrive at a decision on whom to hire and agreed that Dr. Wallace could take the evening of May 9, 2018, to review the top two applicants (*Id.*, ¶¶ 33–34). According to defendants, Mr. Wallace has stated consistently that, based on all the materials presented as well as the interviews and hiring references, Ms. Howell’s prior experience aligned most closely with the essential duties and preferred qualifications (*Id.*, ¶ 51). Ms. Howell’s previous positions included a combined five years of fundraising, event management, and community outreach, as well as budget planning, staff hiring, and creation of promotional materials at the Arthritis Foundation and the Hilary Rodham Clinton Children’s Library (*Id.*, ¶ 56). Defendants claim that Ms. Sterling has admitted that she does not have outreach and community involvement in the Pulaski County area (*Id.*, ¶ 58).

However, Ms. Sterling denies that the group did not arrive at a decision on the hire after discussion (Dkt. No. 14-2, ¶ 33). Rather, Ms. Sterling asserts that the hiring committee came to a consensus on the basis of the highest scorer from the rubric after five to ten minutes of discussion (*Id.*). Ms. Sterling maintains that members of the committee were not given time to discuss and come to a consensus, nor was there any effort to do that (*Id.*). Instead, Ms. Sterling asserts that Dr. Wallace decided to take the night to make a decision in violation of policy, procedure, and practice (*Id.*, ¶ 34). Ms. Sterling contends that, whether Dr. Wallace reviewed the materials or not, it was apparent from the scoring and how he conducted the interview and decision process that he was angling for his preferred candidate (*Id.*, ¶ 35). Ms. Sterling denies that Ms. Howell was the best candidate because Ms. Sterling had more experience in more fields, a proven track record of good performance, and a bachelor’s and master’s degree in educational fields (*Id.*, ¶¶ 35–36).

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