

issued 9/24/84

Derry Cooperative School District)
)
)
 v.) DECLARATORY RULING
)
)
 Christine Branley)
)
 _____)

I. Introduction

The Derry Cooperative School District has requested a declaratory ruling from the Commission on the question of whether the District's anti-nepotism policy violates the New Hampshire Laws Against Discrimination insofar as it forbids two employees who are married to each other from working in the same building.

This question is ripe for decision at this time. The policy has been applied to Christine Branley, a teacher at the Hood Junior High School in Derry, the same school in which her husband, Kevin Branley, also teaches. In September of 1983 David Brown, District Superintendent, ordered Mrs. Branley's transfer from the Junior High School to Floyd/Grinnell Elementary School. The transfer was not actually effected because Mrs. Branley obtained a preliminary injunction from Rockingham County Superior Court. Mrs. Branley has also filed a charge with this Commission, alleging discrimination based on sex and marital status.

This decision deals only with the District's request for a judgement on the validity of its anti-nepotism policy insofar as it prevents two married persons being employed in the same building; specifically, whether this policy violates the provision of RSA 354-A which prohibits discrimination on the basis of marital status in employment. It does not deal with the facts of Mrs. Branley's case, or with the allegations of sex discrimination and discrimination in the application of the policy which were raised in that complaint.

II. Case Law

The legal issue raised by the District's request is: does the term "marital status" as used in RSA 354-A:8, paragraphs I, II, and III refer to the status of being married to a particular individual or does it refer only to the status of being either married, divorced, separated, widowed or never married.

Neither the Commission nor the New Hampshire courts have addressed this issue before. Four state courts that have considered the question in the context of their own state laws forbidding marital status discrimination have been evenly split on this issue.

In New Jersey, the court considered an anti-nepotism rule forbidding the employment of both spouses in the same department and facility and decided that this rule did not violate the law. The New Jersey court held that the provision forbidding discrimination on the basis of marital status was intended to cover only discrimination based on the condition of being married as opposed to unmarried, and did not extend to discrimination based on the identity of the employee's spouse. Thomson v. Sanborn Motor Express 30 FEP Cases 35 (N.J. Super. Ct., App. Div., 1977)

In New York, the court decided a somewhat different factual situation in the case of Manhattan Pizza Hut v. New York State Human Rights Appeal Board 415 N.E. 2d 950 (Ct. of App. of N.Y., 1980) The court in that case agreed with the New Jersey court in differentiating between discrimination against an individual because "he or she is single, married, divorced, separated, or the like," and discrimination based on the identity of the individual's spouse. However, the factual situation involved a company rule forbidding an employee from working under the supervision of a relative, including a spouse. This rule did not forbid the employment of spouses as co-workers but only the employment of one spouse under the supervision of the other. The court upheld this rule, referring specifically to the nature of the relationship between supervisor and subordinate, and to the business problems likely to occur when one spouse supervises the other, no matter how fair the supervisor's actual behavior.

In this case the court also noted that the language of the statute included a definition of the term marital status that appeared to limit the statute's coverage. Such limiting language does not appear in the New Hampshire statute.

Two other state courts, in Washington and Minnesota, have come to a different conclusion, holding that anti-nepotism rules covering employment of spouses were violative of the state statute forbidding discrimination on the basis of marital status. Both of these cases were similar to the present one in that they dealt

with rules forbidding the employment of spouses as co-workers, rather than only forbidding the employment of spouses in a situation where one must supervise the other.

In the case of Kraft v. State of Minnesota, the court held that the law forbidding marital status discrimination includes discrimination based on the identity or situation of an employee's spouse. The court stated that to hold otherwise would be "to condone discrimination against a portion of the protected class" is contravention of "the broad prohibition against arbitrary classifications embodied in the Human Rights Act and would elevate form over substance." 30 FEP Cases 31, 31 (Minn., 1979).

The Supreme Court of the state of Washington, in the case of Washington Water Power Company v. Washington State Human Rights Commission, upheld a Commission regulation stating inter alia, that "discrimination against an employer . . . because of . . . (b) who his spouse is; or (c) what the spouse does, is an unfair practice because the action is based on the person's marital status." The court held that the legislature had not intended to confine the prohibition against marital status discrimination to the situation in which an employer refuses to hire an individual because he or she is married or unmarried, and that, on the contrary, the statute is broad enough to forbid discrimination because of the identity or occupation of the individual's spouse. The court notes the legislative mandate to construe the statute liberally to protect the civil rights of citizens to be free of discrimination. 27 FEP 1499, (1978)

The Washington court also noted that no evidence had been presented to support any business justification for a general rule forbidding employment of spouses as co-workers. However, the court stated that restrictions in the employment of spouses could be legal and appropriate in certain situations where a business necessity could be shown, "as where one spouse supervises the other, or audits his or her work, or where the spouses are in direct or potential competition with each other," and noted with approval that the Commission regulations made provisions for such exceptions.

Ibid at 1501.

Two federal cases have been submitted by the District to support the position that its anti-nepotism rule as applied to spouses does not constitute discrimination based on marital status. However, these cases, Cutts v. Fowler 692 F. 2d 138 (1982) and Kekeisen v. Independent School District 509 F 2d 1062 (1975) do not deal with the question of whether an anti-nepotism rule constitutes discrimination on the basis of marital status but only with the issue of whether such a rule is a restriction on the right to marriage, in violation of the U.S. Constitution. Both cases hold that the rule does not violate the constitution. This is a very different standard from the standard to be applied under a statute forbidding discrimination based on marital status. A policy may be illegally discriminatory under the statute, but still not rise to the level of a violation of the Constitution.

The Cutts case did in fact raise the issue of a violation of the federal civil service statutes which forbid marital status discrimination. The court, however, decided that it had no jurisdiction over the statutory claim, and therefore did not decide whether the anti-nepotism policy constituted discrimination based on marital status. In addition, it should be noted that the situation challenged in the Cutts case involved the transfer of an employee to avoid placing her under her husband's supervision.

III. Commission Policy

In the past the Commission has refused to consider complaints challenging anti-nepotism rules. The basis for this refusal was a 1981 informal memorandum from the Commission's legal advisor in the office of the Attorney General. This one paragraph memorandum states:

"I have not found any case that extends the concept of 'marital status' to . . . antagonism towards the particular spouse, rather than simply because of the applicant's marital status (emphasis in the original). Dictionary definitions would appear to preclude the Commission from making a finding based on the personality of the person to whom the applicant is married."

It is clear from the discussion above that this 1981 memorandum does not provide a sufficiently thorough analysis to be useful as a basis for decision now.

The Commission for Human Rights is charged by the legislature to enforce the New Hampshire Law Against Discrimination, the provisions of which "shall be construed liberally for the accomplishment of the purposes thereof." RSA 354-A:13. These purposes are stated as the elimination and prevention of discrimination, including discrimination in employment. Such discrimination "against any of its (New Hampshire's) inhabitants . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a democratic state . . ." RSA 354A:1.

The District policy regarding the employment of spouses and relatives is as follows:

In the employment and assignment of personnel, close relatives (mother, father, grandparents, grandchild of the employee or the spouse of the employee, and the spouse, son, son-in-law, daughter, daughter-in-law, brother or sister, or a relative living in the immediate household of the employee) may not be assigned to the same school or department within a school, or under the same administrative head. One relative shall not have immediate supervisory responsibility over another. The School Board may waive this policy when no reasonable alternative is available.

This policy forbids the employment in the same school of two persons who are married to each other. There is, however, no indication or evidence that actual conflict of interest will follow automatically when both spouses are merely assigned to the same school. The fact that the District code goes on to state that the School Board may waive the anti-nepotism policy when necessary is an indication that the Board itself is aware that there are situations in which spouses or relatives may work together and no actual conflict occur.

Upon review, the Commission finds the reasoning of the courts in the Kraft and Washington Water Power cases, supra, most persuasive. It is the opinion of the Commission that the anti-nepotism rule presently in use by the District violates RSA 354-A:8 insofar as it forbids two employees who are married to each other from working in the same building, in that such a blanket prohibition constitutes discrimination on the basis of marital status.

This opinion is supported by the decision of the Rockingham County Superior Court in response to Mrs. Branley's request for an injunction against her transfer. In granting that injunction, the Court referred to the provision of RSA 354-A:8 dealing with discrimination based on marital status and stated:

"This Court finds that plaintiff (Mrs. Branley) will recover based on this statute as the terms of her employment have been altered because of her marital status and no bona fide occupational qualification appears to exist."

The Commission recognizes that there may be situations involving the employment of two persons married to each other in which a bona fide occupational qualification would exist that would make it appropriate to restrict or forbid such employment. One such situation would be when one spouse supervises the other. No doubt other such situations may be found. It is within the District's province to promulgate a new rule that would forbid the employment of both spouses only in those situations where such a bona fide occupational qualification would exist.

One other issue which must be addressed is the issue of "reverse discrimination," which the District claims might occur if the Commission invalidates only that part of the anti-nepotism rule covering relationships by marriage while allowing that part covering relationships by blood to stand.

Reverse discrimination is a term used to refer to discrimination against a previously favored group within a particular category. An example in the category of race discrimination would be discrimination against white applicants. There is of course no suggestion that in allowing the employment of a person whose spouse works in the same building the District should discriminate against those who do not have a spouse working in the same building.

As to discrimination against blood relatives it can only be said that the Legislature chose to forbid discrimination based on marital status and not to forbid discrimination based on, for example, sibling status, as it has not chosen to deal with many other types of employment policies. There is, however, nothing to prevent the District from fashioning an anti-nepotism policy that would apply to relatives by marriage or blood only when a bona fide occupational qualification exists.

1. Declaratory Ruling

The Commission rules as follows:

- 1) The District's present policy discriminates on the basis of marital status in violation of RSA 354-A:8 insofar as it has been interpreted to forbid two employees who are married to each other from working in the same building when no bona fide occupational qualification exists to make such restrictions necessary.
- 2) The District should fashion a new policy restricting employment of two persons who are married to each other only in those situations where a bona fide occupational qualification exists, including but not limited to situations where one spouse supervises the other.

Sept 4, 1984
Date

Nancy Richards-Stower
Nancy Richards-Stower

September 19, 1984
Date

Gail F. Paine
Gail F. Paine

AUG. 30, 1984
Date

Barry J. Palmer
Barry J. Palmer

I do not agree with the decision of the majority.

August 25th, 1984
Date

Kenneth E. Fredette
Kenneth E. Fredette

I do not agree with the decision of the majority.

August 28th 1984
Date

Robert J. Normandeau
Robert J. Normandeau