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GARY MERRILL V. FALL MOUNTAIN REGIONAL SCHOOL DISTRICT – SAU 60

EA 0313 – 06
16D – 2006 - 01191

DECISION ON THE MERITS AFTER PUBLIC HEARING

Procedural Background

1. Complainant Gary Merrill, ("Merrill") filed a Charge of age discrimination in employment on September 16, 2006 against Fall Mountain Regional School District – SAU 60, ("SAU"). At the time of the acts complained of, Merrill was employed by SAU as Head Custodian of the High School District. He was first hired by SAU in August, 1999.
2. After investigation, a cause finding resulted in the case being scheduled for public hearing on October 6 & 7, 2009 before Commissioners Cole (Chair), Mirhashem and Boynton. Attorney James Allmendinger of NEA New Hampshire appeared on behalf of Mr. Merrill. Attorney Edward Kaplan of Sulloway and & Hollis appeared on behalf of SAU 60.
3. This case was dually filed with the U.S. Equal Employment Opportunity Commission under the Age Discrimination in Employment Act, or "ADEA", 29 U.S.C. §623 (a) protecting workers forty and older, and NH RSA 354-A:7, which protects individuals of any working age. Prior to the public hearing in this case, the U.S. Supreme Court issued an opinion on June 18, 2009 in *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009), which eliminated the burden-shifting framework in cases under the federal age anti-discrimination law if the plaintiff employee proves a prima facie case of disparate treatment age discrimination. The *Gross* court instead held plaintiffs to a higher burden of

proof: that but for acts of age discrimination, no adverse action would have been taken by the defendant employer.

4. The holding in *Gross* applies to the ADEA federal claims of Merrill. The parties briefed and the Commissioners assigned to this public hearing decided, in a separate decision analyzing that sole issue, that the analysis articulated in *Gross* would not apply to NH RSA 354-A:7. A copy of that decision is released today with this decision on the merits; however, the parties were told prior to hearing there would be a different standard for the state and federal claims so they could plan the introduction of their evidence, witnesses, exhibits, direct and cross examination testimony, pleadings and oral arguments.

Factual Background Relating to Charge Allegations

5. In the spring of 2006, Merrill, a sixty three year old Head Custodian working at SAU, became interested in applying for an internally posted position of Custodian Manager, one position level above his own. Internal candidates were given "preference." He alleged he spoke to William Botting, Facilities Manager, to ask how to apply. Per Merrill, Botting replied he did not want to hire someone fifty eight or fifty nine years old and would instead be looking for someone in their forties. Merrill alleged he told Steven Varone, the District's Business Manager, who was alleged to have said, "He knows better than that, or he shouldn't have said that" or words to that effect. Merrill also alleged that Varone directed Botting to take Merrill's retirement plans into consideration during the application and hiring process.

6. Merrill was not hired for the job. He alleged that his declination letter said he had "a good background" but not the "qualifications" the SAU was looking for in the successful applicant. An individual in the forty to fifty year old age range was hired as Custodian Manager.

Decision of the Commission Based on Facts and State and Federal Rulings of Law

7. After two days of testimony, closing arguments, requests submitted by both parties for findings of fact and rulings of law supported by copies of caselaw, the Commission panel deliberated over the course of several days and made the following decision:

8. Merrill had experience with the SAU which involved scheduling, supervising, and evaluating other custodians. Botting informed Merrill the Custodian Manager's job would be fifty percent desk work and fifty percent work in schools.

9. Varone was responsible to recommend the candidate for hire to the School Board. Varone discussed his concerns about how long Merrill might be available to fill the Custodian Manager position with Botting after Varone and Merrill discussed Merrill's interest in the position. Varone and Merrill's discussion included Varone's surprise in Merrill's interest in the position because he thought Merrill was nearing retirement. Merrill replied he would be eligible to retire in two and a half to three years but wanted to work longer if his health allowed. These conversations occurred before the formal interview process.

10. Although Botting selected the members of the hiring committee for Merrill's desired position (Botting, Angelo Salsi¹ and Richard St. Pierre, the retiring Custodian Manager), the panel found as a matter of fact that Botting did not make the discriminatory age-related comments attributed to him.

11. Out of a total of ten applications, five individuals were interviewed including Merrill, age sixty three, Golec, age fifty seven and Lewis, age forty nine.

12. The panel found the evidence introduced at the hearing that Merrill was unable to answer questions during his interview about vinyl composite tile and the PH scale credible.

13. There was no credible evidence that the hiring committee or decision makers discussed Merrill's age or retirement when deciding who to recommend and ultimately select for the Custodian Manager's position.

14. The panel believed Merrill's testimony that he felt the "job was coming to me." Based on a rating system, following two rounds of interviews, (inside candidates first, then outside) Lewis scored highest, then Golec, then Merrill.

15. The panel found Botting's testimony credible when he said that he gave Merrill a higher score than the other two hiring committee members, and as high a score as the ultimately successful candidate. The hiring committee ultimately recommended Golec for the position. Botting decided that since Golec had no custodial or housekeeping background, he would select Lewis as the successful candidate to present to the School Board.

16. Michael Lewis had provided a resume with dates, positions, company names and cities which could add up to thirteen years of housekeeping experience. Botting checked two references on Lewis before a final offer was made. He was unable to check any more than that because the contact information was missing from Lewis' resume.

¹ Salsi was a long term employee who worked in the maintenance department for the SAU.

17. Merrill had limited custodian manager supervisory experience in that he did not hire or fire. He scheduled crews, provided them with feedback about their work, and if not corrected to his satisfaction, brought it to the attention of Mr. St. Pierre, the retiring custodian manager. Additionally, the panel found credible testimony by Mr. Varone that the quality of Mr. Merrill's custodial work on the schools' floors was deficient.

18. The commission panel credited Varone's testimony that he had concerns Merrill would not "transition to management well". Lewis' substantial claimed managerial experience in housekeeping gave him an edge over Merrill, Lewis' only other competition, as Golec came from a maintenance background.

19. Based on articulated concerns about Merrill's ability to transition to a management level position, and weighing the management experience in housekeeping of the outside candidate Lewis, and the testimony regarding Merrill's demonstrated deficient job performance, Merrill cannot show, by a preponderance of the evidence that but for age-related discrimination, which the Commission panel specifically found lacking in his failure to be promoted to Custodian Manager, under the *Gross* standard, Merrill's age discrimination claim fails.

20. Under NH RSA 354-A:7 Merrill sets forth a prima facie case of failure to promote based on age:

- a) Merrill was in a protected age group;
- b) He applied for and was qualified for the position sought;
- c) Qualifications notwithstanding, he was not promoted;
- d) After rejecting Merrill's candidacy, an individual in an age group substantially younger was selected to fill the sought for position.

Having articulated a prima facie case, a presumption of age discrimination arises. The burden of proof then shifts to the respondent employer (SAU) to articulate a legitimate non-discriminatory reason for the complainant employee's (Merrill's) rejection. If the SAU does this, the presumption disappears, and Merrill must show that the proffered reason for its action was a pretext or cover up for age discrimination.

21. SAU has stated its primary nondiscriminatory reasons for not promoting Merrill were that he would have difficulty transitioning to management, he had less supervisory experience than the hired candidate, and his demonstrated job performance was deficient in the area in which he would be supervising other custodians if he were hired for the position.

22. Merrill alleges in response that Varone asked him about his retirement plans before the formal interview process began. Merrill alleged, the Commission's Investigator found, and SAU conceded during closing argument that Varone told Botting to take Merrill's possible retirement into consideration when deciding who to recommend for hire to the School Board.

23. Merrill argued in closing that NH RSA 354-A:7 (IV) (a) was violated. The statute states:

IV. For any employee to be required, as a condition of employment, to retire upon or before reaching a specified predetermined chronological age, or after completion of a specified number of years of service unless such employee was elected or appointed for a specified term or required to retire pursuant to Pt. II, Art. 78 of the constitution of New Hampshire. It shall not be unlawful for an employer to:

(a) Establish a normal retirement age, based on chronological age or length of service or both, which may be used to govern eligibility for and accrual of pension or other retirement benefits; provided that such normal retirement age shall not be used to justify retirement of or failure to hire any individual; or

(b) Require any individual employee to retire on the basis of a finding that the employee can no longer meet such bona fide, reasonable standards of job performance as the employer may have established.

NH RSA 354-A:7 (IV)(a)(b)(Supp. 2009)

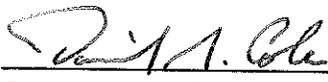
The Commission panel found there had been no evidence introduced during the hearing of the SAU declaring eligibility for retirement as described in (a) above. In addition, the panel concluded that it was legitimate when making plans affecting the future of the SAU workforce to take into consideration how long an individual might serve in his or her position before being replaced. Therefore, Merrill had not met his burden of showing by preponderance of the evidence that the proffered reason of the SAU was pretextual.

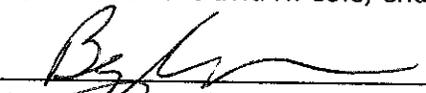
**CASE DISMISSED. NO ATTORNEY FEES OR COSTS.
IT IS SO ORDERED.**

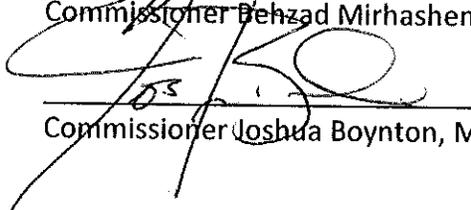
August 24, 2010
Date

August 29, 2010
Date

Sept. 1, 2010
Date


Commissioner David N. Cole, Chair


Commissioner Behzad Mirhashem, Esq.


Commissioner Joshua Boynton, MS