



6th Circuit: More Education and Experience Do Not Mean Superior Qualifications

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By Zack Learman

An employer did not violate the Age Discrimination in Employment Act (ADEA) when it promoted a younger employee over an older employee, even though the younger employee was less educated and had more-limited work experience, according to the 6th U.S. Circuit Court of Appeals.

Plaintiff Regina Provenzano was employed by LCI Holdings Inc. as a supervisor at a Liz Claiborne store. She had a high school diploma and an associate degree in retailing. When Provenzano was 49 years old, Judy Babcock, a co-worker who was 33, was promoted to assistant manager. Babcock lacked a diploma but had been praised for her performance-related virtues.

Throughout 2007 and 2008, LCI was forced to reduce staff and hours due to the economic downturn. Eleven supervisors—more than half of whom were older than 40—were reduced to part-time work, and a 61-year-old store manager was demoted to an assistant manager position. In late 2008, Provenzano was ultimately demoted to a part-time associate position. She resigned and sued, claiming that LCI failed to promote her instead of Babcock because of her age.

The district court dismissed Provenzano's claims. On appeal, the circuit court upheld the dismissal, yet disagreed with the lower court's analysis. Discrimination lawsuits generally entail a burden-shifting analysis. The employee must first establish a prima-facie case. The employer then must provide a legitimate nondiscriminatory justification for its action. Finally, the employee must substantiate that the employer's stated reason is a mere pretext for discrimination.

The 6th Circuit held that Provenzano established a prima-facie case. In this context, Provenzano simply had to prove that a younger employee "of similar qualifications" was promoted. This step, the court articulated, involves a minimal burden, and Provenzano's superior education and experience sufficed to show "similar" qualifications.

At the pretext stage, the court concentrated on LCI's justification for Babcock's promotion: her positive attitude, communication skills, visually appealing displays and store results. Here, Provenzano had to demonstrate either that she was either "a plainly superior candidate" in comparison to Babcock or that she was as qualified or better qualified, plus "other probative evidence of discrimination."

Provenzano asserted that Babcock lacked a high school diploma, supposedly required by the job description, while she had a degree. However, the court noted that the job description listed a diploma among more than 40 skills and qualifications, and there was no evidence that any were mandatory. The court then juxtaposed Babcock's and Provenzano's performance records. Though Provenzano had more work experience, she had been warned and counseled regarding communication and teaming skills, while Babcock had received positive feedback from employees, customers and superiors for her communication skills and positive attitude. Thus, Provenzano was not a "plainly superior candidate."

Assuming that Provenzano was equally qualified, the court considered whether there was "other probative evidence" of age discrimination. Provenzano alleged a pattern: 6 of the 11 supervisors reduced to part-time were over the age of 40; the 61-year-old store manager had been demoted; and at one time all managers had been over 40, but now two were 27 and 34. She also produced e-mails targeting customers desiring a 30-year-old stylistic look instead of a 50-year-old look.

The court held that there was no evidence that the pattern was caused by age discrimination. Some younger managers took over after the death of an older manager. Moreover, nothing suggested that LCI thought that older personnel could not sell the younger look. Indeed, marketing materials described its new customer base as the "perpetual 35-year-old and women 35-54."

Provenzano v. LCI Holdings Inc., 6th Cir., No. 10-1639 (Dec. 15, 2011).

Professional Pointer: Note that a manager effectively documented Provenzano's shortcomings as "communication" and "teaming" issues, where less effective managers might have documented simply an "attitude" problem.

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