NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1083

RICHARD MAGLIONE

vs.

NASHOBA REGIONAL SCHOOL DISTRICT & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Richard Maglione, a former employee of the Nashoba Regional School District (district), timely appeals from an amended summary judgment dismissing his claims.[2] We affirm.

Background. We set forth the facts in their aspects most favorable to Maglione, reserving certain facts for later discussion. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016) (summary judgment); Flomenbaum v. Commonwealth, 451 Mass. 740, 742 (2008) (judgment on pleadings). The district hired Maglione in October 2007 to work as the head custodian at two schools in Lancaster. In June 2013, Maglione applied for

[1] Brooke Clenchy.

[2] In his third notice of appeal Maglione purports to appeal from numerous additional orders and decisions, including an interlocutory order dismissing his "estoppel-contract" claim on the pleadings, all of which are subsumed within the amended summary judgment.

and obtained the position of custodial services manager (CSM). Maglione was the first person to hold the newly-created, administrative-level position that ran for a one-year term. As the CSM, Maglione was responsible for the daily operations and facilities planning for seven schools across three towns, the buildings and grounds, and all school events and activities; he also managed twenty-six custodians. He reported to the director of facilities.[3] He shared office space with the director of facilities and an administrative assistant in the district's central, administrative building in Bolton. The parties' employment relationship was governed by a written work agreement (contract). The district renewed Maglione's contract for consecutive one-year terms on July 1, 2014, and July 1, 2015.

On May 9, 2016, the interim superintendent of schools informed Maglione that the school committee had eliminated his CSM position for the next fiscal year. Following an interview, the interim superintendent confirmed Maglione's appointment to his former position of head custodian in Lancaster, effective July 1, 2016.[4]

[3] Asked to distinguish the two positions, Maglione testified that the director of facilities "was more involved in construction, engineering, contracts, HVAC, electrical, plumbing, [and] building designs."

[4] The head custodian position was subject to a collective bargaining agreement between the district and the Nashoba

When on or about June 1, 2016, the district posted the position of director of facilities management (facilities director), Maglione did not apply because he believed he did not meet the qualifications, including an engineering degree, and certain certifications and licenses. At the request of the interim superintendent, Maglione served on the interview committee, and rated the candidates on a scale of one to five. On July 1, 2016, Brooke Clenchy formally assumed her role as the district's superintendent of schools.

After Clenchy and the interim superintendent conducted a second round of interviews with the finalists for the position of facilities director, Clenchy selected a forty-six year old person. To assist in the transition of the new administration, Maglione agreed to serve in his CSM position during the months of July and August 2016. He agreed to delay the start of his head custodian job based on the interim superintendent's express promise that he would be reassigned to that position if the "interim" CSM position was eliminated at the end of August.

During July and August 2016, Clenchy met with Maglione daily to discuss various topics. Maglione left for vacation on August 13, and returned August 20. By letter dated August 16, 2016, Clenchy formally notified him that the interim CSM

Regional Education Association, and paid less than Maglione's CSM position.

position had been eliminated and that he was being transferred to his former head custodian position in Lancaster, effective September 1, 2016. Before he left for vacation, Clenchy had specifically instructed Maglione that he could not "remove" his papers "from [c]entral [o]ffice" and take them with him to Lancaster. While Maglione was on vacation, the piles of documents stored on or near his desk were boxed and moved to the conference room in order to facilitate the office remodeling and reorganization. Nothing remained in his office space. In an August 16 e-mail, Clenchy informed Maglione that the documents in the conference room were a "concern," and that upon his return, they "need[ed] to have some discussion regarding them."

On August 21, 2016, a Sunday, Maglione entered the administrative building with his son and shredded a number of those documents, leaving three to four trash bags of shredded materials in the conference room. He also left four or five boxes of documents undisturbed in plain view.

On the morning of August 31, 2016, Clenchy met with Maglione, informing him she was "disappointed" and "upset" with him for shredding the documents and that he had put her "in a very difficult position." She acknowledged that he did not "act with any malicious intent." However, she asked him how she was going to explain the shredding to the school committee. At the end of Maglione's usual workday, Clenchy terminated him,

effective immediately. Although Clenchy told Maglione not to return to work, she provided him with his regular salary through October 15, 2016. Maglione was fifty-nine years old at the time. Thereafter, the district permanently filled the head custodian position with an individual who was more than five years younger than Maglione. Because he was terminated before assuming the head custodian position, he was not permitted to grieve the termination.

Discussion. 1. Standard of review. The allowance of a motion for judgment on the pleadings is appropriate where the claim in issue is not legally cognizable. See Okerman v. VA Software Corp., 69 Mass. App. Ct. 771, 774-775 (2007). Summary judgment shall enter when "all material facts have been established and the moving part[ies] [are] entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Our review of both rulings is de novo. See Bulwer, 473 Mass. at 680; Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 212 (2011).

2. Age discrimination claims. We see no error in the entry of summary judgment on the age discrimination claims under G. L. c. 151B.

a. Failure to promote. "Ordinarily, to succeed on a failure-to-promote claim, the plaintiff must show that he or she applied for and was denied a promotion." Charles v. Leo, 96

Mass. App. Ct. 326, 333 (2019). Maglione's claim fails as matter of law for the simple reason that he never applied for the position of facilities director. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991) ("A complete failure of proof concerning an essential element of the [nonmovant's] case renders all other facts immaterial"). Maglione correctly points out that an exception to the rule may be available if an application would have been "futile." Charles, supra. To qualify for this exception, however, Maglione must "show that applying would have been futile because a 'consistently enforced pattern or practice of discrimination' existed which would have resulted in the plaintiff's 'explicit and certain rejection.'" Id., quoting Nguyen v. William Joiner Ctr. for the Study of War & Social Consequences, 450 Mass. 291, 297, 298 (2007).

Here, at no point has Maglione alleged, let alone shown, that such a pattern of discrimination existed at the district. Furthermore, although the long list of qualifications in the job posting might have deterred some potential applicants from applying, Maglione was no ordinary applicant. He cannot claim that the real qualifications were hidden from him. As a member of the interview committee, he had an insider's knowledge that all the qualifications in the job description were not

mandatory.[5] Moreover, at the request of the interim superintendent and Clenchy, he had been "successfully" performing the duties of the facilities director position. In fact, he had received "high praise" from Clenchy for his job performance. Despite this knowledge and success, he never expressed any interest in the position, nor made inquiry about his qualifications. On these facts, no jury question regarding futility is presented.

b. Termination. Even assuming Maglione established a prima facie case of discriminatory termination, he failed to meet his production burden at the third stage of the governing order of proof -- that the reason for the termination was a pretext.[6] See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973); Bulwer, 473 Mass. at 681-683.

We fail to see the "substantial evidence of pretext" claimed by Maglione. To start, the record demonstrates that

[5] Maglione admitted that none of the people he interviewed met all the qualifications listed in the job posting. He also admitted that during the interview process he did not raise any concerns about the candidates' lack of qualifications with Clenchy or the interim superintendent.

[6] Maglione seemingly challenges the defendants' satisfaction of their second-stage burden for the first time on appeal. This he may not do. See Trapp v. Roden, 473 Mass. 210, 220 n.12 (2015). In any event, even if he had raised the issue in the trial court, the defendants easily met their burden, which "is not onerous." Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 442 (1995).

Clenchy consistently stated that she terminated Maglione for insubordination in connection with the shredding incident. To the extent Maglione relies upon statements concerning his "unsatisfactory performance" contained in the defendants' position statement submitted to the Massachusetts Commission Against Discrimination as evidence of pretext, the statements were offered in rebuttal of Maglione's claim that he met his stage-one burden. The nondiscriminatory reason given for the termination was Clenchy's finding that "Maglione's decision to shred the piles of [f]acilities documents that he had been expressly asked to retain [was] insubordinate, conduct unbecoming, and a failure to faithfully execute the duties and responsibilities of his position." That articulation of Clenchy's reasoning was consistent with her explanation to Maglione given on the date of his termination. The allegation in the position statement that Maglione had been insubordinate to the new facilities director during the summer of 2016 supplemented rather than contradicted Clenchy's reason for the termination. On this record, no jury could reasonably find that the nondiscriminatory reason for the termination was false.

There was a dispute of fact as to whether Clenchy bolstered her termination decision by claiming untruthfully that the administrative assistant also told Maglione not to shred the

piles of papers.[7] Given the clear and unequivocal documentary evidence and the nature of Maglione's actions, any dispute was not material and would not support a finding of pretext.

A failure to conduct a fair investigation may support a reasonable inference of pretext, but not on these undisputed facts. Here, Maglione asked Clenchy to investigate and confirm that the "duplicate" purchase orders he shredded were available in two other locations (the business office and on the computer). However, there were more than just purchase orders among Maglione's papers. Maglione admitted that his handwritten notes were in the piles, that there could have been quotes from vendors, and that he did not know "what . . . all [the papers] were."[8] By Maglione's own admission, some of the papers were unrecoverable. Clenchy knew that the purchase orders were maintained in the business office. Clenchy cannot be faulted for refusing to conduct an investigation that at best would have verified that some of the shredded documents were not unique.

We are not persuaded by Maglione's argument that the district was not "damaged in any way." Maglione created

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[7] Maglione argues that Clenchy also falsely stated that the new facilities director told him that the documents were to remain intact. However, the facilities director testified that he had no memory of speaking with Maglione about the issue.

[8] The facilities director testified that "there were all different types of documents" in Maglione's piles (i.e., more than just purchase orders).

needless questions about a potentially sensitive issue. The district was damaged in its ability to be accountable.

Next, Maglione argues that the spoliation of evidence -- the surveillance videotape, handwritten notes taken by the director of human resources, and the trash bags filled with shredded material -- would allow the jury "to draw negative inferences against the defendants." Maglione, however, "rais[ed] the question of spoliation" only in passing in a footnote in his memorandum in opposition to the defendants' motion for summary judgment, without further development. He also did not bring the issue to the attention of the motion judge at the summary judgment hearing, ask for a ruling, or object to the judge's failure to address the issue in his decision. Contrast the case upon which Maglione relies, Gath v. M/A-COM, Inc., 440 Mass. 482, 487-489 (2003) (finding no abuse of discretion in judge's spoliation order). The deposition questions and answers on the topic referred to in Maglione's postargument letter submitted to this court pursuant to Mass. R. A. P. 22 (c) (2), as appearing in 481 Mass. 1652 (2019), did not preserve the issue. The spoliation issue is deemed waived. See Halstrom v. Dube, 481 Mass. 480, 483 n.8 (2019). See also Ciccarelli v. School Dep't of Lowell, 70 Mass. App. Ct. 787, 799 (2007).

Clenchy's hiring practices would not support a reasonable inference of pretext. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 55-56 (2005); McKenzie v. Brigham & Women's Hosp., 405 Mass. 432, 437 (1989). Even if Clenchy waited ten days before terminating Maglione, the delay was inadequate to support a finding that his shredding was not the real reason for his termination.

Maglione offers no comparator evidence, and no evidence of disparate treatment of those in the protected age category, of hostile treatment of Maglione, or of any ageist comments. See Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 398-402 (2016). In sum, the defendants demonstrated that "there are no material facts in dispute" (citation omitted). Bulwer, 473 Mass. at 690.

c. Aiding and abetting. Our conclusion regarding Maglione's underlying G. L. c. 151B claims necessarily resolves this derivative claim against Clenchy individually. See Verdrager, 474 Mass. at 395 n.23; Lopez v. Commonwealth, 463 Mass. 696, 713 (2012); Russell v. Cooley Dickinson Hosp., Inc., 437 Mass. 443, 458 n.7 (2002).

3. Breach of contract claims. We conclude that summary judgment was properly entered on these claims. We have assumed in Maglione's favor that his interim CSM contract continued "through" midnight on August 31, 2016, entitling him to good

cause protection at the moment of his termination.[9] Regarding that defense, Maglione argues that he did not disobey Clenchy's directive because he did not "remove" anything from the central office; neither Clenchy nor anybody else told him not to destroy the documents (and no policy prohibited it); and Clenchy elevated a simple miscommunication as a pretext to breach his contract rights. Maglione knew, however, before "cleaning up" his papers that Clenchy was concerned about the "safely stored" documents and wanted to talk to him about them. He also knew that the most recent director of facilities and others had "cleaned" their computers and shredded files, leaving Clenchy and her administrators, including the new facilities director, with little "legacy" documentation.[10] Yet, he did not call Clenchy before shredding his piles of paper. On these undisputed facts of record, no jury could reasonably find that Maglione's act of shredding did not constitute a removal in violation of Clenchy's order or that Clenchy lacked good cause to terminate Maglione.[11] Because Maglione cannot show a breach,

[9] Under the terms of the contract, Clenchy was permitted to dismiss or discharge Maglione for "good cause," defined as "any grounds put forth by the [s]uperintendent which are not arbitrary, irrational, unreasonable, in bad faith[,] or irrelevant to the operation of the school system."

[10] We note that some of the documents in Maglione's pile might have been subject to the public record law.

an essential element of his claim, summary judgment was properly entered. See Bulwer, 473 Mass. at 690 (stating elements of breach of contract claim).[12]

4. Implied covenant claim. In conclusory fashion, Maglione alleged in paragraph twenty-six of the complaint that the defendants' "conduct" constituted breaches of the implied covenant of good faith and fair dealing. He did not assert a separate count to put the defendants on fair notice of the claim. At the summary judgment stage, he made one passing reference to the claim in his opposition memorandum, and did not address the claim at all at the hearing. The judge understandably did not mention the claim in his decision. In light of the inadequate presentation in the trial court, we decline to consider the claim here. See Halstrom, 481 Mass. at 483 n.8.

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[11] In the interests of justice, the judge allowed the defendants' motion to amend their answer to assert the affirmative defense of good cause. Maglione has not briefed the propriety of that ruling, thereby waiving any objection, a point confirmed at oral argument. See Abate v. Fremont Inv. & Loan, 470 Mass. 821, 833 (2015).

[12] Maglione also presses a second breach of contract claim relating to the head custodian position. However, he never began working in that position. At the time that he was terminated, Maglione's rights were determined by the CSM contract; his termination for good cause under that contract prevented his assuming the head custodian position.

5. "Estoppel-contract" claim. This claim was properly dismissed on the defendants' motion for judgment on the pleadings. As Maglione admits, his contract and "estoppel-contract" claims for relief were pleaded in the alternative, and he waived his appeal from the dismissal of the contract claims against Clenchy. See Zarum v. Brass Mill Materials Corp., 334 Mass. 81, 85 (1956) ("The law will not imply a contract where there is an existing express contract covering the same subject matter").

Amended summary judgment, entered July 15, 2020, affirmed.

By the Court (Henry, Sacks & Singh, JJ.[13]),

Joseph F. Stanton

Clerk

Entered: September 7, 2021.

[13] The panelists are listed in order of seniority.