



Maine Human Rights Commission

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July 14, 2014

INVESTIGATOR'S REPORT

E13-0647

[REDACTED]

v.

[REDACTED]

I. Complainant's Complaint:

Complainant [REDACTED] alleged that Respondent [REDACTED] discriminated against him when it terminated his employment based on his age.

II. Respondent's Answer:

Respondent denied the allegations of discrimination and asserted that Complainant's employment was terminated because he struggled to improve his work performance and customers complained about him.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: April 11, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): November 13, 2013.
- 3) Respondent has 64 employees and is subject to the Maine Human Rights Act ("MHRA"), Age Discrimination in Employment Act ("ADEA"), and state and federal employment regulations.
- 4) Complainant is represented by [REDACTED] Respondent is represented by [REDACTED].
- 5) Investigative methods used: Thorough review of the written materials provided by the parties, requests for additional information to both parties, and an interview of Complainant. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" in this case.

IV. Development of Facts:

- 1) The parties in this case are as follows:

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- a) Complainant worked for Respondent from August 7, 1989 through April 11, 2013¹, as a Commercial Outside Sales Representative. He was sixty-three years old when he was discharged.
 - b) Respondent provides lawn care related commercial equipment and irrigation products and services to its customers.
- 2) Complainant provided the following in support of his position:
- a) Complainant's job involved sales of commercial equipment, irrigation productions, and other products to Respondent's customers (e.g. golf courses and academic institutions). Complainant believed he was qualified for his job and that he performed his job duties satisfactorily.
 - b) Complainant was the oldest of 13 salespeople. Each salesperson had a different territory.
 - c) Until January 2010, Complainant's territory included all of Maine and New Hampshire, and the sale of commercial equipment and products only. A coworker ("Coworker 1"), who is approximately 14 years younger than Complainant, sold irrigation systems in Maine, New Hampshire, and other areas during that time. They worked with the same customers, selling the different lines of products.
 - i. Complainant worked hard to cultivate his customer relationships. Many of his customers were loyal to him and the company, purchasing what he recommended and without questioning the price.
 - ii. Coworker 1 lost three major accounts in Maine prior to the restructuring. The loss of those accounts totaled over three million dollars.
 - d) Respondent expected salespeople to visit its customers in person on a routine basis. Complainant's territory was the largest and most spread out. Complainant essentially lived on the road to ensure he could make it to each of his customer's locations. Complainant's productivity was hindered by the requirement to visit all customers in person.
 - e) Maine's golfing season is shorter than Southern New England's. Complainant believed that Maine and New Hampshire had less money to support the sales expected by Respondent, unlike more affluent areas within Respondent's territories.
 - f) In 2010, Respondent restructured its operations so that each of its salespeople would sell the full range of products (commercial and irrigation). Complainant's territory became Maine only, and he was expected to incorporate irrigation system sales into his sales work. As a result of the restructure, Coworker 1 was assigned New Hampshire, taking over Complainant's commercial sales there. Coworker 1 had no prior commercial sales experience. Complainant had to introduce Coworker 1 to his New Hampshire customers; Coworker 1 did not introduce Complainant to any customers in Maine.
 - g) Two additional salespeople sold irrigation systems and products throughout Respondent's territories.

¹ Complainant worked for a company that was acquired by Respondent beginning in 1972.

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- h) Based on the restructuring, Complainant felt his sales area was cut in half. Complainant voiced his frustration about his reduced territory. Irrigation sales were a smaller component of Respondent's business. Complainant was concerned that Coworker 1 had damaged the relationship with three major irrigation customers in Maine, resulting in a loss of potential customers. Respondent asked Complainant to try to save the accounts lost by Coworker 1.
- i. Complainant was reduced to selling parts and heads for irrigation systems. Respondent also sold used equipment, but the used equipment business was not an easy sale in Maine since most of the good used equipment (located at the Enfield office) was gone before Complainant could tell his customers about the equipment. The distance between the used equipment and his territory impacted his ability to meaningfully sell used equipment. Other companies specialized in selling used equipment that was cheaper than Respondent's used equipment prices, further diluting the market.
 - ii. After the company restructure, Complainant sold one full irrigation system.
- i) Coworker 1 told Complainant that he took commissions and sales money from sales in Maine after the restructure. Complainant knew that salespeople were supposed to take sales and commissions for their territory. Manager told Complainant that salespeople were paid only for items they delivered. Later, Complainant was instructed to deliver items for Coworker 1 in Maine.² Complainant did not see any money from the delivery. When Complainant addressed this with Respondent, he was told to sell the product.
- j) On January 3, 2013, Complainant attended a sales meeting along with approximately ten other employees, including the sales manager ("Manager"). During the meeting, Manager spoke about the failure of a competitor. He correlated their failure to the age of the salespeople. Manager said he did not want that to happen to Respondent, and declared "we intend to get rid of the old, fat, and lazy. Some of us sales guys are really getting up in age".
- i. Another coworker ("Coworker 2") was present at the meeting. She heard Manager say that the sales team was getting "old, fat, and lazy". In addition Manager said, "We have one of the oldest teams in the country and we need to work on improving the way we do things". Coworker 2 was surprised by Manager's statement since 2012 was a record year for the company.
 - ii. Manager said Respondent received complaints about Complainant. Manager did not provide any specific information about the complaints, nor did Complainant know there were complaints until this meeting.³ Respondent did not provide any information to Complainant about the complaints.
- k) On January 29, 2013, during Complainant's annual review meeting with Manager and the Vice President of Irrigation ("VP"), Manager asked Complainant about his health, indicating that Respondent knew he had health issues, and asked if Complainant was looking to slow down and

² Complainant made multiple deliveries of items that Coworker 1 sold and was not paid a portion of the sales.

³ Complainant provided several Customer Satisfaction Surveys praising his work. Respondent did not provide any specific information about the complaints regarding Complainant's work.

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retire. Complainant informed Manager that he was healthier now than when he was twenty years old.

- i. Respondent routinely held annual performance reviews. At these meetings, Complainant discussed his goals for the next year and received feedback from Manager.
 - ii. Complainant discussed his concern that he could not find the extra million dollars in sales that Respondent was looking for in Maine. He asked where VP and Manager thought the additional sales were, and they responded that the sales were in irrigation.
- l) During the same meeting, VP asked how long Complainant intended to work. Complainant explained that he had no plan to retire in the near future. VP and Manager discussed a potential change in the requirement for Complainant to visit golf courses north of Bangor where the customers were far apart and travel was time consuming.
 - m) On April 11, 2013, Manager called Complainant and told him that his employment was terminated because his sales numbers were too low and Respondent received complaints about Complainant.
 - n) Complainant acknowledged that he typically met 75 percent of his annual sales performance goals.
 - o) Complainant's replacement ("Coworker 3") was approximately 16 years younger than Complainant.
- 3) Respondent provided the following in response to Complainant's allegations:
- a) Respondent is the exclusive representative in New England selling a brand of golf irrigation products, commercial equipment, landscape, contractor equipment, and consumer products.
 - b) In 1989, Respondent took over the Maine distributor where Complainant worked.
 - c) Complainant sold commercial equipment in several territories during his tenure. Another salesperson covered similar territories for irrigation products, often visiting the same customers.
 - d) In response to economic crisis that began in 2008, Respondent laid off two salespeople. Both were younger than Complainant.
 - e) On January 1, 2010, Respondent reorganized its workforce to increase efficiency combining the roles of commercial sales and irrigation sales so that there was only one salesperson in each territory. Respondent believed this change reduced travel time for its salespeople. The reorganization affected all salespeople, not just Complainant and Coworker 1. Two salespeople remained exclusively irrigation salespeople for large projects.
 - i. Respondent provided in-house training beginning in 2009 through 2012 to salespeople like Complainant to educate them on irrigation systems. Complainant also received training on irrigations systems at trade shows.
 - f) Other salespeople had smaller geographical territories after the reorganization.

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- g) Manager and VP believed Complainant resisted the reorganization and that Complainant did not seem to understand or want to understand the irrigation product line.
- h) Customers complained that Complainant said he had "no interest in irrigation" and that Complainant did not treat them well with the reorganization.
- i) After the reorganization, Manager and VP met with Complainant on numerous occasions, as part of his annual reviews, to discuss his poor sales and the transition to irrigation system sales. Respondent believed Complainant had the same earning capacity before and after the restructuring. They saw that he doubled his product line with irrigation systems to sell in his smaller territory.
- j) Complainant was the lowest performing salesperson in 2011 and 2012.⁴
- k) Respondent prepared a Golf Market Analysis in early 2013 identifying golf courses that were potential sales sources in Maine. Respondent believed the market had potential for growth.
- l) By April 2013, it was clear that Complainant's performance was not improving.
- m) Manager denied making any comments about age on January 3, 2013. Manager did inquire about Complainant's health because of some prior injuries. He did not recall if he inquired about retirement.
- n) Complainant received no reprimands, warnings, or disciplinary actions prior to his discharge. No other salespeople in Complainant's district/region were given reprimands, warning, or disciplinary action in the last two years.
- o) Coworker 3 was hired three days after Complainant's termination from employment. Coworker 3 still works in the Maine territory for Respondent.

V. **Analysis:**

- 1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides that it is unlawful "to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment" because of age. *See* 5 M.R.S. § 4572(1)(A).
- 3) Here, Complainant claimed that he was discharged from employment because Respondent wanted to replace him with someone younger. Respondent denied discrimination, and stated that Complainant was

⁴ Respondent provided a spreadsheet of the overall sales/earnings for individual salespeople from 2006 through 2012 showing that until 2011 and 2012 Complainant was not the lowest earner. In fact Complainant out-performed Coworker 1 in 2010, the first year of the restructure. In 2009, Complainant was the second lowest earner, with three coworkers earning within \$5,000 of Complainant's annual earnings.

discharged because of his failure to meet performance expectations and because it received complaints about Complainant.

- 4) Because here there is no direct evidence⁵ of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 5) Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) he performed his job satisfactorily, (2) his employer took an adverse employment decision against him, (3) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).
- 6) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262.
- 7) After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. See *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet his overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. See *City of Auburn*, 408 A.2d at 1268.
- 8) Complainant has established a prima facie case for age discrimination. Complainant has shown he performed his job satisfactorily, his employment was terminated, Respondent hired a replacement (Coworker 3) for Complainant's position, and Coworker 3 was 16 years younger than Complainant.
- 9) Respondent provided a legitimate nondiscriminatory reason for discharging Complainant: he failed to meet his performance expectations and Respondent received complaints about Complainant.
- 10) At the final stage of the analysis, Complainant has demonstrated that Respondent's reason was false or irrelevant and that his age was a deciding factor in Respondent's decision to discharge him:

⁵ "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination. . . ." *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. Although it is a close question, Manager's statement about replacing the "old, fat, and lazy" is contested, and is not considered direct evidence of discriminatory intent in the circumstances of this case.

- a. Complainant worked for Respondent for several decades. For the majority of the years from 2006 through 2012, Complainant was not the lowest income earner (based on commissions on top of his base salary) for Respondent. Respondent alleged that VP and Manager met with Complainant and discussed his sales as part of his annual reviews, but Complainant received no warnings, reprimands, or disciplinary action regarding his sales performance.
- b. After the reorganization, Respondent believed that Complainant should have increased his earnings since Complainant was responsible for a smaller overall territory. To bolster this theory, Respondent alleged that Complainant had the highest number of golf courses in his region, so he should have been able to make more sales. Respondent also required its salespeople to travel, in person, to visit its customers. Complainant had the largest geographical area to cover to reach his customers. There is no evidence that Respondent took into account the amount of travel time required to reach all of its customers in Complainant's territory or the relative available funds of the customers based on the territories as part of its analysis.
- c. Respondent also alleged that it received complaints about Complainant, yet provided no specific information about those complaints. Complainant was not disciplined, counseled, or reprimanded as a result of those complaints.
- d. Complainant was the oldest member of the sales team. His replacement was 16 years younger than him. Respondent acknowledged they hired Coworker 3 as Complainant's replacement.
- e. Coworker 2 recalled Manager saying the sales team was getting "old, fat, and lazy" on January 3, 2013, which corroborates Complainant's allegation. That same month, Manager acknowledged that he inquired about Complainant's health during the annual review, but does not recall inquiring about retirement. VP did not respond to the allegation that VP inquired about how long Complainant intended to work. Less than three and a half months after the annual review, Complainant's employment was terminated. The series of events and closeness in times tends to show that Complainant's age was a factor in the decision to terminate his employment.

11) Discrimination on the basis of age is found.

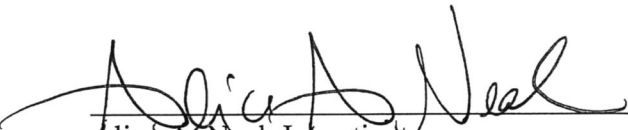
VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

- 1) There are **Reasonable Grounds** to believe that [REDACTED] discriminated against [REDACTED] by terminating his employment on the basis of his age; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneirson, Executive Director



Alice A. Neal, Investigator