

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

EARL M. LIAS and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,

Complainants

Against

Docket No. 97-BEM-3752

STERLING CORRUGATED
BOX COMPANY, INC.

Respondent

Appearances: Robert W. Galvin, Esq. for Complainant Lias
Robert W. Walker, Esq. for Respondent

DECISION OF THE HEARING OFFICER

PROCEDURAL HISTORY

On September 9, 1997, Earl M. Lias (“Complainant”), filed a complaint of discrimination with the Massachusetts Commission Against Discrimination (“Commission”), charging Sterling Corrugated Box Co., Inc. (“Respondent”) with age discrimination in violation of M.G.L. c. 151B, sec. 4. para. 1B. The charge of discrimination results from Complainant’s contention that he was fired at age sixty-one for pretextual reasons and replaced by a substantially younger individual.

Probable cause was found to support the allegations. Efforts to conciliate the matter failed and the case was certified for submission to public hearing on July 2, 2001. A public hearing was held on June 12, 2002. The parties submitted ten joint exhibits.¹ The Complainant testified on his own behalf as did Lawrence M. Whiting and Will Walbridge. Testifying for Respondent were: Seymour Blum; Robert Stroyman; and Virginia Barrett.

Counsel submitted proposed findings of fact and rulings of law. To the extent the parties' proposed findings are not in accord with the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with my findings, such testimony is rejected. Based on all the credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

I. FINDINGS OF FACT

1. Complainant, Earl M. Lias, was born on March 7, 1936. He worked twenty-nine and one-half years for Respondent Sterling Corrugated Box Co., Inc. at 91 Sprague Street, Hyde Park, MA. He was hired in 1968 as a truck driver. After a matter of months, he became Respondent's warehouse manager, a position he occupied until he was terminated in May, 1997 at age sixty-one (61). As warehouse manager, Complainant was in charge of accepting deliveries from suppliers, overseeing the unloading of trucks, coordinating deliveries to

¹Joint Exhibit 10 consists of three subparts (10A-C).

customers, and supervising truck drivers and forklift operators. He reported to Respondent's owner, Seymour Blum, who was born in 1916.

2. Respondent Sterling Corrugated Box Co., Inc. was a small privately-held company that supplied and stored corrugated boxes. It was sold to Bicknell & Fuller Paper Box Company in November, 1997. Prior to its sale, the company employed approximately fifteen persons. The company did not have a retirement plan for its employees, but it did have a profit-sharing plan.
3. The company operated with three co-equal departments: the administrative office; the sales office; and the warehouse. Complainant was in charge of the warehouse. Virginia Barrett, the office manager, was in charge of the administrative office. Robert Stroyman was in charge of the sales office. The company owner, Seymour Blum, spent up to six months a year in Florida. While he was away, he depended on Barrett to run the office, on Stroyman to run the sales department, and on Complainant to run the warehouse.
4. Barrett commenced employment with Respondent in 1985 as a bookkeeper, but subsequently became the office manager. Like Complainant, Barrett was born in 1936. Her primary duties were to take orders to the warehouse, to respond to customer calls and complaints, and to handle all bookkeeping functions. Barrett testified that for many years her relationship with Complainant was reasonably good but for approximately a year prior to the sale of the company there was a

change in Complainant's attitude. Barrett testified that Complainant was not cooperative with her and when she attempted to discuss Complainant's attitude towards her, he would walk away or refuse to respond. According to Barrett, she told Blum that she had a problem with Complainant's attitude.

5. Stroyman commenced employment with Respondent in 1990 or 1991. He was in charge of sales. He was born on September 26, 1943. According to Stroyman, he was aware that there was a "problem" between Barrett and Complainant. Stroyman described Barrett as "not the easiest person to get along with." Tape 4. Stroyman testified that Complainant was well-liked and respected by everyone in the company except Barrett. Tape 4.

6. During his employment with Respondent, Complainant never received any warnings or reprimands for misconduct although Blum may have told Complainant, on occasion, that he and Barrett needed to reconcile their differences. Blum testified that he orally "reprimanded" Complainant for the way that he interacted with Barrett, but I construe these interactions to be non-disciplinary in nature. Blum testified that except for the problems between Complainant and Barnett, Complainant did a "very fine job." Tape 5. Blum gave Complainant yearly bonuses. On occasion, Blum sent Complainant congratulatory notes for performing well. Blum never told Complainant that his job was in jeopardy due to his interactions with Barrett.

7. Truck driver Lawrence Whiting testified that Complainant was a model employee who would do anything for Blum, including coming into work on weekends and on his days off to shovel snow and perform other functions.

8. Approximately two weeks before Complainant was terminated, Stroyman arranged a lunch with Barrett and Complainant. The purpose of the lunch was to discuss the relationship between Barrett and Complainant. During the lunch, Virginia Barrett enumerated some of her complaints including her feeling that some of the drivers had been impolite to her on the company walkie-talkies. Complainant responded that he would speak to the drivers.

9. During the week of May 9, 1997, Blum asked Complainant to develop a set of workplace rules for the warehouse. Complainant consulted with company counsel and developed a draft set of rules for the warehouse. The rules were typed up by someone in the office. Joint Exhibit 3.

10. On May 9, 1997, Blum asked Complainant to come to his office at 3 p.m. At the meeting Blum told Complainant that, “this is one of the most difficult days of my life” and “Earl, I am going to have to let you go.” When Complainant inquired why he was being let go, Blum stated that there was an “undercurrent of hostility” in the company. Blum did not give any specific examples at the time. Complainant asked Blum for a more specific explanation and Blum asked Virginia Barrett to come into the office.

11. During the portion of the meeting that Barrett attended, she was asked by Blum to be specific about her complaints. She testified that she did so. After she left the office, Blum asked Stroyman to come into the office. Stroyman offered no examples of any misconduct on Complainant's part. Complainant was directed by Blum to turn over his keys and leave. Complainant was driven home by truck driver Will Walbridge.

12. Will Walbridge was selected by Blum to succeed Complainant as warehouse manager. At the time, Walbridge was in his early to mid-forties and had worked for the company as a truck driver for approximately three years. Blum replaced Complainant with Walbridge rather than Lawrence Whiting, a truck driver who was fifty years old at the time and had been with the company for twenty-eight years. Blum testified that he did not promote Whiting because he did not think that Whiting had sufficient arithmetic skills to perform the job and because Blum would have had to hire a new truck driver to replace Whiting if Whiting were brought into the warehouse on a full-time basis. According to Complainant, however, Whiting typically filled in as warehouse manager when Complainant went on vacation and "the place ran just fine." Tape 3.

13. Prior to the date of Complainant's termination, Blum began negotiating the sale of his company to Bicknell & Fuller Paper Box Company. The sale was consummated on November 3, 1997. Following the sale, the company's name

was changed from Sterling Corrugated Box Co., Inc. to Sybox, Inc. Blum made arrangements for Barrett and Stroyman to remain on the Sybox payroll for at least two years. Blum also remained affiliated with Sybox for a period of time. Bicknell & Fuller replaced Walbridge with the company's own warehouse manager.

14. Blum testified that he may have told Respondent's customers and suppliers that Complainant had "retired" from the company. Blum testified that he terminated Complainant because he was "afraid" Barrett would quit if he didn't let Complainant go. Blum felt Barrett was a more valuable employee than Complainant because of her relationships with customers and her ability to run the business. Blum testified that the problems between Complainant and Barrett were not insurmountable until the "end" and he conceded that his concern about Barrett quitting was based on an "inference" only. Tape 5. Barrett denied ever giving Blum an ultimatum regarding her employment or that she intended to leave if Complainant were not fired.

15. At the time of Complainant's termination, he earned \$980.00 per week, with fully-paid family health coverage, four weeks of vacation annually, the use of a company truck and gas card, annual holiday bonuses, and contributions to a company profit sharing plan. Complainant worked twenty-two weeks in 1997. When he was terminated, Complainant received proceeds from the company's

profit sharing plan in the amount of \$282,657.50. The company's profit sharing plan lists Seymour Blum and Virginia Barrett as its trustees. Joint Exhibit 7.

16. Following his termination, Complainant received unemployment compensation payments in 1997 totaling \$10,860.00.
17. Complainant suffered from sleeplessness, anxiety, and depression after he lost his job. He worried about how he would support his family and pay for a new car which he purchased the Sunday before his termination.
18. During a visit to an unemployment office in July 1997, Complainant suffered a panic attack requiring medical attention on July 25, 1997 from Dr. Mark Bright, his primary care physician. Joint Exhibit 1. Complainant was prescribed blood pressure medication, a tranquilizer and/or an antidepressant. Complainant received follow-up medical care on August 28, 1997 and on September 26, 1997. Complainant was treated for elevated blood pressure on October 14, 1998, October 21, 1998, November 6, 1998 and November 16, 1998. He received a stress test and ultrasound. Complainant's out-of-pocket medical expenses totaled \$462.31. Joint Exhibit 8.
19. Complainant was unable to pursue jobs involving truck driving because of the medications he was taking. Complainant sought employment with the following businesses: Avon Corrogated; South Boston Ice Cream; New England

Scaffolding; D'Angelos; Unisource; Boco; Miskinis Cars; and Wal-Mart. In January 1998, Complainant accepted employment as a grocery bagger at Shaw's Supermarkets for \$6.15.00 per hour in order to procure health insurance benefits. In 1998, Complainant earned \$3,880.22 from Shaws, elected to receive Social Security benefits in the amount of \$8,512.00, and took a partial distribution from a rollover account made up of his Profit Sharing proceeds. Complainant's wage earnings for 1998 were \$12,392.19.

20. In 1999, Complainant earned \$3,804.00 from part-time employment at Decas Cranberry in Carver as a forklift operator earning \$8.75 per hour and working with his wife making dolls in a craft business. Complainant took a further distribution from his rollover account made up of his Profit Sharing proceeds

21. Since his termination from Respondent, Complainant has lived on compensation from part-time employment and the craft business, Social Security, and withdrawals from his rollover account.

22. Prior to being terminated by Respondent, Complainant thought about retiring at sixty-two or sixty-five but had no specific plans to do so.

III. CONCLUSIONS OF LAW

M.G.L. 151B sec. 4(1B) makes it unlawful to discriminate in employment on the basis of age. The statute protects persons age forty and over. Complainant alleges that

Respondent discharged him because of age. He also claims that Respondent sought to rid itself of his salary in order to enhance efforts to sell the company.

In order to establish a prima facie case of age discrimination in employment, Complainant must demonstrate that he is a member of a protected class who was capable of performing the responsibilities of his job, was terminated and was replaced by someone substantially younger. See Knigh t v. Avon Products, Inc., 438 Mass. 413 (2003); Murphy v. Pub Ventures, 15, MDLR 1098, 1110-11 (1993). Complainant was a member of a protected class by virtue of his age, sixty-one (61). His ability to perform as warehouse manager is not in dispute since even Seymour Blum, who fired Complainant, admitted that Complainant did a “fine job.” Complainant was replaced by Will Walbridge, a man fifteen to twenty years Complainant’s junior. These factors are sufficient to establish a prima facie case of age discrimination.

Once Complainant establishes a prima facie case of age discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its conduct. See Abramian v. President and Fellows of Harvard College, 434 Mass. 107, 116-117 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). According to Respondent’s owner Seymour Blum, he terminated Complainant’s employment because of Complainant’s inability to get along with Virginia Barrett, whom Blum characterized as a more valuable employee. Blum testified that he was concerned that Barrett would quit if Complainant remained on the job.

I will assume, for purposes of analyzing Complainant's age discrimination claim, that Respondent has articulated a legitimate, non-discriminatory reason for its conduct, although the termination of a twenty-nine and one-half year employee because of a personality conflict with another employee is facially suspect. The burden of production next shifts to Complainant, who must show by a preponderance of the evidence, that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian, 432 Mass. at 117.

Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. For the reasons set forth below, Complainant has succeeded in satisfying this burden.

The evidence establishes that Respondent exaggerated both the nature of the personality conflict between Complainant and Barrett and the steps taken to address the problem. Blum testified that he believed Barrett would leave the company if Complainant were not fired. However, Barrett denied ever giving Blum such an ultimatum or ever implying that her continued employment was premised on Complainant being terminated. Blum's assertion that he reprimanded Complainant on numerous occasions for his treatment of Barrett is also untrue. Blum may have discussed with Complainant the fact that he and Barrett did not work smoothly together, but Blum never reprimanded the Complainant. Blum admitted that he never told Complainant that his job was in jeopardy. In fact, during the week prior to the discharge, Blum had Complainant

draft rules of conduct for warehouse employees. On the day of the discharge, Blum was unable to give Complainant specific reasons for taking such drastic action. Thus, the termination was imposed without any warning whatsoever, in order to address a non-existent ultimatum, and without a satisfactory explanation.

It is also significant that the termination was imposed on an employee with a spotless record of almost thirty years of devoted service to the company. Barrett conceded that, except for 1996-7, her relationship with Complainant was reasonably good. Stroyman described Complainant as well-liked and respected by everyone whereas he described Barrett as “not the easiest person to get along with.” Blum acknowledged at the hearing that Complainant was a “fine” employee. Whiting characterized Complainant as a “perfect” employee who was devoted to Seymour Blum and would do anything for him. It defies credulity that Blum would fire an individual of Complainant’s loyalty and quality on the basis of vague accusations, such as having a “negative attitude” towards Barrett.

The pretextual nature of Respondent’s reason for terminating Complainant and the fact that Complainant was replaced by a substantially younger employee leads to the conclusion that the real reason for the discharge was age discrimination. Fifty-year old employee Lawrence Whiting testified that he always expected to succeed Complainant as warehouse manager based on his twenty-eight year tenure in the warehouse² yet he was overlooked in favor of a three-year employee in his early to mid-forties. To be sure, Blum was in his eighties at the time he fired Complainant. It is also true that Blum

² Whiting’s age and years of service are computed as of 1997, the year of Complainant’s termination.

continued to employ Virginia Barrett who was the same age as Complainant.

Nonetheless, a preponderance of the evidence supports the conclusion that Blum was motivated to discharge Complainant because of factors relating to Complainant's age. One such factor was the determination that the warehouse manager should be a younger man. The replacement of Complainant by an individual fifteen to twenty years younger and far less qualified, provides ample support for this conclusion.

A second factor supporting the conclusion of age discrimination is evidence that Blum was concerned that Complainant's income and benefits would interfere with the sale of the company. The second factor relies on salary as a proxy for age, recognizing that at age sixty-one, Complainant had accrued a substantial salary and benefits package during his twenty-nine and one-half years on the job.³ Complainant's three decades of seniority distinguishes this case from Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) in which a ten-year service requirement for vesting in a pension plan was held not to violate the ADEA because it was considered to be analytically distinct from age. Even if the facts were comparable, however, this case is brought under state, not federal, law, and therefore Hazen does not control the outcome here.

There is evidence in the record that prior to his discharge, Complainant had discussed retiring at age sixty-two (62) or sixty-five (65). Complainant admits to thinking about retirement, but testified credibly that he had made no decision about when to stop working. The fact that Complainant bagged groceries and operated a forklift

³ I have discounted allegations made in Complainant's post-hearing brief that Blum requested Complainant and other employees to use profit sharing funds to purchase the company. No evidence relating to these allegations was presented at the public hearing

following his termination as warehouse manager lends support to the contention that he was capable of continuing to work in a physically demanding job. Based on these considerations, I conclude that Complainant would have continued to work for the successor company had he been given the opportunity to do so.

IV. DAMAGES

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. ch. 151B and to render the injured Complainant whole. These remedies include damages for lost wages and benefits and for emotional distress that the Complainant has suffered as a direct result of Respondent's discriminatory actions. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997). Based on the evidence in the record, Complainant is entitled to back pay commencing on his last day of employment through the end of 1999.⁴ In 1997, Complainant suffered lost compensation in the amount of \$18,540.00 (30 weeks of unemployment @ \$980.00 per week less \$10,860.00 in unemployment wages). In 1998, Complainant suffered lost compensation in the amount of \$38,567.81 (the difference between Complainant's salary of \$50,960.00 and compensation obtained from other earnings). In 1999, Complainant suffered lost compensation in the amount of \$47,156.00. Altogether, Complainant is entitled to damages for back pay in the amount of \$104,263.81.

⁴ Even though Complainant had no specific plans to retire in 1999, I conclude that his back pay damages end in that year because Sybox only guaranteed two years of continued employment to his co-managers at Sterling.

The burden of proving mitigation lies with Respondent. See J.C. Hillary's v. MCAD, 27 Mass. App. Ct. (1989); Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 132 (1985). To prove a failure to mitigate employment damages, a respondent must show that: 1) one or more comparable employment opportunities were available to a complainant in a location as convenient as or more convenient than the place of former employment; 2) the complainant reasonably made no attempt to apply for any such job; and 3) it was reasonably likely that the former employee would obtain one of those comparable jobs. See Thompson v. Westinghouse, 12 MDLR 1261, 1335 (1990). Other than the mitigation efforts cited above, there is no evidence of any additional offsets against Complainant's claim for lost wages. See Northeast Metropolitan Regional-Vocational School District v. MCAD, 31 Mass. App. Ct. 84 (1991).

Complainant is also entitled to an award of monetary damages for the emotional distress he suffered as a victim of Respondent's unlawful discrimination. See College-Town v. MCAD, 400 Mass. 156 (1987); J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). Such a damage award does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of his own distress. See Stonehill College v. MCAD, SJC 09112 (May 6, 2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). To sustain an award for emotional distress, permissible considerations include such factors as the nature, severity, and duration of Complainant's emotional distress. See Baldelli v. Town of Southboro Police Dept., 18 MDLR 167, 169 (1996). Complainant testified that following his termination, his "whole world came tumbling down." Tape 2.

Complainant suffered from sleeplessness, anxiety, and depression after he lost his job. He worried about how he would support his family and pay for a new car which he purchased the Sunday before his termination. During a visit to the unemployment office in July 1997, Complainant suffered a panic attack requiring medical attention on July 25, 1997 from Dr. Mark Bright, his primary care physician. Joint Exhibit 1. Complainant was prescribed blood pressure medication, a tranquilizer and/or an antidepressant. Complainant received follow-up medical care during which he was treated for elevated blood pressure. Following his termination, Complainant was forced to take menial jobs such as bagging groceries in order to obtain health insurance. I conclude that Complainant is entitled to \$100,000.00 in emotional distress damages and an additional \$462.31 in out-of-pocket medical expenses for office visits and prescriptions.

V. SUCCESSOR LIABILITY

The next issue which must be addressed is whether Sybox, Inc. is a successor to the age discrimination claim against Sterling Corrugated Box Company, which no longer operates as a business. The case has been defended by Sybox, Inc., which submitted a post-hearing memorandum characterizing itself as “formerly” Sterling Corrugated Box Co. Such a defense indicates that Sybox considers itself to be a successor to the claim against Sterling.

A successor corporation generally does not assume the liability of its predecessor corporation, but Massachusetts courts consider several factors in determining whether to

depart from the general rule. Successor liability is imposed where: 1) the successor expressly or impliedly assumes liability of the predecessor; 2) the transaction is a de facto merger or consolidation; 3) the successor is a mere continuation of the predecessor; or 4) the transaction is a fraudulent effort to avoid liability. See Ihemdi v. Caremark, Inc., 20 MDLR 114 (Kaplan, 1998) quoting Cargill, Inc. v. Beaver Coal & Oil Co., Inc., 424 Mass. 356 (1997). Several of the above criteria apply to this case. First, Sybox, Inc. has impliedly assumed liability by defending this action. Second, the sale of the company appears to be a continuation of the predecessor based on evidence that Sybox maintained the operations of Sterling and retained as managers Virginia Barrett and Robert Stroyman.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G.L.ch. 151B, sec. 5, Respondent and/or its successor is ordered to CEASE and DESIST from engaging in acts of age discrimination and shall pay to Complainant, Earl M. Lias, within sixty (60) days of receipt of this decision:

- (1) the sum of \$ 104,263.81 lost wages and \$462.31 in out-of-pocket medical expenses plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(2) The sum of \$ 100,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complainant was filed until aid or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

SO ORDERED this 25th day of May, 2004.

Betty E. Waxman
Hearing Officer