

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

---

MCAD & FRED BAILEY,  
Complainants

v.

DOCKET NO. 04-BEM-00107

DUPLITRON,  
Respondent

---

Appearances:

Lawrence Siskind, Esquire for Fred Bailey  
Joseph Kelleher, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 21, 2004, Complainant Fred Bailey filed a complaint with this Commission charging Respondent, Duplitrion, Inc., with discrimination on the basis of age in violation of M.G.L.c.151B, § 4(1B). The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified to public hearing. A public hearing was held before me on June 2-5, 2008. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

## I. FINDINGS OF FACT

1. Complainant Fred Bailey resides in Brockton, Massachusetts. He was born on August 10, 1933, and is in the protected class of individuals over the age of 40.

Complainant has worked in the office equipment business since 1959, primarily as a salesman.

2. Respondent Duplitron is a company selling and servicing copier and fax equipment and supplies with offices in Brockton, Massachusetts and New Jersey. Richard Hassler, whose date of birth is December 28, 1960, is Respondent's president. Norman Kravetz, who is in his late 50s, is the company's vice president and general manager and Joseph DeSantis is Respondent's vice president of sales.<sup>1</sup>

3. John Meehan was, at all times relevant to this matter, employed as controller of Respondent. In addition, he managed the accounts payable/receivable and supplies and supervised the employees of those departments. Meehan reported to Hassler, spending equal time in Respondent's New Jersey and Massachusetts offices. Meehan worked every other week at the Brockton location. Every month he compiled sales, expense and profit figures in a report to Hassler.

4. In September 1994, at the age of 60, Complainant was hired as a salesman in Respondent's Brockton office. At the time of his hire he had 40 years of experience in the business and had many contacts in the area. Hassler testified that DeSantis recommended Complainant for employment, telling Hassler that Complainant "sells a ton." Hassler met with Complainant, liked his resume and based on Complainant's assertion that he could sell a half million worth of product in the next year, immediately hired him to work on obtaining "major accounts," such as the Commonwealth of

---

<sup>1</sup> Kravetz and DeSantis did not testify at the public hearing

Massachusetts. Hassler testified that at the time the company had no one handling large accounts and Complainant was a “perfect fit” for the company.

5. Complainant worked 40 hours per week and received a salary of \$500 per week. He was entitled to commissions, but did not receive any commission during the time he was a salesman because he made no sales. He was also entitled to paid vacation and sick days. Complainant’s duties were to contact potential accounts and develop a rapport with the buyers, demonstrate equipment and bid on contracts. Complainant testified that at first he went into the field with Hassler and brought Kravetz in on other accounts.

6. Complainant testified that the copier business is highly competitive and it is a buyer’s market in which several companies compete to sell the same products. He stated that successful sales work requires bidding, pricing and constantly keeping in touch with customers. According to Complainant it can take up to 25 years to obtain a contract.

7. Complainant testified that nine months working as a salesman, Hassler assigned him to a new position of “sales support,” a position that was created for him because of his industry contacts and experience. In the sales support position, Complainant assisted Steve Woolner in Respondent’s document imaging division as well as other sales staff by telemarketing, finding prospects, leading sales staff to the prospects, accompanying sales staff into the field and making presentations with the products. After the change to sales support, Complainant’s salary remained the same; however his name did not appear on sales documents and he was no longer entitled to receive commissions. Hassler disputed that the sales support position was created only nine months after Complainant was hired by Respondent and believed it was two years

after he began working there. Hassler stated that Complainant continued to work on major accounts throughout his employment, but when the sales support position was created he no longer worked exclusively on major accounts. Hassler testified that when sales support was created, Respondent's sales were excellent. I credit Hassler's testimony.

8. Complainant testified that during his tenure at Respondent he succeeded in getting Respondent on the Massachusetts bid list, which enabled Respondent to bid for contracts with the cities and towns of Massachusetts and ultimately to obtain contracts with several cities and towns. In addition, through his contact with a consultant, Leon Hebert, Complainant was able to assist Respondent in obtaining contracts with many insurance companies including Hingham Mutual and Holyoke Mutual. In addition, a year or two after Complainant left Respondent, Woolner sold a system to AIM Mutual for \$250,000. Hassler acknowledged that Complainant did a great job compiling the bid for the state contract. (Testimony of Complainant; Testimony of Hebert; Testimony of Woolner)

9. Steven Woolner was employed by Respondent selling document imaging software, and performing training, installation and support. He currently runs his own technology development and sales business. Woolner testified that during the time Complainant was assigned to sales support, Complainant taught him a lot and he could not have survived at Respondent without him. He stated that Complainant always followed up on accounts, was available to him and generous with his time. Woolner testified that he would never have known about AIM had Complainant not introduced him to Lee Hebert. He eventually closed the deal with AIM through Hebert in December

2004; more than a year after Complainant left the company. Complainant also arranged an appointment for Woolner with Holyoke Mutual that resulted in a \$30,000 deal and a commission for sales person Dave Kurlander. Complainant helped Woolner get on the list of vendors eligible for the Commonwealth's bidding process which according to Woolner was a windfall for Respondent. Kravetz and other sales people such as Kurlander, and Laurie Levine were assisted by Complainant. Woolner acknowledged that no sales support person was hired after Complainant's termination. I credit Woolner's testimony.

10. Complainant testified that Marty Wakstein, who was in charge of Respondent's networking and computer system, made offensive age-related comments to him. On occasion Wakstein would stop by Complainant's desk and make comments such as, "Hey Fred where's your wheelchair?" or "When are you going into the nursing home?" or "Put your teeth in your head, old man." Complainant said he took these remarks "with a grain of salt," and told Wakstein to "knock it off," and to stay away from him. The remarks "irritated" him because, in his words, it's "not something you'd say to anyone or your own mother or father." Woolner corroborated that Wakstein made derogatory remarks about Complainant's age.<sup>2</sup> Complainant never complained to Hassler or anyone in management about these age-related remarks<sup>3</sup> and Hassler testified credibly that he was unaware of any issues concerning offensive age related comments by Wakstein.

---

<sup>2</sup> On one occasion, long after Complainant had left the company, Woolner complained to Hassler that Wakstein had teased him about his weight.

<sup>3</sup> There was some dispute as to whether Wakstein was a contractor or an employee of Respondent. However, Wakstein's employment status is irrelevant to the outcome of this case.

11. According to several witnesses, Respondent was in good financial condition until the terrorist attacks of September 11, 2001. Subsequently business began to decline and in early 2002 Meehan recommended a wage freeze. Meehan testified that in 2002 Respondent's sales revenue dropped, there was a substantial drop in cash flow, and he downsized the office staff. The number of copiers and faxes Respondent had in the field decreased, requests for supplies were down and document imaging was losing money. In early 2003, Respondent lost a long-standing major client, Thompson Financial. At this time business became more competitive and profit margins were smaller. Meehan told Hassler that Respondent had to reduce spending, look at staffing levels in all the departments and make "hard decisions," and reduce any non-revenue generating positions in sales. In addition to losing its account with Thompson Financial, Respondent lost its account with Bank of Boston when it merged with Fleet Bank, which had its own copier vendor. I credit his testimony.

12. In approximately February or March of 2003, Respondent terminated sales support employee Benjawan Kritvoonyarit, who was in her 20s and Kurt Kilsby in service support, who was in his 30s.

13. On the morning of May 1, 2003, Hassler met with Meehan, who informed him that the company had lost \$13,444 in April and that Hassler had to reduce the number of employees immediately. Meehan, whom Hassler referred to as the "grim reaper," recommended cutting all support positions, such as service support and sales support. In addition, Meehan advised Hassler to disband document imaging because it wasn't profitable. Hassler did not take Meehan's advice in this regard because he viewed document imaging as the "future of the business." (Testimony of Hassler; Testimony of

Meehan) I credit their testimony about the financial situation the company faced and the need to cut personnel.

14. Hassler testified that when service manager Steve Bruen arrived at the office that morning Meehan and Hassler instructed him to lay off one technician of his choosing. Bruen laid off service technician John Duarte the same day. I credit his testimony

15. Hassler testified the same day he terminated sales people who were not productive, including John O'Brien, age 45 and Donald Leon age 39. Leon was allowed to remain through the end of the month in order to complete a big deal for which he would receive a commission. I credit his testimony.

16. Hassler testified that Meehan had been telling him for the past year that there was no sales support in Respondent's New Jersey office and therefore Respondent could not justify having sales support in its Massachusetts office. Meehan told Hassler to cut any non-revenue producing employees because if he did not reduce salaries the company would fail and it was for this reason Hassler decided to lay off Complainant. I credit his testimony.

17. Complainant testified that Hassler called him into his office on April 24, 2003<sup>4</sup> and asked him how old he was. Complainant responded that he would be turning 70 that year and Hassler responded, "Don't you think it's about time you retired?" Complainant was shocked and uncomfortable and responded that he loved his job, had to continue working for financial reasons and had no plans to retire. I credit Complainant's testimony, although I find that this meeting took place on May 1, 2003 and not April 24,

---

<sup>4</sup> I find the meeting more likely took place on May 1, 2003, which is consistent with the documents relative to Complainant's vacation, his final paycheck, and the testimony of Hassler.

2003. Hassler denied asking Complainant his age and suggesting it was time he retired. I do not credit Hassler's testimony in this regard.

18. Complainant testified that he asked Hassler at this meeting if Hassler would consider reducing his hours from five days to three days per week. According to Complainant, Hassler told him to consider the part-time schedule and let Hassler know his decision. Complainant claims that ten minutes after he left Hassler's office he left Hassler a message that he would accept a reduced schedule. In his deposition and filings with the Commission, Complainant never mentioned calling Hassler after the meeting that day, and I find that he never called Hassler back that day. I do not credit Complainant's testimony that Hassler told Complainant to decide whether he wanted to work part-time. However, I find that while Complainant may have believed that he had been offered a part-time position by Hassler, this was a misunderstanding on his part. Complainant went on a previously scheduled vacation May 5 and testified that he expected to return to a part-time job when he returned from vacation.

19. Hassler testified that the meeting with Complainant took place on May 1, 2003. During the meeting he told Complainant that business was down, the company was not making its numbers, and that it had lost the Thompson Financial account. According to Hassler, Complainant indicated that he was aware of the company's financial troubles, and Complainant asked Hassler to consider him for part-time employment; however Hassler testified he did not offer Complainant part-time employment. Hassler, instead, told Complainant that he would discuss the matter with Meehan and Kravetz but could not guarantee him a position. Hassler testified that he believed it was clear from their discussion that he had terminated Complainant's

employment at the meeting and afterwards he instructed operations manager Kristen Karlsen to pay him a termination check. After meeting with Complainant, Hassler remained in his office for an hour and received no further communication from Complainant. I find that Hassler did not explicitly tell Complainant that his employment was terminated at this meeting, nor did he explicitly promise Complainant a part time position.

20. On May 12, 2003, when Complainant reported to the Brockton office for work between 7:00 and 7:30 a.m., Karlsen called Hassler, who was in New Hampshire and asked him what to do. Hassler told her to have Complainant wait until Kravetz could get there. He then called Kravetz and directed him to inform Complainant that Respondent could no longer keep him on. (Testimony of Hassler) Later that day, Kravetz called Complainant in and told him that business was bad and he was going to have to let him go. Complainant responded that he was shocked and believed he and Hassler had agreed that he would work part-time. Kravetz responded, "That's the way it is." Complainant testified that he felt he was "fired twice in 30 days." (Testimony of Complainant)

21. Complainant testified credibly that he was never told his performance was deficient and the year prior to his termination he received a \$100 per week pay increase. On the date of his termination he was the oldest employee in Respondent's Massachusetts office.

22. Complainant testified that approximately two months after his termination, in July 2003, Woolner called to tell him that Respondent was hiring sales people. Upon hearing this, Complainant wrote a note to Hassler that he was ready to come back when

Hassler was ready for him and dropped the letter off with Kristin Karlsen on July 25, 2003. (Ex. C-3) Complainant never heard back from Hassler, who acknowledged receiving the note from Complainant, but testified he did not respond because he could not re-hire Complainant for financial reasons. I credit Hassler's testimony.

23. Complainant testified that John Cocco, a salesman for Respondent from 2001 to 2003, called him on February 28 or 29, 2004, nine months after his termination and told him that Kravetz had remarked at a meeting, "It's about time we got rid of that old geezer, Fred Bailey." According to the Commission's probable cause finding, Cocco reported this statement to the Commission investigator. (Ex. C-7) However, at the public hearing, Cocco who is currently a truck driver, was called as a witness by Respondent and testified that although subsequent to Complainant's termination, he had discussions with Complainant about Complainant's departure from Duplitron, he could not recall Kravetz making any derogatory comment about Complainant, did not remember calling Complainant to say that Kravetz had referred to him an old geezer and did not remember calling the MCAD to report such a remark. I found Cocco's testimony not credible and I find that he relayed Kravetz' remark to Complainant and to the Commission.

24. Hassler testified that Jay Horton, age 42, was hired as a sales person in digital imaging in 2003. Hassler stated that Horton was a 3% partner at a company that refused to pay him a commission on a house deal he was working on. Horton left that company over the disputed commission and approached Hassler with a proposal that Hassler finance the deal, worth \$250,000 in sales revenue to Respondent, and agree to pay Horton a commission. Hassler put together the financing and completed the deal within two or three months. Hassler testified that he could not turn down the arrangement offered by

Horton because the deal Horton had dropped in his lap was too lucrative. He testified that Horton remained employee at Duplitron for only six months or so and left to sell cars. Hassler testified that Horton was not hired to replace Complainant, and I credit his testimony.

25. Brad Green was hired in November 2003 to perform the IT functions that Wakstein had been doing, but for considerably less money. However after six months the company's computer system experienced serious problems, Green was terminated, and Wakstein was re-hired.

26. Hassler testified that no one was hired to replace Complainant and that to this day Respondent employs no "sales support" employees. Complainant acknowledged that no one was hired to replace him in sales support and that the persons hired after he left Respondent were hired to do sales and not sales support. I credit their testimony.

27. The sales people who remained employed by Respondent after the lay offs were Joe DeSantis, age 50; Norman Kravetz, age late 50s; Paula Crowley, age 40; Lisa Troio, age 35; Steve Woolner, age 45; John Cocco, age 31 ; Jolie Adams, approximate age 30-35; Silva, approximate age 30-35. (Testimony of Hassler)

### III. CONCLUSIONS OF LAW

M.G.L. c.151§1B makes it unlawful to discriminate in employment on the basis of age. In this case, Complainant does not dispute that Respondent was undergoing an economic downturn which resulted in lay-offs of a number of employees, but contends that Respondent's decision to eliminate his position was motivated by unlawful age discrimination.

In order to establish a prima facie case of age discrimination where there is a reduction in force, Complainant must show that he is 1) a member of a protected class; (2) that he performed his job at an acceptable level; 3) that he was terminated and that his lay off occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005)

As a 70 year old man, Complainant is protected by G.L. c. 151B. Complainant demonstrated that he was competent in the position of sales support and that he was laid off while workers who were at least five years younger than he were retained. Knight v. Avon, 438 Mass. 413,424 (2003). Complainant's performance was not an issue as there was evidence that through his efforts and contacts, Respondent made several sales and obtained access to the Massachusetts bid system. Thus, Complainant has established a prima facie case of age discrimination.

Once Complainant establishes a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for his termination. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). As part of its burden of production, Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, but need only show that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission

Against Discrimination, 439 Mass. 729, 735 (2003). Respondent's articulated reasons for Complainant's lay off were the company's loss of sales and a major account which resulted in financial losses that necessitated reducing its payroll. The credible evidence supported the financial difficulties that Respondent was experiencing. Respondent laid off several other employees simultaneous with Complainant, and its president Hassler testified credibly that Complainant's lay-off followed discussions with Respondent's controller who recommended the termination of all non-revenue producing employees, including all employees performing sales support functions. While I believe that Hassler may have asked Complainant his age and about the possibility of retirement at the time of his termination, I conclude that, given Respondent's debilitating financial circumstances, this inquiry was not motivated by age animus.<sup>5</sup> That Hassler hired Complainant at age 60 and increased his salary the year before his termination also evidences a lack of age animus.

Once Respondent has proffered evidence of legitimate, non-discriminatory reasons for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant did not offer credible evidence of pretext. He failed to demonstrate that the reasons articulated by Respondent were not the real reasons for his lay-off or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001).<sup>6</sup> Furthermore Respondent terminated several employees of varying ages at the same time it laid off Complainant, thus undermining the argument that Complainant's lay off was a

---

<sup>5</sup> The discrepancy as to the date of Complainant's actual termination is not material to my decision

<sup>6</sup> Complainant offered evidence attempting to dispute Respondent's severe financial difficulties in the form of comments by Kravetz to the Boston Business Journal ("BBJ") that its 2002 and 2003 sales were greater than the company's internal figures showed. However after several witnesses testified credibly that the company gave the BBJ inflated sales figures in order to appear competitive and that some of its sales people used the BBJ surveys as a marketing tool, Complainant now argues that Respondent's providing inflated sales figures to the BBJ demonstrates its lack of credibility. I am not persuaded by Complainant's argument and I conclude that the issues surrounding the BBJ surveys are irrelevant to this matter.

pretext for age discrimination. While I credited Complainant's testimony that Hassler asked him about his age and possible retirement, these "stray remarks" do not support a finding of age discrimination given the legitimate financial concerns articulated by Respondent. The fact that Respondent hired Complainant at age 60 also suggests a lack of age animus. While I conclude that Kravetz likely remarked to a former co-worker nine months after Complainant's termination that he was glad the "old geezer" was gone, even if this comment were made, it does not negate that Respondent's financial situation was the but-for cause for Complainant's termination. I conclude that the motivation for Complainant's lay-off was Respondent's deteriorating financial situation and the fact that his was not a revenue producing position. Moreover, there was no evidence that the position of sales support was ever filled after Complainant's termination. Therefore Complainant has not persuaded me that but for his age, he would not have been terminated.

With respect to Complainant's allegation that Wakstein made offensive comments to him about his age and that this was evidence of a hostile work environment, I conclude that because Complainant never complained to managers about Wakstein's comments, and there was no evidence they knew about them, Respondent is not liable for Wakstein's comments, even if they were made. Finally, there is no evidence that Wakstein was involved in the decision to terminate Complainant. Given all of the above, I conclude that Respondent did not engage in unlawful discrimination on the basis of age when it terminated Complainant's employment, and the complaint in this matter should be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final order of the Hearing Officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 22<sup>nd</sup> day of May, 2009.

---

JUDITH E. KAPLAN,  
Hearing Officer