

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & HELEN E. SOUZA,
Complainants

v.

DOCKET NO. 04-BEM-03138

FIBRE LEATHER MFG. CO.,
Respondent

Appearances:

Gigi D. Tierney, Esquire for Helen Souza
Gregory J. Koldys, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 27, 2004, Complainant Helen Souza filed a complaint with this Commission charging Respondent, Fibre Leather Manufacturing Company 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 for public hearing. A public hearing was held before me on November 15 and 16, 2006. 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.

II. FINDINGS OF FACT

1. Complainant Helen Souza resides in Acushnet, Massachusetts. She was born on August 31, 1929.

2. Complainant was hired by Respondent Fibre Leather Manufacturing Co., located at Belleville Avenue, New Bedford, MA, in October 1958. Complainant was laid off on June 18, 2004 at the age of 74, having worked for Respondent for over 45 years.

3. Respondent Fibre Leather, a family-owned company founded in 1927 by Samuel Finger, was in the business of the saturating, coating and embossing paper. After Samuel Finger's death, his son Louis Finger took over the company. When Louis Finger became ill in 2002, his brother Daniel Finger, who had held several positions in the company over the years, became its president. As president, Daniel Finger was the sole person with authority to hire and fire office employees. He served in this position until Respondent was sold in January 2005. After the sale, the business became known as South Coast Technical Products. Daniel Finger's date of birth is September 19, 1927.

4. Complainant originally worked in Respondent's laboratory, where she performed testing of merchandise, checked billing and performed clerical duties, such as typing.

5. In around 1987, Complainant began working full-time in Respondent's front office as an order entry clerk. Her duties included entering requisitions into a computer, forwarding copies to various departments, occasionally answering telephones and reviewing export paperwork for corrections. At the time of her termination, Complainant was the only order entry clerk employed by Respondent.

6. In 2004 three other employees worked in the front office with Complainant; Bookkeeper Kathleen Sitarz, age 49, Export Manager Linda Cravinho, age 53 and Secretary Carol Gutowski, age 56.

7. Carol Gutowski's duties included checking bills, typing correspondence, answering telephones and entering data into the computer. Gutowski was able to perform order entry work on her computer, and after Complainant's lay-off, Gutowski assumed this duty. Gutowski, who was approximately 18 years younger than Complainant, was laid off in 2006.

8. Ellen Hull, the daughter of Lewis Finger and niece of Daniel Finger, held the position of scheduler for several years. In 2004 she was a member of Respondent's board of directors, as well as a shareholder and secretary of Respondent. Hull occasionally interacted with Complainant at work, although she was not Complainant's supervisor.

9. Between 2001 and 2004, Complainant complained several times to Daniel Finger both orally and in writing about Hull's conduct toward her. According to Complainant, Hull engaged in behavior such as standing behind her chair and mumbling, using profanity, re-arranging orders on Complainant's desk, slamming doors, refusing to answer pages and slamming her hand down on Complainant's computer. Complainant testified that she was intimidated and frightened by Hull.

10. Complainant testified that she believed Hull treated her poorly because of her age. Complainant offered into evidence several written complaints about Hull that she had made to Daniel Finger. However, all of these complaints concerned disputes about work-related issues and there was no evidence that Hull's treatment of Complainant was based on her age. (Exh. C-1-4)

11. Subsequent to September 11, 2001 and in the years following, Respondent began to lose business. Respondent suffered substantial financial losses as orders decreased. In 2002, Respondent lost \$600,000.00. In 2003 the losses were in excess of

\$600,000.000. In 2004 Respondent's losses were \$800,000.00 and in 2005 its losses were \$1.6 million.

12. From 2002 to 2004, the number of employees at Respondent was reduced from approximately 42 to 27, due primarily to lay-offs made necessary by significant financial losses resulting from a decline in business. During this period of time, Daniel Finger temporarily reduced the hours of the office staff from five days to four days as a cost-saving measure. Also, during this period of time, several hourly workers were laid off.

13. In April and May 2004, Complainant was out of work for medical reasons. She returned to work in June.

14. Complainant testified that on Friday, June 18, 2004 at 4:55 p.m. Daniel Finger called her into his office and told her that she was laid off indefinitely. He explained to her that while she was out sick in April and May, the office ran smoothly and he had therefore determined that the office could continue to operate without her and told her that Carol Gutowski would take over her duties. He also told Complainant that due to the company's recent financial difficulties, he needed to find financial savings wherever he could and reminded Complainant of the recent temporary reduction in the office workers' days from five to four as a cost-cutting measure. I credit Complainant's testimony, which is corroborated by the testimony of Daniel Finger.

15. Complainant testified that she proposed to Finger that she work part-time in areas where she had previous experience, including the laboratory, Building C and the shipping room, in order to cobble together a full week's wages. Finger denied this request, whereupon she gathered her belongings and walked out. Finger testified that he

did offer Complainant a part-time position in the lab, which she turned down because she wanted to work full-time. Complainant emphatically denied that Finger offered her a part-time position. While I find that Complainant and Finger discussed the possibility of part-time work, I do not credit Finger's testimony that he offered Complainant a part-time position in the laboratory. I find Complainant's testimony in this regard more credible.

16. William Peterson worked for Respondent from 1980 as a maintenance supervisor and remained employed by South Coast Technical Products until he was laid off on April 14, 2005. His date of birth is September 2, 1948. Peterson knew Complainant from their occasional interaction at work. He testified that Complainant was conscientious, diligent and meticulous.

17. Peterson described Ellen Hull as arrogant and demeaning. He testified that on one occasion he heard Complainant page Hull on the intercom. He observed Hull answer the telephone comment upon hanging up, "The fucking asshole, why doesn't the old bitch give it up." Peterson did not know who the person on the other end of the telephone was, but drew the inference that it was Complainant, because Hull had picked up the phone in response to Complainant's page. He did not tell Complainant about the matter at the time. On cross-examination, Peterson acknowledged that after he was laid off in April 2005, by South Coast Technical Products, he consulted Complainant's attorneys about the possibility of filing a law suit against Respondent. In addition, Peterson acknowledged that he was friendly with Complainant and that he was listed as a reference on her job applications. Given all of the above, I find that Peterson was biased against Respondent and its successor because of his lay off and his personal friendship

with Complainant, and I do not credit his testimony about Hull's purported discriminatory remark.

18. Daniel Finger acknowledged that there was friction between Hull and Complainant, and each complained to him about the other, orally and in writing. In order to remedy this source of friction within the company, Finger advised Hull to be civil and to interact with Complainant as little as possible and to work through him if she had to communicate information to Complainant in order to minimize the interaction between the two. I credit this testimony.

19. Finger testified that he alone made the decision to lay off Complainant, and that Ellen Hull had no input whatsoever into the decision. He stated that while Complainant was out on medical leave during the months of April and May 2004, the office continued to run as smoothly as when she was there, so he determined that it was feasible to eliminate her position and save money for the company. I credit his testimony.

20. Finger, who described Complainant's performance as accurate, but slow, testified that while Complainant's job duties could be absorbed by the other office workers, he did not believe that Complainant could perform the duties of other office employees without training. I credit his testimony.

21. Finger testified that during this time period, Respondent considered closing its doors and so advised its employees. I do not credit this testimony. The evidence suggests it is more likely that Respondent intended to sell the company and that the elimination of Complainant's position put it in a better position to do so.

22. A new group of owners, including Ed Fedderman and Michael Finger, purchased the company in January 2005, and renamed the company South Coast Technical Products. Thomas Costella, the President of South Coast, testified that the company's financial condition remains poor and I credit his testimony.

23. Costella testified that the company has undergone further lay-offs, and now employs only 20 people. Kathleen Sitarz continues to work full-time in the office, while Linda Cravinho works part-time as an order entry clerk. Respondent has also cross-trained a lab coordinator to back up the office workers. Carol Gutowski was laid off in April 2006. I credit his testimony.

24. Costella testified that for a short period of time, a student intern, paid by Fedderman out of his personal funds and not by the company, performed some order entry and customer service work, and then went on to work for another business owned by the former owners. Costella stated that Cravinho and Sitarz took over some of his duties. I credit his testimony.

25. Costella testified that between June 2004 and September 2004 three hourly workers were laid off, as was David Finger, the owner's son, who worked in sales. I credit his testimony.

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 decreased work weeks and lay-offs, but contends that Respondent's decision to eliminate her 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 she is 1) a member of a protected class; (2) that she performed her job at an acceptable level; 3) that she was terminated and that her 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 74 year old woman, Complainant is protected by G.L. c. 151B. Complainant demonstrated that she was competent in the position of data entry clerk. Complainant was laid off and office workers who were more than five years younger than she were retained. Knight v. Avon, 438 Mass. 413,424 (2003). Complainant's performance was acceptable as there was evidence that her work was competent. 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 its termination of Complainant. 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). 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, only 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 troubled finances, the discovery that Respondent's office continued to function well in Complainant's absence, and Complainant's lack of ability to perform the other functions in the office. There was undisputed evidence that Respondent was financially troubled, had temporarily reduced its work week and laid off some of its workforce. The company was sold in January 2005. Respondent's president, Finger, testified that he laid off Complainant instead of the other front office workers because they were able to perform her job duties without difficulty in her absence and he did not believe she could perform their jobs without training.

Once Respondent has set forth 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. She failed to demonstrate that the reasons articulated by Respondent were not the real reasons for her lay-off or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001). Complainant did not dispute that Respondent was having severe financial difficulties and was sold off in January 2005. Respondent's decision to reduce the work week of all office employees rather than eliminate Complainant's position earlier in the year suggests a lack of age animus. While I believe that Complainant's advanced age and extended medical leave may have been considered in the decision of whom to lay off, they were not determinative cause for the decision to lay-off Complainant.¹ Lipchitz, supra, at 503 (2001). I conclude that the primary motivation for Complainant's lay-off was Respondent's deteriorating financial situation, the fact that the office was able to run

¹ Complainant did not allege handicap discrimination, and there was no evidence as to whether Respondent may have perceived her as handicapped upon return from a medical leave.

without her, and because her duties were easily absorbed by another office worker in her absence. Complainant has not persuaded me that but for her age, she would not have been terminated.

With respect to Complainant's allegation that Ellen Hull engaged in "harassment" against her because of her age and that this was evidence of pretext, I conclude that their mutual hostility resulted from an on-going personality dispute and disagreements about the quotidian details of running Respondent's business. There was no credible evidence that Hull's conduct toward Complainant was motivated by discriminatory animus on account of her age. Even if Hull were found to have made a stray remark about Complainant's age, this was insufficient to create a hostile work environment and there is no evidence that she was involved in the decision to terminate Complainant.

Therefore, the complaint in this matter shall be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, This 1st day of June, 2007.

JUDITH E. KAPLAN
Hearing Officer