

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION and JAMES MARSH,
Complainant

v.

TOWN OF SAUGUS,
Respondent

Docket Nos. 95-BEM-2648
95-BEM-2786
96-BEM-2706

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Walter E. Steele, Jr., Esq., for Complainant.
Stephen C. Pfaff, Esq., for Respondent.

I. PROCEDURAL HISTORY

On October 20, 1995, Complainant, James Marsh, filed a complaint (95-BEM-2648) with the Massachusetts Commission Against Discrimination (the "Commission"), against Respondent, Town of Saugus. In his complaint, Complainant alleged that Respondent engaged in unlawful discrimination on the basis of age and disability and unlawful retaliation when it bypassed him for appointment to the position of full-time police officer. On November 3, 1995, Complainant filed another nearly identical complaint (95-BEM-2786) with the Commission that similarly claimed Respondent had engaged in unlawful disability and age discrimination and retaliation when it again bypassed him for appointment. On August 28, 1996, Complainant filed a third complaint (96-BEM-2706) that likewise alleged Respondent had engaged in disability and age

discrimination and unlawful retaliation for repeatedly failing to consider him for the position of full-time police officer.

On June 22, 2001, the Investigating Commissioner issued a lack of probable cause decision with respect to Complainant's charges of disability discrimination and retaliation, but credited Complainant's allegations of age discrimination. On April 4, 2003, the Commission certified the case for Public Hearing. On September 9 and 10, 2003, a Public Hearing was held before me in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the Public Hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by Respondent after the Public Hearing.¹ To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant, James Marsh, is an individual who worked for Respondent as a reserve police officer from 1978 to 1994. On numerous occasions, Complainant applied to Respondent for appointment to the position of full-time police officer. Complainant was born on February 20, 1949 and it undisputed that he was over forty years of age at the time he applied for the positions as

¹ Complainant failed to submit a post-hearing brief. Because I have ruled on the merits of Complainant's case, I have denied Respondent's Motion to Dismiss for Complainant's failure to submit proposed findings of fact and conclusions of law.

described in his complaints. Therefore, Complainant is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Respondent, Town of Saugus, is a municipality in the Commonwealth of Massachusetts and a political subdivision thereof within the meaning of M.G.L. c. 151B, § 4(1C). It is also undisputed that Respondent employs more than six persons; consequently, Respondent is an employer within the meaning of M.G.L. c. 151B, § 1(5).

3. Prior to working for Respondent, Complainant attended public school through the eighth grade and then served four years in the Navy, where he received an honorable discharge. From 1972 to 1988, he worked for the United States Post Office as a letter carrier. Beginning in 1994, Complainant began his own business as a dump truck operator.

4. In 1978, Respondent hired Complainant as a reserve police officer and he continued to work as a reserve officer until 1994. Complainant testified that reserve officers generally fill in for absent or vacationing full-time police officers. In addition, reserve officers perform contracted "paid details", more commonly known as "road jobs." Complainant claimed that in his first few years of employment as a reserve police officer, he worked approximately fifty percent of the time on a shift assignment, where he performed the normal duties and responsibilities of a police officer; and, the other fifty percent of the time on paid details. Complainant testified that beginning in approximately 1992, he began working more paid details than shift assignments. However, according to

Cornelius Meehan, the Town's former Police Chief, Complainant admitted during an interview on January 24, 1995, that in 1994 he only worked once as a reserve officer. At the Public Hearing, Complainant testified that in his last few years as a reserve police officer for the town, he worked less than one shift per week and perhaps no more than two paid details per month. Complainant has not alleged that Respondent was responsible for his reduced his workload as a reserve officer. I credit Meehan's testimony.

5. In September 1994, Complainant signed a certification list indicating his interest in being considered for appointment to the position of full-time police officer. On September 12, 1994, he met with Lt. Richard Murphy for a preliminary interview. According to Complainant, Lt. Murphy told him the Town had three full-time positions open, and then Murphy stated, "between you and I, we've already made the decision." Murphy subsequently indicated in a memo to Town Manager Edward Collins that during Complainant's interview, Complainant stated, "he felt he had been put out to pasture and was not a serious candidate for appointment. He said he accepted the reality of the situation and was not unhappy." Complainant admitted to making the "put out to pasture comment", but denied making the other statements.

6. As part of the hiring process for the position of full-time police officer, the Town of Saugus required applicants to fill out an application which, among other things, required information about the applicant's employment history, education, military status, and criminal and credit backgrounds. Complainant acknowledged that he did not complete the application when he refused to

provide information about his credit background. He also admitted that he did not pay the required ten-dollar fee assessed by the Town to perform the credit check. However, Complainant claimed that the Town never asked him for the ten-dollar fee. In addition, he testified that he did not believe he had to complete this application since he completed an application in 1978. He also stated that he did not complete the application because it would be reviewed by Sgt. Dana Bates, with whom Complainant had an altercation with in 1975. Based on my observations of Complainant at the Public Hearing, and considering the numerous excuses he gave for refusing to complete the Town's application, I refuse to credit his testimony on this matter.

7. The Town then notified Complainant to report for an interview for the full-time police officer's position on January 23, 1995. On the morning of January 23, Complainant called the Town Manager's office to cancel the interview due to illness. Complainant claimed that at 3:30 pm the next day, while working at his regular job, he received a page from the Town Manager's Office. He stated that when he called back, he was told to report immediately to Town Hall for his interview. He testified that he then went directly to Town Hall without first going home to change out of his work clothes. However, contrary to his testimony at the Public Hearing, in typed notes Complainant prepared and previously submitted to the Commission, he wrote, "I telephoned his secretary Tuesday morning [January 24, 1995]; she called me [back] and asked if 3:30 that afternoon was good. I said yes, I would be done work at 3:15 and would go right to the Town Hall from work."

8. On January 24, 1995, Town Manager Edward Collins, Chief Meehan, Lt. Murphy, and Personnel/Finance Officer Richard Cardello interviewed Complainant for the full-time police officer's position. According to Complainant, during the interview Collins acted in a "high-strung" manner and yelled at him about the way he was dressed. Complainant admitted to stating during the interview, "I know for a fact you're not hiring me", and "I already know who you're going to put on." He further claimed that Collins then stated, "I am not putting anyone over forty years on my department." Complainant testified that he then stood up and left the interview. Contrary to Complainant's testimony, Cardillo claimed that Collins neither appeared "high-strung", nor made any comment about Complainant's clothes. In addition, Cardillo stated that Collins never made any remark about not hiring anyone over forty years of age. Chief Meehan likewise testified that Collins did not act high-strung or yell at Complainant during the interview. Meehan also corroborated Cardillo's testimony that Collins never made any remark about not hiring anyone over forty. When asked why they bothered to interview Complainant if he did not complete the job application, Meehan replied, "to ask him why he did not fill in the application." I credit Cardillo and Meehan's testimony.

9. At all pertinent times hereto, Town Manager Edward Collins was the appointing authority for police officers in the Town of Saugus. But Cardillo and Meehan testified that the Town Manager made appointments based on the recommendations of the Police Chief. Meehan and Cardillo testified that after Complainant's interview of January 24, 1995, they both recommended to Collins

that Complainant not be selected for a full-time position of police officer because he had failed to complete his application for the position, and the other candidates were better qualified and had superior educational credentials. I credit Meehan and Cardillo's testimony. In addition, Complainant failed to submit any credible evidence that rebutted Meehan and Cardillo's testimony that the other candidates were better qualified and had superior educational backgrounds.

10. Complainant alleged that Edward Collins engaged in unethical and inappropriate conduct when in January 1995, he bypassed Complainant and instead selected his son, Patrick Collins, to be a police officer. Cardillo testified, however, that Respondent initially hired Patrick Collins in September 1994.² In addition, Cardillo claimed that Ed Collins had recused himself from the selection process when his son applied for a position with the Town. I credit Cardillo's testimony.

11. On January 31, 1995, Cardillo forwarded to the Massachusetts Department of Personnel Administration ("DPA") a certification list indicating that the Town had selected John Naglieri, Thomas Jones, and Patrick Collins for appointment to the position of full-time police officer. Respondent does not dispute that all of the selected candidates were less than forty years of age. In his cover letter to the DPA, Cardillo indicated that the Town had bypassed three reserve officers on the list, including Complainant. With respect to the bypassed

² Complainant has not alleged that he was a candidate for appointment in September 1994, and even if he did apply for the position at that time, he has not alleged any impropriety in his complaints with respect to the Town's appointment of full-time police officers in September 1994.

candidates, Cardillo wrote that the Town bypassed Steven King for failing to appear at an interview; Ralph Memmolo for not completing the necessary paperwork to obtain a credit report; and, Complainant “due to his failure to complete the questionnaire necessary to complete a background investigation.” Cardillo testified that the DPA never contacted him with respect to the bypass letter of January 31, 1995, nor otherwise indicated that they found the reasons for bypassing Complainant to be unacceptable. I credit Cardillo’s testimony.

12. Unlike Complainant, all of the officers selected for appointment had either an associate or bachelor’s degree. In addition, Complainant had numerous documents in his personnel file indicating that he was unsuitable for appointment to full-time police officer. Specifically, Complainant failed a firearms qualification in 1993 and received a troubling psychological evaluation in 1978, which stated, “Mr. Marsh’s poor grasp of and vague motivation for police work combined with possible difficulties in solving problems and managing conflicts are grounds for serious reservations about his potential to function as a police officer.”

13. On April 18, 1995, Cardillo sent a letter to the DPA indicating that the Town had appointed three more full-time police officers: Shawn Flynn, Glen Cote, and Michael Riccadelli. According to Cardillo’s letter to the DPA, all three of the selected candidates had obtained either an associate degree or bachelor’s degree and two of the candidates (Flynn and Cote) had law enforcement experience. I credit the factual assertions contained in Cardillo’s letter. Again, Respondent does not dispute that all of the selected candidates were less than forty years of age.

14. Michael McGrath testified that he began working for Respondent as a reserve police officer in 1981 and then as a full-time police officer in 1989. McGrath claimed that at a union meeting in 1993 or 1994, Ed Collins made the comment that he did not want to hire police officers from the “old” reserve list and then remarked, “Do you really want to see me hire someone over 40?” I credit McGrath’s testimony.

15. Herbert Collibee testified that he began working as a reserve police officer for Respondent in 1975 and then as a full-time police officer from 1976 to 2001. Collibee claimed that at a union meeting, Ed Collins stated, “By the way, the four SOB’s are not gonna see an appointment in Saugus.” Collibee believed that Collins was referring to Complainant and three other reserve officers. I credit Collibee’s testimony.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, § 4(1C) prohibits discrimination against an individual on the basis of age by the Commonwealth or any of its political subdivisions, by itself or through its agents. The term “age”, pursuant to M.G.L. c. 151B, § 1(8), refers to persons over forty years of age.

Complainant has alleged that Collin’s derogatory comments about his age constituted “direct evidence” of discrimination. Direct evidence is evidence, “if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.” Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000), *quoting*, Johansen v. NCR Comten, Inc., 30 Mass. App.

Ct. 294, 300 (1991); *see also*, Chief Justice for Administration and Management of the Trial Court (CJAM) v. MCAD, 439 Mass. 729, 732, n. 11 (2003) (typically, direct evidence consists of statements of discriminatory intent attributable to an employer). In a direct evidence case, Complainant does not have to adhere to the three stage burden shifting paradigm because he does not need the benefit of an inference. Rather, a mixed motive analysis is applied to Complainant's allegation of discrimination. Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000).

In this case, Complainant has presented direct, credible evidence of age discrimination. Specifically, I credited McGrath's testimony that Collins made the comment that he did not want to hire police officers from the "old" reserve list and then remarked, "Do you really want to see me hire someone over 40?" I further find that this statement can not be construed as a "stray remark" since Collins had the power to appoint police officers and the comment directly related to his use of that authority. *See*, Wynn & Wynn, 431 Mass. at 667 (stray remarks in the workplace, statements by people without the power to make employment decisions, and statements made by decision-makers unrelated to the decisional process itself do not suffice to satisfy the plaintiffs threshold burden).

Consequently, I conclude that McGrath's testimony established that at least one factor motivating Respondent's failure to hire Complainant was illegitimate.

Since Complainant has produced credible direct evidence of age discrimination, the burden of persuasion shifts to Respondent to show that it would have made the same decision absent the illegitimate motive. Wynn & Wynn, PC, 431 Mass. at 667, *citing*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245 (1989). The appropriate question is whether Respondent's "proffered legitimate reason also motivated the employment decision, and if so to what extent." Wynn & Wynn, PC, 431 Mass. at 667, *citing*, Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 301, *quoting*, Price Waterhouse, 490 U.S. at 252. In other words, if a complainant in an unlawful discrimination case shows that an impermissible motive played a part in an employment decision, the employer "must show that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.*; Fountas, 22 MDLR at 269.

I find that Respondent has met this burden. I credited Meehan and Cardillo's testimony that in order to be qualified for the job, Complainant had to complete an application for the position and pay ten dollars to the Town so it can obtain a credit check. Complainant admitted that he neither completed the application, nor gave the Town a check for the credit investigation.³ I further credited Meehan and Cardillo's testimony that they recommended to Collins that Complainant not be hired for the job because all of the selected candidates were better qualified and had superior educational backgrounds.⁴ Respondent has,

³ Since Complainant neither completed his application, nor paid the fee for the credit investigation, I specifically find that he was not qualified for the position. Thus, it is axiomatic that Complainant could not have established a prima facie case under the inferential method used in indirect evidence cases. *See*, Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 41 (1995).

⁴ As discussed above, Complainant did not submit any credible evidence to rebut Meehan and Cardillo's testimony that the other candidates were better qualified and had superior educational backgrounds.

therefore, proven that it would have made the same decision notwithstanding Collin's derogatory comments. Consequently, Complainant has failed to establish that Respondent engaged in unlawful age discrimination in violation of G.L. c. 151B, § 4(1C).

IV. ORDER

For the reasons set forth above, the complaint in this matter is hereby dismissed. 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 3rd day of June, 2004.

EDWARD R. MITNICK
Hearing Officer