

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION &)
JOHN M. BINGHAM, JR.)
Complainant,)
)
)
v.)
)
LYNN SAND & STONE CO.¹)
Respondent.)
_____)

Docket No. 93-BEM-1491

Appearances: Shannon Liss-Riordan, Esq., for Complainant
Patricia A. Granger, Esq., for Respondent

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

I. PROCEDURAL HISTORY

On August 27, 1993, Complainant John Bingham filed a complaint with this Commission, charging the Respondent, Lynn Sand and Stone, with failure to hire him as a truck driver on account of his race in violation of G.L. c. 151B s.4(1). The Investigating Commissioner found probable cause to credit the Complainant and the matter was certified for a public hearing . A hearing was held before the undersigned hearing officer on April 9 and 10, 2002. The parties submitted post-hearing briefs.

¹ Lynn Sand & Stone was bought out by Aggregate Industries, which is the successor to Lynn Sand & Stone and the official Respondent now in this case. The company has also been known as Bardon Trimount. (Tr. 4, 98-99).

Having reviewed the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Complainant's Background and Work Experience

1. Complainant, John Bingham, was born and raised in Lynn, Massachusetts. He graduated from Lynn English High School in 1972 and attended one year of college at Boston State College. (Tr. 25, 38).²

2. Complainant has significant employment experience working as a construction laborer and working with concrete dating back to his high school years in the 1960's when he worked as an apprentice to his father on construction projects during the summer. Complainant was also a supervisor of construction projects in the military where he operated and maintained large heavy trucks and other equipment and worked with concrete. (Tr. 26-28, 31-32, 35-37).

3. Complainant possesses a Class A driver's license which allows the license-holder to drive trucks weighing up to 105,000 pounds. He has also driven tractor trailer trucks, dump trucks and off-road quarry trucks. (Tr. 26-28).

4. Since 1978 Complainant has served as a construction inspector in the Army reserves, which involves inspecting concrete jobs. A number of his past employers were construction companies where he worked on projects using concrete. (Tr. 33-34).

² Citations to the transcript of the Public Hearing are indicated by "Tr." and the page number(s). All citations to the transcript refer to the first volume (April 9, 2002), unless the citation specifically indicates "Vol. II" (April 10, 2002).

5. Prior to seeking work with Respondent and up until 1995, Complainant's jobs were all non-union and did not include benefits such as a pension plan. (Tr. 117, Vol. II). His jobs were mostly of a short-term nature that ended when work got slow or ran out. (Tr. 39, 41, 43, 45, 48).

6. During the 1980s and 1990's Complainant had a series of jobs driving heavy trucks and heavy equipment and working with concrete. (Tr. 26-27; 41-42). A number of those jobs were for sub-contractors of Respondent Lynn Sand & Stone. He worked for other North Shore companies and would often drive trucks to Respondent's quarries to pick up processed rock. (Tr. 38-41; 45-46). A number of Complainant's employers paid him under the table. (Tr. 47-50)

7. Complainant testified that by the summer of 1993, he had 19 years of experience driving heavy trucks and 25 years of experience working with concrete. (Tr.26-54 passim). I credit his testimony with respect to his experience.

B. Complainant's Application to Respondent, Lynn Sand & Stone

8. In the fall of 1992, a friend of Complainant's, Dave Smith, told him that Respondent was going to hire additional concrete truck drivers for contracts related to the Big Dig/Central Artery project. (Tr. 54).

9. Smith had worked as a laborer at Lynn Sand & Stone since 1984 and continued to work there as of the time of the hearing for its successor company, Aggregate Industries. (Tr. 172-73).

10. Smith and Complainant had been friends since the early 1980's, and they frequently socialized together. They worked out together at the YMCA gym almost every day. (Tr. 54-55, 175-76).

11. Smith suggested that Complainant submit an application to be a truck driver at Respondent. He told Complainant that he could pick up an application from Stephen Mikelop, the supervisor for the company's concrete truck drivers and pointed out to Complainant where Mr. Mikelop's office was located and described Mikelop to Complainant so he would recognize him. (Tr. 56-57, 178-79).

12. Stephen Mikelop was the fleet superintendent at Respondent and his duties included hiring and supervising concrete truck drivers. He has held this job since 1982, and his duties remain the same today. (Tr. 99-100).

13. Complainant testified that he had never considered applying for a truck driver position at Respondent because he heard for years that Respondent did not hire minorities. Throughout the approximately four years that he had been on Respondent's premises, working both for subcontractors and customers of Respondent, he had never observed other minorities anywhere on the premises. (Tr. 53-54).

14. Throughout Smith's eighteen year tenure at Respondent and its parent and successors, Bardon Trimount and Aggregate Industries, he had observed only one other employee, a laborer, who was not White. (Tr. 182).

15. After Smith told Complainant that he had heard that Respondent was hiring truck drivers, Complainant went to Mikelop's office to pick up an application on Friday, September 4, 1992. He testified that during this brief encounter Mikelop looked at him directly, eye-to eye while giving him the application form. (Tr. 57-58).

16. Complainant recognized Mikelop as the individual who handed him the application because he was in the office that had been pointed out to him as Mikelop's and because Mikelop matched the description that Smith had given him. Moreover, Complainant identified Mikelop at the Public Hearing, as the man from whom he retrieved his application on that day. (Tr. 57, 105).

17. Complainant filled out Respondent's application at home and on Monday September 7, 1992, he personally returned the application to Mikelop. He testified that Mikelop spent several minutes looking over his application and noted that Dave Smith had referred him to Respondent. Mikelop asked Complainant if he knew Dave Smith and Complainant said that he did. He noted that Mikelop circled Smith's name on the application. According to Complainant, Mikelop looked directly at him during their exchange and told Complainant that he would get back to him. (Tr. 58-60; Exhibit C-1). It is apparent by looking at Complainant that he is African American and I find that Mikelop was aware of this fact based on these two face-to-face encounters with Complainant.

18. Complainant's application for employment with Respondent listed a total of four years of work experience. He listed four prior employers for whom he had worked as either a truck driver or heavy equipment operator. He did not provide any specific information regarding his skills and abilities. (Ex. C-1). However, the application that Complainant was given to fill out did not contain a space to describe his duties at his former jobs; but had only space to list his former positions.(Ex. C-1). In contrast the application forms used by all except one of the drivers hired by Respondent in 1993 had a space for the applicant to list "special qualifications or skills," (Exhibit C-

16A-j) Complainant testified that Mikelop, after looking over his application, asked him no questions about his experience or qualifications.

19. Complainant did not complete the section of the application seeking references because he assumed that Mikelop or anyone at Respondent would know the contractors who were his former employers and I find that this was a reasonable assumption. (Tr. 63). Complainant also did not complete the section of Respondent's application form asking if the applicant is related to a current employee. (Exhibit C-1)

C. Respondent's Hiring Process for Concrete Truck Drivers and Decision Not to Hire Complainant

1. Failure to Hire Complainant in September 1992³

20. Mikelop claimed at the Hearing that he did not hire Complainant when he initially received his application in September of 1992, because he did not have any openings at the time. However, on September 14, 1992, a week after Complainant submitted his application, Mikelop hired Terence Conway, who is White, as a concrete truck driver. Mikelop was not able to recall the date Conway was offered the position or whether it was before or after Complainant submitted his application. Respondent suggested that an applicant's "hire" date is the date on which he begins work, not the date on which he was offered the job, however this assertion was not supported by witness testimony. In any event, even if it were true that a hire date is the date that an applicant

³ At the Public Hearing, Respondent objected to the admission of evidence regarding its failure to hire Mr. Bingham in September 1992 because he did not file his charge of discrimination until more than six months later, in the fall of 1993. The objection was overruled and Complainant was allowed to admit the evidence.

actually begins work, Mikelop acknowledged that the time period between getting offered a job and beginning work can be very short, even less than a week.

(Ex. C-13; Answer to Interrogatory No. 5; Tr. 119).

21. Mikelop stated that Conway was hired because he “specifically had concrete experience.” (Tr. 119-20). Mikelop also claimed that he did not have any knowledge from Complainant’s application that he had experience working with concrete, whereas he knew from Conway’s application that he had experience with concrete. Mikelop did admit, however, that he was familiar with Complainant’s former employers listed on his application. (Tr. 133-34). It is reasonable to presume that Mikelop would have known that these contractors worked with concrete and that Complainant had similar experience, given that three of the four were customers of, or contractors for, Respondent.

2. Failure to Hire Complainant in the Summer of 1993

22. After submitting his application to Mr. Mikelop in September of 1992, Complainant never heard back from Respondent about the status of his application. (Tr. 64). Complainant noted to Smith from time to time that he’d heard nothing about his application. Eventually Smith told Complainant that Respondent was again hiring concrete truck drivers and he decided to seek out Mikelop to inquire about the status of his application. (Tr. 64-65).

23. On June 15, 1993, Complainant went to Mikelop’s office to ask about his application. When he did not find Mikelop in his office, he went to look for him out on the grounds of Respondent’s plant. While riding in his truck on the haul road, Complainant spotted Mikelop approaching him in a truck, and waved him down. (Tr. 65-

67). Both men got out of their trucks to speak and Complainant began the conversation by telling Mikelop that he understood Respondent was hiring concrete truck drivers and that he wanted to know the status of his application and where he was on the hiring list. (Tr. 67-68).

24. During this exchange Mikelop did not ask Complainant his name and he acted as though he knew who Complainant was and seemed aware of the fact that Complainant had applied to be a concrete truck driver. (Tr. 67). His response to Complainant was that Complainant did not have any concrete experience and that he was hiring experienced concrete truck drivers first. (Tr. 68).

25. Complainant informed Mikelop that he had 25 years of concrete experience. He also told Mikelop that he was a truck driver, and all Mikelop had to do to train him was show him around once on a concrete truck. (Tr. 68). By this, he meant that he just needed to be shown the different types of buttons and where the power switch was on a concrete truck. (Tr. 72).⁴

26. Mikelop responded by saying, "It's not like that." He looked at the ground, avoiding eye contact with Complainant. It was clear to Complainant from Mikelop's body language that Mikelop was uncomfortable with the conversation and wanted it to end. (Tr. 72-73, Vol. I; Tr. 109, Vol. II).

27. According to Complainant nothing further was said between the two men. Mikelop did not ask Complainant any questions about his truck driving experience or his

⁴ Mikelop also admitted that the skills involved in driving a concrete truck are very similar to the skills needed for driving other trucks, and that it was very quick to train a new driver how to drive a concrete truck. He acknowledged that even drivers who did not have previous experience driving heavy trucks could typically be trained in a day or two how to drive a concrete truck. (Tr. 156).

25 years working with concrete, or anything at all about his application. (Tr. 68, 73-74, 137-38). Mikelop claimed to have no recollection whatsoever of this encounter with Complainant and claimed to have met Complainant only one time in his office. I did not find this testimony credible and believe Complainant's version of the meeting and conversation on the haul road.

28. Complainant testified that it was unequivocally clear to him after his conversation with Mikelop on June 15, 1993, that he was not going to be hired by Respondent. (Tr. 73, 74). Up until that day, he believed that his application was under consideration, and he was simply waiting for a response. (Tr. 64, 66).

29. Complainant testified that he was very upset upon realizing that he would not be hired by Respondent. He had been anticipating the prospect of working in a steady union job for Respondent, which, unlike any of his previous employers, provided benefits such as health insurance, paid vacations, and a pension plan. With his many years of experience driving heavy trucks and working in the concrete industry, he believed he was totally qualified for the position. He stated that it hurt him deeply to realize that he was not going to be hired because of his race and that he never before had believed he was turned down for a job because of his race. (Tr. 74-76.)⁵ Complainant's testimony about this aspect of his rejection was very compelling and credible.

30. Respondent claims that the first eleven drivers it hired in 1993 were hired because they had experience driving a concrete truck. However, Respondent failed to produce evidence that all of these drivers had such experience. (Ex. 16; Tr. 147-150).

⁵ Other than this case, Mr. Bingham has never filed any other complaint of discrimination, nor has he ever filed another lawsuit of any sort. (Tr. 95).

31. Respondent produced applications for only eight out of these eleven drivers. (Exhibits C-16 a-h). Despite Complainant's requests, applications for three of the drivers, Joseph Donlan, Dennis Holland, and Robert Reynolds, were never produced. (Tr. 147-48). Respondent produced the applications for all of the other drivers hired between September 1992 and August 1993, as well as the applications for all unsuccessful applicants during this time period. It presented no evidence or explanation for why it was not able to produce the applications for these three drivers. Mikelop confirmed in his testimony that those three applications were never produced. (Tr. 147-48).

32. In addition, Mikelop admitted at the Hearing that it is not entirely clear just from looking at certain applications whether the applicant has concrete truck driving experience. (Tr. 148). Viewing the eight applications produced Mikelop admitted that it was not clear from the application of at least one of the drivers hired, Louis Fendone, that he had experience driving a concrete truck. (Exhibit C-16D; Tr. 149). This same applicant had completed only one year of high school and also did not list his former supervisors, job titles, or descriptions of his previous employment on his application. (Tr. 149). Mikelop claimed to have called his employment references to determine what his experience was. (Tr. 149-50).

33. In addition to the absence of evidence that all of the first eleven drivers hired in 1993 had concrete truck driving experience, Mikelop also admitted that actual experience driving concrete trucks was not a necessary qualification and that Complainant's experience driving heavy trucks and working generally with concrete was relevant to the job. He agreed that experience working with concrete and knowledge

about concrete was relevant to the job of a concrete truck driver and would be useful experience to have for that job. (Tr. 133, 157-58).

34. Mikelop also stated that experience driving a variety of heavy trucks was relevant to the job of a concrete truck driver and would have been a consideration in hiring. (Tr. 135). He admitted that truck driving skills of one sort or another are largely transferable and stated there are no special skills required of a concrete truck driver that are not required of drivers of other heavy trucks. He stated that training a non-experienced driver to drive a concrete truck is simple and brief. By his own testimony, the training typically takes only a day or two. (Tr. 156-59). Complainant, with 19 years of heavy truck driving experience and a Class A driver's license would have required less training time than someone without his experience.

35. Within two days of Mikelop's June 15, 2003 conversation with Complainant, on June 16 and 17, 1993, Mikelop hired four more drivers who Respondent claims had concrete truck driving experience. All of these drivers were Caucasian. The Respondent did not produce applications for three of the drivers who were hired on June 17, 1993, Joseph Donlan, Dennis Holland, and Robert Reynolds. (See Exs. C-17 and 20)

36. After June 17, 1993, Mikelop hired one more driver who had experience driving a concrete truck, Arthur Stivaletta, on July 6, 1993. (Exs. C-16(h); C-17).

37. At the time Mikelop had his conversation with Complainant on June 15, 1993, Mikelop was about to hire several more drivers, and had also come close to exhausting the pool of applicants who had experience driving concrete trucks. (Tr. 150, Vol. II). Thus, Mikelop's response to Complainant about why he had not yet been hired was at best not fully forthcoming.

38. Contrary to Mikelop's explanation to Complainant that he was only hiring experienced concrete truck drivers, within a very short time thereafter he considered and hired applicants who did *not* have experience driving concrete trucks.⁶ Indeed, after hiring Mr. Stivaletta, Mikelop hired three drivers who Respondent concedes had no experience driving concrete trucks. (Tr. 129). These drivers were Mark Downey, Philip Peters, and Jim Karakaedos. (Tr. 150).

39. Not only did these drivers have no experience driving concrete trucks, they also had no experience working with concrete and far less truck driving experience than Complainant. In addition, their applications were no more detailed than Complainant's application. *See* Exhibits C-16(i), 16(j), and 16(k).

40. The first of these three drivers who admittedly had no experience driving concrete trucks, Mark Downey, only completed one year of high school, did not list any dates of previous employment on his application, did not list addresses or phone numbers for any former employers or supervisors. In the two lines provided to describe his work for each of his previous employers, he wrote nothing more than "truck driver" and "driver." Nowhere on his application did he indicate he had experience working with concrete. *See* Exhibit C-16(I). Respondent provided no evidence that Mr. Downey had experience working with concrete. Mikelop admitted at the hearing that he could not tell

⁶ If I were to accept Respondent's claim that the "hire date" of each candidate as listed on its interrogatory responses, (Exhibit C-20, and earnings chart, Exhibit C-17) is the date the driver actually began working and not the date the driver was offered the job, then the evidence would suggest that at the time Mikelop spoke with Complainant on June 15, 1993, he had already exhausted the pool of applicants who he claims had experience driving concrete trucks. Thus, if Respondent is to be credited on its claim that the "hire date" is a date after the job offer was made, then the evidence suggests that Mikelop truly was lying to Complainant when he told him on June 15, 1993, that he was not yet considering applicants who did not have concrete truck driving experience.

from Downey's application if he had experience working with concrete .(Tr. 151-52). He testified that he hired Downey because he was recommended by a former employer whose business leased property at Respondent. (Tr. 150-52).

41. Downey's application is dated 7/6/93, which is the same date that he was hired, according to Respondent's answer to interrogatories (Exhibit C-20) and according to the earnings chart provided by Respondent. (Exhibit C-17). This evidence strongly suggests that, with respect to his hiring, there was no real process, and he was asked to submit an application form simply as a formality.

42. The date on Downey's application also suggests that Respondent may have been less than forthright when it claimed, with respect to Terence Conway, that the "hire date" for drivers listed in its interrogatory responses refers to the date that the driver actually started working as opposed to the date that he received an offer of employment. I find that hire date indicates the date that the driver received an offer. If Mr. Downey did not submit his application until 7/6/93, he could not have started working that day since Mikelop testified there was some pre-employment paperwork and screening that had to be completed between the date an applicant was given an offer and the date he began working. Pursuant to this process, Downey could not have begun working until sometime after 7/6/93, to allow time to complete the paper work and medical screening. (C-16(i); C-17).

43. The second driver hired who admittedly had no experience driving concrete trucks, Philip Peters, submitted an application showing no experience working with concrete and only one year of experience working as a truck driver for a waste company. Most of his previous experience was as a maintenance worker. (Exhibit C-

16(j); Tr. 152). Mikelop testified that he hired Peters because he was recommended by a superintendent at Respondent. (Tr. 152-53).

44. Peters dated his application 8/10/93. (Exhibit C-16 (J) According to Respondent's interrogatory responses and earnings chart, Peters was hired *before* he submitted an application. The documents show that he was hired on 8/9/93. (Exs. C-20; C-17; Exhibit C-16(J); Tr. 154).

45. Contrary to Respondent's assertions, these dates suggest that the "hire date" on Respondent's documents indicates the date that a driver was offered employment, not the date on which he actually began work.⁷ They also suggest that with respect to some applicants, the application process was a sham. The fact that two of the applications of drivers hired by Respondent are dated on or after their hire date leads me to conclude that these applications were completed on or after the date the individuals were offered employment. (Exs. C-16 (i) &(j); C-17).

46. The third driver hired who admittedly had no experience driving a concrete truck, Jim Karakaedos, completed only two years of high school, had no experience working with concrete, and had some experience as a "driver" for a supply company and a suede company.⁸ His application lists no addresses or phone numbers for either of his *two* former employers, no supervisors names, notes less than one year of

⁷ If the "hire date" is the date Philips actually began working, that would suggest that he submitted his application after he began working. This is not believable and, if it were true, would be evidence that Respondent's application process is truly a sham. Thus, I cannot credit Respondent's assertion that the "hire date" is the date a driver began working.

⁸ There is also no evidence in the record that Mr. Karakaedos held a Class A, or even a Class B, drivers license. See Exhibit C16K. (Tr. 154).

experience with his most recent employer, and lists no dates of employment for his previous employer. (Ex. C-16[k]).

47. Mikelop testified that he hired Karakaedos because of a personal recommendation he received for him from a current driver, Steve Kassiotis. (Tr. 154). Therefore the last three drivers Mikelop hired in 1993 were hired based on personal recommendations he received from current employees of Respondent or from an employer who did business with Respondent. (Tr. 151-54).

48. Mikelop claimed to have hired Downey, Peters, and Karakaedos because each had a personal “sponsor” who had recommended them to Mikelop. Mikelop admitted that he did not assess their qualifications in relation to Complainant’s or other applicants. I find that the hiring decisions for these three positions were based largely on the subjective recommendations of individuals who worked for or were known to Mikelop. (Tr. 151-154; Tr. II, 141-143).

49. The personal “sponsors” for these drivers had worked with them previously and vouched for them in the capacity of personal recommendations. Mikelop did not attempt to contact any of Complainant’s previous employers for an employment reference, despite having admitted that he was familiar with the employers that Complainant had listed on his application. (Tr. 133, 134, 137 Tr. II, 143).

50. Three of the four previous employers Complainant listed on his application either did contract work for Respondent or were customers of Respondent and they were all located on the North Shore. (Tr. 61). Thus, it was reasonable for Complainant to assume that Mikelop knew of them and could easily contact them. (Tr. 63). Nonetheless,

Mikelop did not seek any additional information from Complainant to assist him with any such inquiry.

51. Mikelop claims that he checked a reference for Complainant by speaking with Dave Smith. Complainant listed Smith on the first page of his application as the person who referred him to Respondent. (Exhibit C-1). He did not list Smith as either a personal or work reference. Thus, Complainant's application does not indicate that Smith was a reference, personal or otherwise, but merely the person who called his attention to the fact that the company was hiring and suggested that he apply.⁹

52. Mikelop testified that he was impressed with Complainant's application and sought out Dave Smith to inquire about Complainant after their encounter in June of 1993. I did not find this testimony entirely credible. At some point, Mikelop did speak to Smith, but Smith could not recall exactly when that was. Smith testified that Mikelop saw him, while driving around the plant, and came over and asked him simply if he knew Complainant. Smith testified that he responded yes, he did know Complainant, and that they were friends. (Tr. 183). Smith recalled that Mikelop asked him nothing further about Complainant and that was the end of the conversation and Mikelop left. (Tr. 184). I credit Smith's version of this conversation. Smith who is still employed at Respondent would have had no reason to lie about this encounter. (Tr. 174-175) Both he and Complainant agreed that their friendship waned after this complaint was filed, and Smith was reluctant to cooperate with Complainant during the investigation of this complaint.

⁹ Complainant testified that he left the "personal references" section on his application blank because his personal references would have been minorities and did not think this would be helpful. He was willing to have Respondent contact any of his previous employers listed in the work experience section, as these references would be more relevant and he expected that Mikelop would recognize those employers. (Tr. 63; Vol. II 108).

53. Nonetheless, Smith testified that had he been asked his opinion of Complainant or if he would recommend him, he would have said that Complainant was a good guy, dependable, conscientious, and a good worker. (Tr. 185). Smith testified that he knew Complainant to be a good worker, trustworthy and dependable. (Tr. 177).

54. In contrast to Smith's testimony, Mikelop claimed that he asked Smith whether he knew Complainant, and that Smith replied he did not really know him, that Complainant was just someone who worked out at his gym. (Tr. 142, 144; *See also* Exhibit C-15). Smith testified he would not have said that he didn't really know Complainant and this would have been a lie because Complainant is a friend of his. (Tr. 184- 185). I do not credit Mikelop's version of this conversation. Not only has Mikelop been a key manager with Respondent for many years, he is the alleged perpetrator of discrimination in this case and I found most of his testimony to be unpersuasive. Mikelop admitted that he did not ask Smith anything else or say anything else to him in that conversation. (Tr. 142-43). Mikelop took no other steps to gain information about Complainant or his experience. (Tr. 143).

D. Respondent's Hiring Policies and Hiring History

55. There were no African American concrete truck drivers hired or employed by Respondent, Lynn Sand & Stone, and its successor corporations, Bardon Trimount and Aggregate Industries, during all times relevant to this case.¹⁰ Mikelop, who has been personally responsible for hiring concrete truck drivers for the Respondent for twenty years, from 1982-2002 has never hired a truck driver who is not White. (Tr. 100). He

¹⁰ The record contains evidence of only one truck driver ever employed by Respondent who is a minority (apparently hired before Mr. Mikelop became in charge of hiring), and that driver is an American Indian. *See* Exhibit C-20. At the Hearing, Mr. Mikelop acknowledged that as of that time in April, 2002 he has yet to hire a minority for a concrete truck driver job. (Tr. 100-01, 104).

testified that as of August 1993, he had hired approximately 25-30 concrete truck drivers, and none of them were minority. (Tr. 100, 101, 103). He also testified that he could only guess that as of 2002, he had hired 50-60 concrete truck drivers at Respondent in total, none of whom are minorities. (Tr. 100-01, 104).

56. In 1992, of the 426 individuals employed by Respondent, only 3 (less than 1%) were African American. (Tr. 106). Only 26 of the 426 employees (6%) were not White. *See* Exhibit C-9.¹¹

57. Respondent's plant is located near the city of Lynn, Massachusetts (Tr. 108), which has the fourth highest proportion of minority population of any city or town in the Commonwealth of Massachusetts (after Boston, Springfield, and Brockton). *See* Exhibit C-12. Lynn's population is one-third non-White and over ten percent African American. *See* Exhibit C-11.¹²

58. Mikelop, who has been personally responsible for hiring truck drivers for Respondent and its successor corporations for twenty years, admitted that he has made no efforts whatsoever to recruit and hire any minorities. (Tr. 115-16). More significantly, Mikelop does not advertise for truck drivers, but instead, relies solely on "word-of-mouth" to announce openings and recruit applicants. (Tr. 104 -105).

¹¹ The company's few minority employees were concentrated at the lowest skilled, and presumably lowest paying, levels. The great majority of the company's employees in 1992 who were not White were unskilled laborers (20 out of 26 minority employees). The company had no minority employees in the job categories of Officials and Managers, Professionals, Technicians, and Sales Workers. The only minority female employed by the company worked in the category Office and Clerical. *See* Exhibit C-9. These statistics are virtually identical for 1993. *See* Exhibit C-10.

¹² An additional 5% of the population of Lynn identifies itself as being of two or more races, meaning that anywhere from 10 to 15% of the population may be at least in part African American. *See* Exhibit C-11.

59. Respondent has been a party to state and federal construction contracts, and in 1993, during the time that Complainant's application was pending, Mikelop was hiring drivers to work on a contract for Boston's "Big Dig." (Tr. 113-14). Mikelop claimed he did not know if there were any requirements with respect to minority recruitment and hiring for companies with contracts involving federally or state-funded construction projects, such as the "Big Dig." He admitted that he took no steps whatsoever to recruit minority employees or applicants, and he did not interview any Black candidates. (Tr. 115-16).

60. Despite Complainant's credible testimony that he met Mikelop face-to-face, on two occasions in 1992, when he picked up and returned his application, and that Mikelop clearly recognized him when they met again in June 1993, Respondent asserts that Mikelop did not speak with Complainant until 1993 and did not know Complainant was Black until that meeting. (Exhibit C-15) This assertion is simply not credible. In a previous discrimination case brought by an unsuccessful applicant, Charles Campbell, Mikelop also denied knowing that the Complainant was Black. (Tr. 103).

E. Complainant's Damages

61. As a result of not being hired as a truck driver by Respondent, Complainant suffered considerable emotional distress. As he testified, Complainant's previous employment had been in short term, non-union jobs with no benefits, and he was greatly anticipating the opportunity to work in a steady union position. He truly believed that he was not hired as a truck driver because of his race and this confirmed what he had heard for years: that Respondent did not hire minorities. This was very upsetting to him. (Tr. 74-76.)

62. Complainant's emotional upset manifested itself in physical symptoms, including losing his appetite and losing weight. He also testified that he stopped going to the gym to work out because he felt so dejected. (Tr. 76.) Complainant impressed me as a quiet, dignified and extremely hard-working individual who clearly was humiliated and embarrassed by this experience. He had not filed any complaints of discrimination throughout his entire career in construction, but was clearly affected sufficiently by this rejection to take steps to vindicate his rights. This action took some courage considering Complainant's testimony about the nature of the industry and how many contractors in his area do business with each other. He stood a significant chance of his being labeled a "trouble maker," who should not be hired.

63. As a result of not being hired by Respondent, Complainant suffered lost wages until 1998, although the precise amount of wages lost is difficult to determine precisely due to the transient nature of his jobs, the informal and undocumented manner in which he was paid, and Complainant's difficulty in recalling the sequence and length of time he worked at some of these jobs. Notwithstanding, Complainant continued to make consistent efforts to find work, however that work was sporadic and sometimes short term. He was not able to find steady work until the fall of 1995 when he was able to join the operating engineers union. (Tr. 76). He claimed that his earnings did not equal what they would have been at Respondent until 1998 when he became a crane operator. (Tr. 77-78).

64. Complainant testified that the years following his rejection from Respondent were "very lean" years for him financially. (Tr. 76). He also testified that he had unreported income in both these years, but that this was common due to the nature of

the industry and how he was paid. (Tr. 46, Vol. II) He estimated that his total earnings in 1992 and in 1993, including under-the-table earnings, were between \$10,000 and \$15,000 per year. (Tr. 86-87).¹³ However, when pressed on cross-examination about earlier representations he had made with respect to interim earnings, he testified that in 1993 he might have worked for four months at Bartlett & Stedman at \$13 per hour for fifty hours per week. He also stated that in 1993 he worked for Bobby James Trucking for six months at \$100 a day for five to six days a week and for Tranello Trucking beginning in November of 1993 and continuing for approximately 6 months for five days per week. (Tr. 50-52 Vol. II) Thus, based on his best recollection, Complainant is estimated to have earned approximately \$26,400 in 1993.

65. Complainant's tax return for 1994 shows \$15,097 in reported earnings. Exhibit C-5. Complainant acknowledged that he also had under the table earnings in 1994, when he worked for Caruso McGovern. He had made earlier statements that he worked for nine months for Caruso McGovern earning \$15 per hour for sixty hour weeks. At the hearing he stated he did not believe he worked there for nine months, but that he had no reason to doubt the accuracy of his earlier statement.¹⁴ (Tr. 53-54 Vol. II) If this were indeed true, Complainant would have earned an additional \$23,400 in unreported income in 1994.

66. Complainant's tax return for the year 1995 shows that he had reported income of \$16, 688 in addition to \$1, 887 in unemployment compensation for a total of

¹³ These estimates of Complainant's income for 1992 and 1993 are higher than the amounts shown on the IRS documents and on his Social Security earnings statement introduced into evidence. Exs. C-2, C-3 , C-4. Complainant acknowledges that for those years, his income was actually higher than these documents reflect.

¹⁴ Reference to earlier statements by Complainant include his deposition testimony and statements he gave to an MCAD attorney with respect to his interim earnings.

\$18, 575. (Ex. C-6, Tr. 55 Vol. II). He also testified that he did not work for Tranello trucking in 1995 and that he was certain of this, despite any previous statement he might have made to the contrary. He remembered and stated repeatedly that he had worked for Tranello trucking only one year and that was in 1993. (Tr. 55-56; 60 Vol. II)

67. Complainant's tax return for 1996 shows the he earned \$29,197 in addition to unemployment compensation in the amount of \$2,167 for a total of \$31,364 (Ex. C-7; Tr. 58, Vol. II) Complainant recalled that he worked union contract jobs that year but could not recall the companies that he worked for. He stated that he had no unreported income in 1996. (Tr. 58-59, Vol. II).

68. Complainant testified that a summary of his 1997 tax return reflects that earned \$27, 540 plus an additional \$6,960 in unemployment compensation for a total of \$35, 420. (Ex. C-8, Tr. 60, Vol. II)

69. The earnings for the concrete truck drivers hired by Respondent in 1993, for the years 1993 to 1999 are listed in Exhibit C-17. These earnings varied based on the seniority of the truck drivers and the number of hours worked and the range was significant. The average annual salary for those drivers who appear to have worked close to full time in the each of years 1993 – 1997 is as follows: ¹⁵

1993	\$18,411
1994	\$39,185
1995	\$36,826

¹⁵ These calculations exclude Joseph Donlan's 1993 earnings of \$420.48 and do not include the salaries of drivers who appear not to have worked full time based on the union contract rate of pay for truck drivers. (C-18, p. 131) The yearly earning is also extrapolated from the 7 month figure on the chart. While certain assumptions and estimates had to be made to arrive at these figures, there is no requirement that damages be proven with precise certainty. Agoos Leather Cos., Inc. v. American and Foreign Insur. Co., Inc. 342 Mass. 603 (1961)

1996	\$34,480
1997	\$75,155

70. The Complainant testified that he is not seeking lost wages for the year 1992 and I find that there is insufficient evidence in the record from which I could determine the average salary of a truck driver at Respondent in 1992.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4 (1) prohibits discrimination in employment including refusal to hire an individual on account of race. In order to establish a claim of discrimination under a disparate treatment theory, the Complainant may rely on the inferential model of proof, with the three-part burden shifting analysis. See Wheelock College v. MCAD, 371 Mass. 130 (1976); Blare v. Huskey Molding Systems, 419 Mass. 437 (1995).

In the first stage of proof the Complainant must establish a prima facie case. He may do so by showing (1) that he is a member of a protected class; (2) that he was qualified to perform the duties of the job at issue; (3) he was subject to an adverse employment action; and (4) he was treated differently from other similarly situated persons not of his protected class. Jones v. Glowacki, 23 MDLR 296 297 (2001).

I conclude that Complainant in this case has established a prima facie case of discrimination. He is a member of a protected class, African American, he applied for a position for which he was qualified, he was not hired for the position, and Respondent hired 15 individuals who were all White during the time that his application was pending.

The evidence demonstrated that Respondent hired a White applicant to be a truck driver within a week after Complainant applied in September of 1992 and in the summer of 1993 hired at least thirteen more White applicants to be truck drivers.

Respondent has argued that I should not consider evidence of Respondent's failure to hire Complainant in September of 1992, on the grounds that he did not file a claim for this action within six months of filing his application. However, I conclude that Complainant believed that his application was pending during the time period from September of 1992 until June of 1993, and prior to his June 1993 encounter with Mikelop he had no reason to believe that his application was not under consideration or that he had been rejected for employment. Thus I find that he filed within 6 months of when he had unequivocal notice that his application was no longer being considered. See Wheatley v. American Telephone & Telegraph Co., 418 Mass. 394, 398 (1994) (statute of limitations for complaining of a discriminatory act "does not begin to run until the employee has sufficient notice of that specific act"); Soriano v. City of Lawrence Police Dep't., 12 Mass.L.Rptr. 565, 2000 WL 1584852, *2 (Mass. Super. Oct. 23, 2000) (allowing claim filed twelve years after discriminatory act by holding that the clock begins to run from the date of notice that the specific, adverse act was motivated by discrimination).

Once the Complainant establishes a prima facie case of discrimination, the Respondent must articulate a legitimate non-discriminatory reason for its failure to hire Complainant. The employer must "produce not only evidence of the reason for its action, but also underlying facts in support of that reason." Wheelock, supra. at 136. The employer must also "produce credible evidence that the reason or reasons advanced were the real reasons." Id. at 138.

The reason Respondent articulated for not hiring the Complainant in September of 1992 is that there were no openings at the time. However, when confronted with the fact that it actually hired a White truck driver approximately one week after Complainant applied, Respondent first alleged that the hire date of an applicant is the date on which he begins work and not the date he is offered the job. I did not find this assertion to be credible, particularly in light of the fact that Mikelop had no recollection of when this individual was offered the position. Respondent then asserted that the successful applicant had experience driving a concrete truck which Complainant did not have. It is true that the successful candidate's application notes experience working with concrete, while Complainant's does not. However, Complainant listed a number of previous employers on his application who are in the industry and with whom Mikelop would have been familiar.

During the summer of 1993, at or around the time that Complainant confronted Mikelop about the status of his application, Respondent hired fourteen other drivers. Mikelop specifically told Complainant during their encounter that the reason his application had not been considered was because Respondent was hiring experienced concrete truck drivers first and Complainant did not have any experience working with concrete, at which point Complainant protested that he had 25 years of experience with concrete.

Respondent failed to produce applications for three of the drivers who were hired on June 17, 1993, Joseph Donlan, Dennis Holland, and Robert Reynolds. Thus there is no documentary evidence to corroborate Respondent's assertion that these drivers had experience working with concrete. In fact, the timing of the hiring of these three men, just

two days after Complainant's conversation with Mikelop, renders the failure to produce their applications somewhat suspect. The non-production of crucial documents allows the finder of fact to draw an adverse inference regarding what those documents would have shown. See Testa v. Wal-Mart Stores, 144 F.3d 173, 177 (1st cir. 1998); Nation-Wide Check Corporation, Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 217 (1st Cir. 1982).

In addition, it is unclear from the application of at least one other of first eleven drivers hired in 1993, Louis Fendone, that he had experience driving a concrete truck and his application was no more detailed than Complainant's. He had completed only one year of high-school and did not list his former supervisors, job titles, or descriptions of previous employment. Thus based on any objective measure, his application was no stronger than Complainant's.

Complainant, who had 25 years of experience working with concrete and 19 years experience driving heavy trucks, clearly had superior qualifications for the job of a concrete truck driver than three of the other applicants hired in the summer of 1993, Downey, Peters, and Karakaedos. There is no evidence that any of the these three hires had any experience at all working with concrete, and none of them had close to Complainant's experience as a truck driver, let alone Complainant's experience as a truck driver in the construction industry. That Complainant had more experience than these three White hires is not only true in fact, but is also evident merely from a comparison of their application forms. Complainant's application listed four previous jobs as a truck or heavy equipment operator going back to 1987, and all but one of these employers were in

the construction industry. Mikelop admitted that Complainant's experience driving heavy trucks and equipment was easily transferable to the positions he hired for.

Mikelop claimed at the Hearing that he considered Complainant's application after their meeting in June 1993, by looking at his application and checking a reference by talking to Dave Smith. However, this claim contradicts Complainant's credible testimony that it was clear from their conversation in June 1993 that Mikelop had no intention of hiring him even after Complainant stated he had 25 years working with concrete. During that brief encounter, Mikelop did not even look at him in the eye, did not ask him anything about his application, experience, or references, and made it clear to Complainant he wanted to end the conversation quickly. (Tr. 72-73). Mikelop's claim that he was impressed with Complainant's application also contradicts the testimony of Dave Smith, who stated that Mikelop asked him only if knew Complainant, and when Mr. Smith answered that they were friends and worked out together, Mikelop asked him nothing further. In sum, I conclude that Mikelop clearly never considered Complainant's application.

Mikelop's explanation to Complainant that he was only hiring qualified applicants is undermined by the evidence that Respondent hired at least the three White candidates mentioned above who did not have the requisite experience. He claimed that these applicants, while admittedly not as qualified as Complainant, had personal sponsors who were known to Mikelop, who put in a good word for them or requested that they be hired. This sort of subjective vetting process is generally suspect because it tends to exclude minorities or people of color who may not have an "in" with the company or who may not be part of the "good old boy" network. The fact that Mikelop would continue to rely

on a subjective, word of mouth hiring process, particularly in light of Respondent's abysmal record of hiring minorities as truck drivers, lends further credence to the suspicion that discrimination was at play in the hiring process. In work places that are overwhelmingly White, subjective, word-of-mouth hiring processes have been condemned as a means of perpetuating a disproportionately White workforce. Gains v. Boston Herald, Inc., 998 F. Supp. 91, 96, 108 (D. Mass. 1998) (discrimination can be made out where evidence that the subjective decision making process coincides with a significant disparity in the representation of a particular group) ; Grant v. Bethlehem Steel Corp., 635 F.2d.1007, 1010-11 (2nd cir. 1980) ("haphazard" method for selecting foremen in which White superintendents were given "uncontrolled discretion to hire whom they pleased" and in which superintendents hired "by word of mouth on the basis of wholly subjective criteria" was evidence of discrimination.); EEOC v. Metal Service Co., 892 F.2d 341 (3d cir 1990) (word-of-mouth hiring practice among existing employees in conjunction with an all White work force, is itself strong circumstantial evidence of discrimination.)

Having determined that Respondent's articulated reasons for not hiring Complainant are not supported by credible evidence or are inherently suspect, a reasonable fact-finder could conclude that they were not the real reasons for the decision. From this the fact-finder may infer discriminatory animus. Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 118 (2000). Complainant must ultimately prove by a preponderance of the evidence that the Respondent was motivated by discriminatory animus. Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). However, Complainant may meet this burden of proof by circumstantial evidence such as the

inference of discriminatory animus that may be drawn from proof that one or more of the reasons advanced by the employer is false. Id. at 504.

I conclude that the reasons advanced by Respondent for rejecting Complainant's application were not the real reasons for its actions, but a pretext for discrimination, and that Complainant has proved that the Respondent acted with discriminatory intent, motive, or state of mind. Mikelop was Respondent's manager who actually hired the truck drivers and in many aspects he was not a credible witness. I found his testimony regarding the number of face-to-face meetings he had with Complainant to be particularly untruthful. He claimed to have met Complainant only one time in his office in 1993, an assertion that I did not believe. Mikelop's apparent and convenient recollection of the details of some thirty resumes submitted almost ten years ago, along with his recollection of which candidates he spoke to and whether he contacted references, was also largely suspect. He also incredibly claimed not to know the names of the owners or principals of the company for which he had worked as a manager for over 20 years.

In addition to the above, the fact that Mikelop dismissed Complainant's assertion that he had 25 years of experience, that Respondent used a word-of-mouth hiring process, and that Respondent has never hired a minority truck driver, I conclude that Complainant's race was the reason he was not considered as an applicant and that once Mikelop saw that Complainant was Black, Complainant did not stand a chance of being hired. Thus, I conclude that Complainant has proven a case of disparate treatment in hiring on account of his race in violation of G.L. c. 151B s. 4(1).¹⁶

¹⁶ Complainant urges me to find that he has also proven a claim of disparate impact discrimination in hiring relying on the argument that Respondent's subjective word of mouth hiring practices had a disparate impact on minority applicants. I decline to make rulings of law with respect to such a claim because I do not have sufficient evidence to reach such a conclusion.

IV. REMEDY

Pursuant to General Laws c. 151 B. s. 5, the Commission is authorized to impose a remedy that will make the Complainant whole and to eliminate the discriminatory practice. This includes awarding damages for lost wages, lost benefits and for emotional distress suffered by the victim of discrimination as a direct consequence of the unlawful action. College-town Div. Interco, Inc. v. MCAD, 400 Mass. 156 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172 (1985). “The finding of [discrimination] alone permit[s] the inference of emotional distress as a normal adjunct of the [employer’s] actions. It necessarily follows that in c. 151B cases an award of emotional distress damages can be sustained even in the absence of physical injury or psychiatric consultation.” Labonte v. Hutchins & Wheeler , 424 Mass. 813 (1997), *quoting* Bournwood Hospital, Inc. v. MCAD, 371 Mass.303, 317 (1976).

Having calculated the average earnings of the truckers hired in 1993 who worked full time, I conclude that as a result of not being hired by Respondent, Complainant is entitled to lost wages for the years 1994 through 1997. In 1994, Complainant earned approximately \$38,497 in reported and unreported income. The average salary in 1994 for the full time truckers hired the previous year was \$39,185. In 1995, Complainant had approximate income of \$18, 575. The average salary for the relevant full time truckers at Respondent in 1995 was \$30,770. In 1996, Complainant earned approximately \$31,364. The average salary for the relevant truckers at Respondent in 1996 was \$34,480. In 1997 Complainant earned \$35,420 and the average earnings of relevant truckers at Respondent

for that year was \$75,155. The total amount of Complainant's lost wages for the years 1994 – 1997 is \$61,790.¹⁷

I conclude that Complainant also suffered significant emotional distress as a result of Respondent's rejection of him as a candidate and from the manner in which he was dismissed by Mikelop. I find that Respondent's refusal to hire Complainant was a serious affront to his dignity and caused him to feel humiliated and embarrassed. I credit his testimony that the rejection upset him so that he lost his appetite, lost weight and stopped going to work out, something he did religiously. I believe that this rejection affected him profoundly and that he did not make the decision to file a complaint of discrimination frivolously. Complainant impressed me as a very serious and hard-working individual who had struggled to make a living for years at insecure, short-term jobs and who anxiously sought and anticipated the opportunity to become a member of a union with its attendant benefits and better job security. I believe he was deeply disappointed and offended that this opportunity was denied to him for reasons that were unfair and discriminatory. I conclude that he is entitled to an award of emotional distress damages in the amount of \$100,000 to compensate him for his emotional distress.

V. ORDER

Having determined that Respondent violated G.L. c. 151B and having determined that Complainant suffered damages as a result therefrom, I hereby Order that:

¹⁷ These calculations are admittedly estimates based on the Complainant's best recollection of what he earned in those years, much of which is undocumented due to the manner in which he was paid, and based on averages for the varying amounts of salary earned by the truckers who actually were hired and worked full time. While the method of calculating these estimates is admittedly imprecise, it seemed to be the most reasonable method of determining Complainant's losses given the available evidence.

- 1) Respondent pay to the Complainant the sum of \$61,790 in damages for lost wages for the years 1994 through 1997, within 60 days of receipt of this decision with interest thereon at the statutory rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- 2) Respondent pay to Complainant the sum of \$100,000 in damages for emotional distress, within 60 days of receipt of this decision with interest thereon at the statutory rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- 3) Respondent is hereby ordered to cease and desist immediately from engaging in discriminatory conduct in its hiring practices. In furtherance thereof Respondent is hereby ordered to advertise all future vacancies for truck drivers in two local newspapers, the *Lynn Item* and the *Salem Evening News*. Respondent shall to submit to the MCAD the applications of all candidates who apply for any advertised truck driver positions. It shall also submit reports to the Clerk of the Commission, on January 15 and June 15 of each year for the next 5 years, noting the applications, names, and dates of hire of all the truck drivers hired in the previous six months, along with copies of any advertisements placed in the designated newspapers. These requirements shall remain in effect for 5 years from the date of this Order.

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

This represents the final Order of the Hearing Officer. Any party aggrieved by this Order may file an appeal to the Full Commission pursuant to 804 C.M.R. 1.23 by filing a notice of appeal with the Clerk of the Commission within 10 days of receipt of this Order and a Petition for Review within 30 days of receipt of this Order.

So Ordered this 9th day of April, 2003

Eugenia M. Guastaferr
Hearing Officer