

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & JOYCE POOR,
Complainants

V.

DOCKET NO. 97-BEM-1541

PETER M. FRASCA, D.M.D.,
Respondent

Appearances:

Edward A. Bettencourt, Jr., Esq. for the Complainant
Leonard F. Femino, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 5, 1997, Complainant Joyce Poor filed a complaint with this Commission charging Respondent Peter M. Frasca with discrimination in employment on the basis of age, in violation of M.G.L. c. 151B, §4. 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 March 3-6, 2003. After careful consideration of the record in this matter 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 Joyce Poor resides in Rowley, Massachusetts. Her date of birth is May 27, 1933.

2. Respondent Peter Frasca is a dentist with a private practice in Peabody, Massachusetts. He began his career as a dentist in 1975 in his father's dental practice. He continued the practice in a new location in January 1976. At all times relevant to this matter, Respondent employed six or more employees. I find that he is an employer within the meaning of M.G.L.c. 151B.

3. In 1984, Complainant learned of a job opening at Respondent's office through her daughter, Kathy Furtado, who worked for Respondent. After an interview, Respondent hired Complainant as a receptionist. Complainant worked for Respondent for 12 years until her employment was terminated on December 5, 1996.

4. Complainant's daughter, Kathy Furtado, has worked for Respondent since 1980, initially as a dental assistant, and since 1984 as the Office Manager. Furtado was

Complainant's direct supervisor. At the time of the public hearing, Furtado was still employed by Respondent.

5. Complainant's duties included answering the telephone, greeting patients, scheduling patients, confirming patient appointments, informing the dentist and hygienists when patients would arrive, and calling patients who failed to appear for their scheduled appointments.

6. By all accounts, Complainant and her daughter Cathy Furtado did not get along. They frequently bickered at the front desk, creating a stressful atmosphere for themselves and for others in the office. Their differences have apparently not been resolved, as the hostility between them was obvious at the public hearing.

7. A former employee, Sherri Leiderman, who worked as a dental hygienist for Respondent from 1987 to January 1993, testified that the office atmosphere became more tense as Respondent's business grew. She stated that on one occasion Respondent threw his checkbook ledger onto his office floor in anger and all the checks flew out onto the office floor.

8. Leiderman testified that Respondent had a way of blaming his employees if patients did not keep appointments. She described an incident when patients failed to appear for their appointments and Respondent threw the employees' paychecks in his trashcan. As a result, the employees received their checks with food stains on them.

9. Leiderman testified that on another occasion when a patient had failed to appear for an appointment, Respondent asked Complainant where the patient was. Complainant responded that she had not yet had a chance to call. Respondent responded by tossing the patient's records over the counter and onto Complainant's desk, saying "I guess we won't be needing these, then."

10. In 1988, Respondent created a profit-sharing pension plan, although he did not fund the plan until 1992. By the terms of this profit-sharing plan, Respondent contributed a percentage of his profits into the plan to be distributed to the employees. By the terms of the plan, the older the employee, the higher amount of the distribution. However, Respondent received a certain percentage of the distribution before the remainder of the

profits were distributed to his employees. Thus, the amount of Respondent's distribution was unaffected by the age of the plan's participants.

11. In 1992, Respondent made contributions of \$38,482.32 to the plan. He received \$30,000.00. Complainant received the next highest contribution of \$4,615.75. Debbie Hartford received \$892.36. Sherri Casey Leidermann received \$584.45. Zoe Ann Patrikas received \$1,332.86 and Kathy Furtado received \$1,056.90. In 1992, Complainant received more money from the profit-sharing plan than all other employees, except Respondent.

12. In 1989, at Respondent's request, Complainant wrote a job description for her position. On the job description, along with her other duties, Complainant repeatedly wrote, "Answer the phone-watch the clock." Respondent testified that he found this repeated phrase irritating and facetious. I credit this testimony.

13. Respondent reviewed Complainant's job performance on January 26, 1995. Respondent rated Complainant on a scale of one to 10 in several areas with 10 the best rating and one the worst. She received ratings of either nine or

10 in honesty, appearance, patient phone technique and thoroughness. She received ratings of either four or five in "ability to grow on job", "ability to adapt to and be alert to changing circumstances", "following office policy", "attitude", "ability to accept criticism", "understanding of dental procedures" and "understanding the needs of the doctor".

14. Respondent testified that Complainant was very good with patients, dressed appropriately and had a very good telephone manner. Respondent testified that Complainant never improved with regard to other aspects of her job. Nonetheless, he continued to employ her because she was Furtardo's mother.

15. On November 8, 1994, Respondent wrote to Complainant:

Dear Joyce,

I want to put down in writing what we have spoken about at length for many years at staff meetings and in reviews about what I consider the most important aspect of a receptionist in my practice. The person sitting at the front desk must be alert and aware of the activities that go on in the front office. That includes the arrival of patients, the tardiness of patients and most importantly notifying the appropriate staff member, hygienist or dentist, of the arrival of his or her patient. Failure to do this in a timely fashion is unfair to the staff member and renders proper and appropriate treatment difficult and stressful... This afternoon, at least twice, patients

were sitting in the reception room for an extended period of time and the appropriate staff member was not notified. In one case, this put a significant amount of pressure on a hygienist. I feel this is unnecessary and I must insist that you pay more attention to this aspect of your job...

(Exh. R-2)

Respondent stated that despite giving this letter to Complainant and discussing her performance at monthly staff meetings, Complainant never improved in this aspect of her job.

16. Complainant testified that at each of her employment reviews, Respondent told her that she received more from the profit-sharing plan than any other employee. Respondent stated that this was generally his response to Complainant's complaints that her raises were insufficient and was not a comment on her age. I credit Respondent's testimony in this regard.

17. Kathy Furtado testified that Complainant had difficulty operating the phone system, the answering machine and the light system used to communicate with the Respondent and the hygienists. I credit this testimony.

18. According to Complainant, on one occasion morning in 1996, she told Respondent that she had never heard Furtado make a derogatory comment an elderly patient. Respondent responded, "Well, you ought to hear what she says about you." Complainant took this to mean that Respondent was referring to Complainant as elderly. Respondent did not recall making this statement. I credit Complainant's testimony in this regard.

19. By all accounts, one of Respondent's overriding concerns was insuring that all appointment time slots were filled in order to maximize profits. Complainant and other employees who scheduled patient appointments were instructed to immediately call patients to fill openings if a patient cancelled an appointment.

20. On one occasion in 1996, at approximately 7:30 a.m., after a patient had cancelled an appointment, Respondent instructed Complainant to call the next scheduled patient to come in early. Complainant called the patient immediately, commenting to Respondent that elderly people have a tendency to get up early in the morning. His response was, "Well, you ought to know." Respondent did

not recall making this statement. I credit Complainant's testimony that Respondent made this statement.

21. In 1995, Respondent began a romantic relationship with another dentist in the office, causing his wife to initiate divorce proceedings. In the ensuing years, Respondent was engaged in a bitter divorce, with his wife confronting him at the office on at least two occasions and Respondent obtaining a restraining order prohibiting his wife from coming to the office. These events caused stress in the office.

22. In the summer of 1996, Respondent hired a consultant, Paul Hegner, from a company called Practice Office Management, to evaluate his dental practice and perform an appraisal of the practice in connection with his divorce proceedings to insure that the business was not overvalued. In connection with his evaluation, Hegner performed an examination of the financial records and reviewed the expenses of the business, including the salary and benefits paid to each employee.

23. Complainant testified that she never met with Hegner. However, Hegner testified that he observed

Complainant working and during one visit to the office spent an hour speaking with her. I credit Hegner's testimony that he spoke to Complainant and evaluated her duties.

24. Hegner testified that he initially talked with Complainant about the benefits of using an interactive computer system. At a second meeting with Complainant, Hegner again discussed the computer system with Complainant, only to discover that Complainant had no memory of what they had discussed earlier.

25. According to Hegner, during this second meeting Complainant told him that she would not learn how to use a new computer because it was "too complex" and she had been doing things a certain way for a long time and was not going to change. I credit Hegner's testimony about her reluctance to learn a new system. Hegner testified that after these meetings he concluded that Complainant had neither the aptitude for the computer nor the desire to learn.

26. As part of his evaluation, Hegner met with Kathy Furtado on several occasions and determined that her

problems with Complainant were requiring her to spend too much time at the front desk and away from her administrative duties. Hegner told Respondent that Furtado needed to concentrate more on her managerial duties and recommended Complainant be terminated. I credit this testimony.

27. Respondent testified that he concluded that Furtado's health was suffering because of the tension between her and Complainant and as Furtado was a valued employee, he decided to terminate Complainant's employment. I credit this testimony.

28. Although Respondent testified that the conflict between Complainant and Furtado was the sole source of his stress, I do not credit this testimony. I find that in addition to the stress caused by Complainant and Furtado, there was considerable stress in Respondent's office due to Respondent's personal matters, including his divorce.

29. Respondent hired Shirley Lawlor, whom the witnesses estimated to be in her late 30s to early 40s, to replace Complainant.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B§4(1B) makes it unlawful to discriminate in employment on the basis of age. The statute protects persons age 40 and over. Complainant alleges that Respondent discharged her because of her age and because her age entitled her to receipt of large distributions from Respondent's profit-sharing plan.

In order to establish a prima facie case of age discrimination in employment, Complainant must demonstrate that she is a member of a protected class who was capably performing the responsibilities of her job, was terminated and was replaced by someone substantially younger. Knight v. Avon Products, 438 Mass. 413 (2003). Murphy v. Pub Ventures, 15 MDLR 1098, 1110-11 (1993). Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000).

Complainant established her membership in a protected class by virtue of her age, 63, at the time of her termination, and that she was replaced by someone substantially younger than she. However, Complainant has not established that she was adequately performing her job at the time of her termination. Respondent's witnesses testified credibly that Complainant performed poorly in several aspects of her job, such as inability to use the

telephone system, the computer systems and the communications system. Respondent testified credibly that notwithstanding her poor performance, Complainant did not improve on the job, but that he kept her on only because she was Furtado's daughter. Respondent finally terminated Complainant's employment upon the advice of a consultant who did a professional evaluation of the business. Respondent also highly valued Furtado as an employee and was concerned that Furtado's health would suffer from the stress of continuing to work with Complainant.

Assuming that Complainant had established a prima facie case of age discrimination, the burden of production shifts to Respondent to articulate legitimate, non-discriminatory reasons for its conduct. Abramian, supra. According to Respondent, he terminated Complainant's employment because of his dissatisfaction with her performance as well as her inability to get along with her daughter, who was his office manager. I find that Respondent has met his burden of articulating legitimate, non-discriminatory reasons for Complainant's termination.

If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that the Respondent "acted with discriminatory intent, motive or state of

mind." Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, supra. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of discriminatory animus. Id.; Abramian, 432 Mass at 117.

Complainant offered no credible evidence that Respondent's articulated reasons for terminating Complainant's employment were a pretext for unlawful discrimination. When, on the advice of a consultant, Respondent decided to terminate Complainant's employment in order to maximize the performance of Furtado, his highly valued office manager, his decision was entirely appropriate and free of discriminatory animus. Furthermore, the key reason alleged by Complainant for her termination, that Respondent would benefit financially if Complainant were out of the profit-sharing plan, was not borne out by the evidence. By the terms of the plan, Respondent first received a certain portion of the profit-sharing benefits, with the remaining profits distributed among his employees, including Complainant. Thus, although Complainant received

a larger proportion of the remaining benefits because of her age, Respondent's benefits were unaffected by the amount of her benefits.

Further, Complainant has offered evidence of statements made by Respondent tending to support animus based on age, however, I conclude that these "stray remarks" did not establish that Complainant's termination was motivated by age animus. Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 298 (1991). There was evidence that Respondent occasionally behaved immaturely in the office, for example by throwing papers in anger and, on two occasions, making sarcastic remarks about Complainant's age. This behavior, though inappropriate, does not support the charge that his decision to terminate Complainant's employment was motivated by age discrimination. Finally, the evidence portrayed an office where personal and office disputes were intertwined and hostility pervaded the atmosphere. However, the enmity did not result from discriminatory animus, but from personality conflicts among the Respondent, the Complainant and Complainant's daughter.

Therefore, I conclude that Respondent did not engage in unlawful discrimination on the basis of age and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, this complaint is hereby dismissed. This constitutes the final order of the hearing officer. Any party aggrieved by this order must file a Notice of Appeal to the Full Commission within ten days of receipt of this decision and must file a petition for review to the full commission within thirty days of receipt of this order.

SO ORDERED, this 12th day of September, 2003.

JUDITH E. KAPLAN
Hearing Officer