

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

Lawrence J. Herman,  
Complainant

v.

Docket No. 95-BEM-2397

Furniture Freight Terminal, et al.,  
Respondents

Appearances: J. Channing Bennett , Esquire, for Complainant  
Gordon P. Katz, Esquire, and Marjorie E. Lanier, Esquire, for Respondents

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

This case concerns an individual who claims that he was subjected to discrimination on the basis of his age and handicap when he was terminated from his position as a furniture finisher. His complaint alleges unlawful discrimination in violation of M.G.L. c. 151B, § 4(1B) (16).

II. PROCEDURAL HISTORY

On October 3, 1995, Complainant, Lawrence J. Herman, filed a complaint of discrimination against Respondent. The Investigating Commissioner issued a Finding of Probable Cause on August 9, 2000. After the Finding of Probable Cause, Complainant filed a Motion to Amend his complaint to name D. M. Reid Associates Ltd., Reid Enterprises, Inc. and David M. Reid individually and d/b/a Reid Enterprises as

Respondents. The Motion to Amend was allowed on October 31, 2000. After conciliation efforts failed, the case was certified for public hearing. A public hearing was held before me on September 24, 2001. The parties submitted post-hearing proposed findings of fact and conclusions of law.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law, and supporting arguments of the parties. To the extent the proposed findings and conclusions are not in accord with the findings therein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with my findings. To the extent the testimony of various witnesses is not in accord with the findings herein, such testimony is not credited. Having duly considered the record before me, I make the following Findings of Fact and Conclusions of Law and Order.

### III. FINDINGS OF FACT

1. Complainant, Lawrence J. Herman, is a resident of Roslindale, Massachusetts. His date of birth is July 3, 1930. (Tr. I, pp. 26-27)
2. Respondent, Furniture Freight Terminal, Inc. ("FFT, Inc.") was an employer within the meaning of M.G.L. c. 151B. Founded in 1977, it ceased doing business in December 1997. David Reid was President of FFT, Inc. At the time of the hearing, Reid was 60 years old. (Tr. I, pp. 170-171, 186)
3. Respondent hired Complainant to work as a full time furniture finisher in its small retail furniture store in Peabody in 1988. At the time of Complainant's hire, he was 58

years old. Complainant stated that Reid was not concerned about his age when he hired him. (Tr. I, pp. 31, 71)

4. Complainant's supervisor was Gary Parker. (Tr. I, p. 35)
5. Throughout his employment, Complainant was never reprimanded or disciplined. (Tr. I, pp. 40, 52)
6. In 1995, Respondent employed approximately a dozen employees. (Tr. I, p. 42)
7. Throughout his employment, Complainant earned \$575.00 per week. Respondent paid Blue Cross/Blue Shield health insurance premiums for Complainant and his wife. (Tr. I, p.33)
8. Complainant testified that Respondent pressured him to switch his health insurance coverage from Blue Cross/Blue Shield to Medex, a less expensive insurance plan. On specific occasions Parker and another office employee individually spoke to him about health insurance coverage. Complainant was not aware of the amount Respondent paid for his health insurance nor of the amount it paid for other employees' insurance. (Tr. I, pp. 38-39, 48-49, 89-91)
9. In 1992, Complainant underwent quadruple bypass surgery and was out of work for approximately three weeks. He returned to light duty with some physical restrictions. Respondent accommodated Complainant's restrictions by not having him perform heavy lifting. Complainant eventually returned to working without limitations. (Tr. I, pp. 37-38)
10. Complainant testified that after returning from his medical leave, he was subjected to disparaging comments by Parker and his co-workers. He stated that Parker and his co-

workers referred to him as ‘old man’ and made comments to the effect ‘the old man’s going blind.’ (Tr. I, p. 47)

11. Reid testified that Complainant had complained about Parker, but never complained about age related comments, and that in approximately 1993, Parker had recommended that Reid fire Complainant. (Tr. I, pp. 192-193)
12. Reid testified that in 1993, Respondent posted a net loss of approximately \$45,000. He stated that in 1994, it conducted a large inventory liquidation sale, resulting in it breaking even for that year. Reid stated that by the summer of 1995, the store was posting a loss for the year of \$56,000 and by the conclusion of that year, Respondent had suffered a net loss of approximately \$100,000. (Tr. I, p.195, Ex. 26)
13. Reid testified that Respondent’s financial situation in the summer of 1995 forced him to cut expenses. He believed that cutting back on advertising would have resulted in a loss in sales and therefore, he decided to cut back on payroll. Reid testified that the position of furniture finisher was the one job he could do without. Complainant was Respondent’s only furniture finisher. (Tr. I, pp. 78, 195-196) I credit Reid’s testimony.
14. Reid testified that on two to three occasions in 1994 and 1995, economic factors caused him to approach Complainant about assuming, for additional pay, a combination position of furniture finisher and warehouse manager. He stated that he preferred to retain Complainant instead of the warehouse manager because of Complainant’s finishing skills and previous employment as a manager. Reid testified that Complainant was not interested in assuming the additional duties of the combined position. Complainant denied that he was offered the responsibility of managing the warehouse. (Tr. I, pp. 86-87, 196-198) I credit Reid’s testimony on this issue.

15. Reid testified that Complainant's lack of interest in assuming the responsibility of the combined position and Respondent's poor financial condition compelled him to lay-off Complainant for strictly financial reasons. He stated that Complainant's health insurance was not a consideration in his decision. (Tr. I, pp. 162, 198-199) I credit his testimony.
16. On August 17, 1995, Parker informed Complainant that he was being laid off. Complainant testified that Parker told him at the time of the lay-off, "It's your age and medical history that's making my insurances go sky high." Complainant testified that he asked Parker whether he could work part time in exchange for Respondent paying his health insurance and also requested two weeks notice and severance pay. Parker denied these requests. (Tr. I, pp. 42-46, 50)
17. Complainant was very upset about being laid off. He testified that he and Parker engaged in a heated argument and Parker ran out of the warehouse. Reid testified that Parker informed him that Complainant started waving his fist and screaming he was going to kill him and that Parker stated that he feared for his safety. Complainant denied threatening Parker with violence. (Tr. I, p. 51, 94-97)
18. Reid testified that prior to Complainant's threatening conduct toward Parker, he had hoped that Complainant would have been the person he called back to perform per diem finishing work. He stated that on the day that Complainant was laid off, after Complainant had engaged in the threatening conduct towards Parker, he placed an advertisement for a furniture refinisher for two to three days per week in the Essex County Newspapers' Salem Evening News. (Tr. I, pp. 53-54, 163-164, 202-203, Ex. 1) I credit Reid's testimony.

19. Complainant testified that he saw the advertisement for the furniture refinisher position in the newspaper on August 18, 1995. (Tr. I, pp. 53-54)
20. Complainant came to Reid's office unannounced a day or two after being laid off and apologized for his argument with Parker. He asked Reid to allow him to work part time in exchange for payment of his Blue Cross/Blue Shield health insurance premiums. With Complainant present, Reid called Parker in order to see if an arrangement for Complainant to perform per diem work could be negotiated. Reid testified that Parker stated he was very upset by Complainant's threatening behavior and that he would quit if Reid hired Complainant to work at the warehouse. Reid stated that at this point, he terminated Complainant's employment permanently. (Tr. I, pp. 161-162, 201-203) I credit Reid's testimony.
21. Reid stated that he volunteered to call employers in the furniture business and give Complainant a good recommendation. Complainant denied that Reid volunteered to make calls on his behalf to assist him in finding employment. (Tr. I, pp. 100, 203)
22. Complainant stated that he began to search for full time employment two to three weeks after being laid off. He stated that he was only able to find part time employment with no health benefits at The Convertible Castle a/k/a Bernie and Phyl's and began to work there on a part time basis in the fall of 1995. He worked part time until January 2001, when he became employed full time. (Tr. I, pp. 57-68)
23. Complainant testified that his lost wages from 1995 through 1997 amounted to \$43,302.69 and that he paid approximately \$11,600 in health insurance premiums during those years. Respondent ceased doing business in December 1997. (Tr. I, pp. 116-121, Exs. 7, 22)

24. Complainant testified that after his termination, he was very depressed. He stated that he felt he was being pushed out of his job because of his age. Complainant's wife testified that he had difficulty eating and sleeping, and was withdrawn, for six weeks, when he started working again. (Tr. I, pp. 52, 56-57, 115-116, 215-216)
25. In late October 1995, Respondent hired Brian Phaneuf to perform finishing work. Phaneuf worked as an independent contractor on a part-time schedule of three nights a week, for approximately four hours a night, and did not receive health insurance benefits. In the three to four months prior to Respondent's closing in late 1997, Phaneuf worked full time while the store liquidated its inventory. Reid stated that Respondent also used The Furniture Doctor, a furniture finishing service, for some of its finishing work. (Tr. I, pp. 129-138, Ex. 24)
26. Reid stated that approximately half of Respondent's employees were over age 40 and that one salesperson was approximately 68 years old when he retired. (Tr. I, p. 190)
27. After liquidating its inventory, Respondent ceased doing business in December 1997. (Tr. I, pp. 170-171)
28. Reid testified that he formed Reid Enterprises, Inc., a holding company, in 1982 and was its sole shareholder, but was not an officer or director. Reid Enterprises, Inc., owned FFT, Inc. as the sole shareholder and also owned D.M.Reid Associates, Ltd., as well as other operating companies that performed a liquidation business. Reid testified that FFT, Inc. maintained separate bank accounts and financial records. (Tr. I, pp. 142-155, 186-190, Ex. 13)

#### IV. CONCLUSIONS OF LAW

##### JURISDICTION

Respondent contends that Complainant failed to file his claims against Reid Enterprises, Inc. and David M. Reid, individually, within the six month statute of limitations period and that Complainant waived, as matter of law, claims against Reid Enterprises, Inc. and David Reid, due to his failure to act to amend the complaint to add these parties until over five years after it was originally filed.

Complainant's Motion to Amend his complaint to name D. M. Reid Associates Ltd., Reid Enterprises, Inc. and David M. Reid individually and d/b/a Reid Enterprises as Respondents was granted by the Commission on October 31, 2000. Pursuant to 804 C.M.R. 1.10 (6) amendments shall relate back to the original filing date of a complaint. Although Complainant's Motion to Amend was granted after the August 9, 2000 probable cause finding, I conclude that the additional named Respondents were on notice of the alleged unlawful discriminatory practices, which arose out of the subject matter of the original complaint. I conclude that Reid, individually, and Reid Enterprises were not denied the opportunity to prepare a defense; nor were they otherwise prejudiced by their addition as party Respondents. Accordingly, I find that Complainant's claims against the Respondents named in his amendment are not barred by the statute of limitations.

##### AGE

M.G.L. c. 151B, § 4 (1B) prohibits discrimination on the basis of age in the workplace. The Complainant may establish a case of discrimination by direct evidence. Direct evidence is evidence that, "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. Massachusetts Comm’n Against Discrimination, 431 Mass. 655, 665 (2000). 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.

In this case, Complainant has presented direct, credible evidence of age discrimination: Parker’s remark regarding Complainant’s age and Respondent’s health and insurance costs at the time he laid off Complainant. Parker’s statement to Complainant as he notified him of the lay-off that, “It’s your age and medical history that’s making my insurances go sky high” is direct evidence of discriminatory bias coming from a supervisor who appeared to have the authority to make such a statement. This evidence demonstrates that at least one factor motivating Complainant’s lay-off was illegitimate.

Once Complainant carries his initial burden, the burden of persuasion shifts to Respondent, who “may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive.” Wynn & Wynn v. MCAD, 431 Mass. 655, 670 (2000) quoting Price Waterhouse v. Hopkins, 490 U.S. 228 at 244-245. Respondent has the burden to “show that its legitimate reason, standing alone, would have induced it to make the same decision.” Johansen v. NCR Comten, Inc. 30 Mass. App. Ct. 294, 301 (1991), quoting Price Waterhouse v. Hopkins, 490 US 228, 252 (1989).

Respondent asserts that its declining economic situation caused it to downsize for financial reasons, resulting in Complainant's August 1995 lay-off. It contends that Parker did not have the authority to make the statement regarding insurance and that he was not involved in the decision to lay-off Complainant. Respondent further contends that after Complainant threatened Parker, he was permanently terminated as a result of this conduct toward his supervisor.

Respondent has persuaded me that it would have taken the same action with respect to Complainant's lay-off even absent any improper reference to, or consideration of, his age. The reason asserted by Respondent for its action, its declining economic situation, is supported by documentary evidence and by Reid's credible testimony regarding Respondent's financial circumstances and the integrity of his decision-making process with regard to Complainant's lay-off. I further find that, although Complainant stated that Respondent encouraged him to switch to less expensive health insurance coverage, there was no evidence to suggest that Respondent was actually paying higher health care costs for Complainant. Moreover, Respondent's omitting Complainant's threat to Parker as a reason for his termination in earlier documents submitted to the Commission does not change the fact that his termination was already decided for financial reasons.

Additional factors belie Respondent's discriminatory animus in terminating Complainant. Complainant's own testimony established that when hiring him at age 58, Reid was not concerned about Complainant's age, and Reid's testimony indicated that half of Respondent's employees were over forty years of age. Additionally, Respondent never hired another full time furniture finisher after laying-off Complainant. Rather than

replacing Complainant, Respondent hired an independent contractor on a part-time basis to provide finishing services. Finally, I find that Parker's references to Complainant as "old man" subsequent to his return from medical leave were stray isolated comments that are insufficient to prove an impermissible discriminatory animus.

On the basis of the factual record in this case, Respondent has persuaded me that its articulated legitimate reason for Complainant's lay-off was the motivating factor and that it would have taken the same action absent any improper motive. While I have no doubt that Complainant's termination was a difficult and humiliating event for him, he has not proven by a preponderance of the evidence that Respondent's actions violated M. G. L. c. 151B, § 4(1B).

### HANDICAP

M.G.L. c. 151B, § 4(16) states that it shall be an unlawful practice for an employer to refuse to hire, rehire, advance in employment or otherwise discriminate against, because of a handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation. In order to establish a prima facie case of employment discrimination, Complainant must first demonstrate that he is a handicapped individual as defined by M.G.L. c. 151B, § 1(17). He subsequently must prove that he was an otherwise qualified handicapped person and was terminated under circumstances which give rise to the inference that his termination was based on his handicap. See Ryan v. Town of Lunenburg, 11 MDLR 1215 (1989); McLain v. Holyoke Hospital, Inc., 19 MDLR 101 (1997); Commission Against Discrimination Guidelines: Employment Discrimination on

the Basis of Handicap-Chapter 151B s. IX (A)(1) (“MCAD Guidelines”). It is not a requirement that Complainant show, as part of his prima facie case, that he was terminated solely because of his handicap. Dartt v. Browning-Ferris Industries, Inc. 427 Mass. 1 (1998)

Complainant has not demonstrated that he is a handicapped person as defined by M.G.L. c. 151B, § 1(17). In order to be a disabled person within the meaning of the statute, an individual must suffer from a “physical or mental impairment, which substantially limits one or more major life activities.” *Id.* Complainant did not claim at the hearing that his heart disease was a handicap. He failed to submit any evidence to demonstrate that his heart disease or having undergone heart surgery constituted a physical impairment substantially limiting his major life activities. Nor was there any credible evidence that Respondent perceived him to be handicapped at the time of his termination.

#### INDIVIDUAL AND CORPORATE LIABILITY

Complainant had alleged that in terminating him, Reid acted as an officer of Respondent and is thus personally liable. He further alleged that Reid and Reid Enterprises are alter egos of FFT, Inc. and that he may therefore ‘pierce the corporate veil’ and hold them liable for discrimination. Due to my conclusions above, it is not necessary to resolve the issues of whether “alter ego” liability exists on the part of Respondents Reid Enterprises and David Reid individually or whether these Respondents are separate and distinct legal entities.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, I hereby order that the complaint in this matter be dismissed.

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

So Ordered this 16<sup>th</sup> day of December, 2002

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Walter J. Sullivan, Jr.  
Hearing Commissioner