

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & LEONARD NOILES,
Complainants

v.

DOCKET NO.00-BEM-0935

ADOLPH BAUER, INC.,
Respondent

Appearances:

Vincent L. DiCianni, Esquire for the Complainant

Michael P. Mason, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about March 28, 2000, Leonard Noiles filed a complaint with this Commission charging Respondent with discrimination 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 this matter failed, and following a certification conference, the matter was certified for public hearing. A public hearing was held before me on September 9-11, 2003. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Adolph Bauer, Inc., located in Holbrook, Massachusetts is a company whose primary business is producing embossing dies and foil stamping dies for the greeting card and packaging industries, as well as for other businesses. Respondent employs more than six persons and is an employer within the meaning of M.G.L.c.151B§195.

2. Complainant Leonard Noiles was born on August 1, 1938. He resides in Hanover, MA. Complainant began his employment with Respondent in 1965. From 1965 to 1993, Complainant worked in various departments, primarily the routing department. He also worked briefly in the pantograph and shipping departments, and from 1974 to 1980, he co-supervised the shipping department. Beginning in 1980, Complainant worked in the routing department where he supervised trainees and worked on routing machines. In general terms, the routing machine traces images onto dies. Routing is close work requiring the router to wear magnifying glasses.

3. In 1982, Complainant was invited to join Respondent's second tier of management, known as "staff".

In this capacity Complainant attended staff meetings and helped establish company policy. In addition to their managerial duties, staff members remained on the production force and continued to work on machines. By 1987, Mark Sherwin, Joe McDonell, Paul Prim, Kenny Boyer and Complainant were all staff members.

4. In 1993, Respondent was purchased in a leveraged buyout by four of its employees, David Larsen, James Dunbar, Edward Synan and Robert Hunt.¹ David Larsen is Respondent's president. James Dunbar is Respondent's vice president and Treasurer. Complainant desired to become part of the new ownership and, to that end, wrote a letter to George Krim, one of the previous owners, asking to be considered as a new owner. Complainant was not considered for ownership by the former owners.

5. Complainant testified that in the spring of 1993, shortly after the buyout, the new owners called him into a meeting to discuss his status. Complainant testified that in the meeting David Larsen told him he was "getting too old" and that his position in the company might change. Complainant testified that he was in shock and figured

¹ Synan and Hunt are deceased

something bad was going to happen. Larsen denied ever telling Complainant he was "getting too old." Larsen testified that he considered Complainant a contemporary who was active and with whom over the years he had played sports in the company parking lot. I credit Larsen's testimony that he did not tell Complainant he was getting too old.

6. Shortly after the meeting, Larsen removed Complainant from the management staff and transferred him from the routing department to the office where he worked on computer graphics, order entry and telephone customer service calls. Complainant no longer performed managerial duties. Complainant testified that others in the company were "pleased that something bad happened to him" because Complainant could "no longer can boss [them]."

7. Sometime in 1995, after a decline in computer graphics jobs, Complainant was transferred back to the routing department. It was Respondent's practice to assign each employee in routing to a particular machine. When Complainant returned to the routing department, there were two vacant machines, one of which had been stripped down and "cannibalized" for parts. The other machine was

assigned to Complainant and according to him it required frequent repairs and slowed him down considerably. When he moved back to routing, Complainant's supervisor was Mark Sherwin, however all of the staff members directed his work, including Joe McDonell, to whom Complainant frequently complained about the machine, to no avail. Complainant frequently repaired the machine himself. Complainant remained in routing from 1995 to 1999.

8. In the summer of 1999, having been told by managers that someone with experience was needed in pantograph, Complainant was transferred from the routing department to the pantograph department, where he worked on a pantograph, which is a tracing machine. His supervisor in pantograph was Jim Medeiros.

9. Complainant testified that his experience in pantograph was limited, as he had worked only for a short period of time in that department 25 years earlier. When Complainant originally worked in pantograph, he worked primarily with materials made of steel, whereas in 1999 he worked primarily on blocks of carbon that filled the air with carbon dust and were dirty.

10. In September 1999 Complainant was offered and refused a transfer from pantograph to the fiberglass department. He refused because when assigned there on previous occasions the fumes had sickened him. According to Complainant, shortly after refusing the transfer, Medeiros informed him that all of his overtime was to be cut. Complainant testified that he relied on overtime pay to help with living expenses.

11. Complainant received a \$0.25/hour raise in 1998. Before that time, Complainant had not received a raise for seven years. David Larsen testified that Complainant had not received raises because he had reached the top of the pay scale. Under the previous owners, Complainant worked 15 to 20 hours of overtime per week. When the new owners took over, Complainant's overtime was reduced by 5 hours per week.

12. Jim Medeiros testified that he once told James Dunbar that Complainant was not meeting production goals in pantograph and Dunbar showed Complainant a better way to hold his hands in order to work more efficiently. At other times, Medeiros told Complainant that he needed to work faster. Complainant did not dispute Medeiros' testimony,

but felt he was unfairly compared to Adam Parks, who had been in pantograph for two years and to Medeiros, who had been in pantograph for 12 years.

13. Michael Johnson, whose date of birth is October 3, 1979, started at Respondent on October 20, 1999 and was assigned to the routing department, several months after Complainant was transferred from routing to pantograph. Johnson performed some of the duties that Complainant had performed as a router. However, according to David Larsen, Johnson was only training in the routing department and would ultimately be assigned to rout fiberglass.

14. On the morning of November 17, 1999, Complainant was at work in pantograph when Jim Medeiros and Adam Parks began to play loud rock music on the radio. Complainant testified that he sensed that Medeiros and Parks were "snickering" about the music because they knew he did not like rock music. Complainant testified that he told Joe McDonnell that he could not stand the music, but because he did not want to confront Medeiros, he was leaving for the day. He did not receive permission to leave the workplace.

15. When Complainant arrived at work the next morning, Medeiros directed him to speak with Dunbar, who told Complainant, "Things aren't working out. We're going to let you go. The decision's already been made and can't be reversed." Dunbar refused to hear Complainant's reasons for leaving the previous day. Upon receiving the news, Complainant felt sick to his stomach and worried how he would make ends meet.

16. David Larsen is Respondent's president. Larsen has been with the company since 1973, having worked in the etching department, the dark room and the finishing department until 1993 when he became one of the company's new owners. As president, Larsen had no day-to-day responsibility for personnel matters, which were left to the managers.

17. Larsen testified that while a member of staff, Complainant sat by himself during meetings and refused to participate, which was a major "stumbling block" for the managers.

18. Larsen testified that by 1995, after a decline in computer graphics work, there was little for Complainant to

do in the office. At that time, the managers wanted to terminate Complainant's employment, however, the owners wanted to keep him on because of his long service to the company. I credit this testimony.

19. According to Larsen, Complainant had a poor attitude and there had been constant friction between Complainant and managers since the change in ownership. Larsen testified that Complainant's walking off the job on November 17th was "the straw that broke the camel's back." I credit this testimony.

20. Larsen testified that the decision to terminate Complainant's employment was made by a group, including himself, Dunbar, Synan, Medeiros, Bill Larsen, Sherwin and McDonnell. However, according to Respondent's answers to interrogatories, Larsen and Dunbar were the sole decision makers regarding Complainant's termination.

21. Larsen testified variously that Complainant was terminated because of lack of work, that he was laid off for financial reasons, and that he could not adequately perform the pantograph job. Larsen further testified that the reasons for terminating Complainant were "partly

financial and a combination of everything else.”

Complainant was the only employee laid off in 1999.

22. Larsen testified that while Michael Johnson trained in the routing department, he was being trained to eventually rout in the fiberglass department. Respondent's answers to interrogatories stated that Johnson performed some of the duties previously performed by Complainant in routing.

23. James Michael Dunbar, born in 1940, is Respondent's vice president and treasurer. Dunbar started at Respondent in August 1958 and became an owner in 1993. Dunbar worked together with Complainant in the pantograph department when Complainant first worked at Respondent.

24. As an owner, Dunbar oversaw the pantograph department but was not Complainant's direct supervisor. Dunbar testified that in 1999 Jim Medeiros complained about Complainant's poor work ethic and his slow performance. Dunbar testified that Complainant failed to properly complete time sheets. I credit this testimony.

25. According to Dunbar, in 1999 he spoke with Complainant on several occasions regarding his failure to work up to his capabilities, however, despite several discussions, Complainant's work did not improve and he did not properly complete time sheets. I credit this testimony.

26. According to Dunbar, Bill Larsen wanted to terminate Complainant's employment, however, David Larsen wanted to retain Complainant because of his skills. Dunbar testified that the managers believed Complainant was intentionally slow. I credit this testimony.

27. Dunbar testified that Complainant's walking out on November 17th was consistent with his poor attitude. According to Dunbar, Complainant was terminated because of his poor production and lack of cooperation and not for financial reasons. I credit this testimony.

28. Jim Medeiros has worked for Respondent for 17 years, all in the pantograph department. Medeiros considered Complainant to be experienced in pantograph and over the years occasionally went to Complainant for advice about handling jobs in the pantograph department.

29. Medeiros testified that in 1999, he was aware of problems with Complainant in other departments. Therefore, when Complainant transferred to pantograph, Medeiros met with him to discuss his expectations regarding their working relationship. At the meeting, Medeiros explained that he wanted to utilize Complainant's expertise and although he would assign work to Complainant, he would try not to act as Complainant's "boss", as Complainant had more experience than he did. According to Medeiros, Complainant responded that he would require retraining and their relationship would suffer because he did not want to be in pantograph. I credit Medeiros' testimony.

30. According to Medeiros, Complainant seemed to not pay attention to the "set-ups" and was away from his machine a lot. Both Medeiros and Dunbar testified that the graphite blocks with which Complainant worked in 1999 were easier to use than the steel he had worked with many years before. Complainant acknowledged that he frequently used the restroom and that Medeiros had a problem with Complainant's frequent hand washing. Complainant testified that he did not know of a time study and was not told how to record his time.

31. Alan Parks worked at Respondent from February 1994 to 2001 in the pantograph department. Parks testified that one morning, a few months before Complainant's termination, when he greeted Complainant as usual, Complainant responded, "Get away from me. I don't want to be bothered". When Parks asked if everything was alright, Complainant responded, "Get the fuck away from me" and then picked up a handful of brass chips from the floor and gestured as if to throw them at Parks. Parks later reported the incident to Joe McDonell. When Parks next saw Complainant, he said he was sorry if he hurt Complainant's feelings. Complainant responded, "Leave me the fuck alone. Everyone in this place pisses me off." Complainant testified that although his behavior was not appropriate, the incident was blown out of proportion and that he and Adams are good friends.

32. Ken Boyer has worked at Respondent since August 1982 and is supervisor of fiberglass. Boyer testified that after Complainant was removed from supervisory status in 1993 he became disgruntled.

33. Bill Larsen, whose date of birth is March 1, 1957 is the brother of owner David Larsen. He has worked at

Respondent since June 1975. Bill Larsen testified that at first he had a good relationship with Complainant, however their relationship changed during the time both were managers.

34. Bill Larsen testified that after the new owners took over, Complainant became upset and difficult to work with. When both Bill Larsen and Complainant were members of management staff, Complainant did not participate during staff meetings. Complainant was dismissed from the management staff in May or June 1993, after other staff members complained about him to the owners. Bill Larsen testified that subsequent to Complainant's leaving the staff, he repeatedly recommended to the owners that Complainant be terminated. The owners responded that they did not want to terminate Complainant's employment because his skills and knowledge benefited the company. I credit Bill Larsen's testimony.

35. Bill Larsen testified that the new owners' policy was to closely monitor overtime to ensure it was warranted. Employees were required to indicate on time sheets how much time they spent on each particular job. Complainant did

not keep track of each particular job, rather, he simply signed in and out for each day.

36. Bill Larsen testified that Respondent conducted two time studies. The first study was limited and tracked only the time of Complainant and co-worker Peter Hunt, two employees about whose time the owners were concerned. The study merely tracked their time and recorded the results. Bill Larsen was personally responsible for a follow-up study that included the entire company. Respondent had no written documents relative to the time studies.

37. Bill Larsen testified that both Sherwin and McDonnell complained about Complainant's poor relationships with co-workers, including Emery and Beaton. However, Larsen acknowledged that others had problems getting along with Beaton.

38. Bill Larsen testified that Complainant was terminated not because of his age, but because he was not "making rate" and therefore the company was not making a profit on the jobs Complainant was doing.

39. Mark Sherwin, whose date of birth is March 9, 1955, has been employed at Respondent for 22 years. Sherwin began as an apprentice engraver and currently oversees engraving and routing.

40. Sherwin testified that Complainant was bitter about not having become an owner, and while he was still on management staff, acted as though he were above the other managers and was not a "team player". Sherwin stated that during staff meetings, Complainant would stand in a corner and refuse to participate. Sherwin, Ken Boyer, Joe McDonell and Bill Larsen told the owners that the situation was not working and Bill Larsen asked the owners to terminate Complainant. I credit this testimony.

41. Sherwin became Complainant's supervisor when he was removed from management staff in 1993. Sherwin's notes from an August 1995 staff meeting include a complaint about Complainant going into co-workers' workstations after hours and a co-worker's complaint that while he worked overtime, Complainant sat reading the newspaper. Sherwin also recalled an argument between Complainant and another router regarding missing tools. According to Sherwin, the

managers believed that Complainant was manipulating his time sheets.

42. Sherwin testified that when Complainant returned to the routing department in 1995, he was assigned the best machine available. He testified that Complainant was transferred from routing to pantograph in 1999 because his behavior was affecting too many employees.

43. Sherwin's notes from a staff meeting state, in part:

We talked to [Complainant] about going through peoples papers + workjackets - He shouldn't be behind peoples benches AT ALL and is being watched. Trying to stay on top of his time... We have been trying to control overtime as requested... We are having some resistance to this. In most cases there is no problem - in others there are- 2 people in particular we have to talk too [sic] Peter H. in embossing and [Complainant] in routing. We have asked that All times be logged in the proper fashion...Dave L. suggested a time study at last meeting... I have asked both Peter and [Complainant] to record all time and sign out only for lunch ½ hour But to no avail... possible solution...to create "workboxes" for each person in routing...I feel that [Complainant] is still playing games and everyone will have to adhere to this system if its to work all because of 1 person.

(Exh. R-5)

44. At An August 1995 meeting, Sherwin's notes state, in part:

First off having problems between Ken E. + [Complainant] - Sparks flying over tools etc. Ken is claiming that things of his are missing and someone is going through his drawers after hours. [Complainant] is only one working late hours. So we have to talk to him. Also claiming that [Complainant] is not working during overtime - reading magazines and papers on overtime and afternoon breaks going way too long.

(Exh. R-6)

45. Gordon Jenkins, date of birth September 2, 1925 remained employed by Respondent as of December 28, 1999 at age 74. Pauline Jenness, date of birth May 26, 1937 remained employed by Respondent as of December 28, 1999 at age 62. Jack Ridge, date of birth June 21, 1937 retired in 1999 at age 62 and Tich Huynh, date of birth January 20, 1932 retired in 1999 at age 67. (Exh. R-3).

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 repeatedly transferred Complainant, and ultimately discharged him because of his age.

In order to establish a prima facie case of age discrimination in employment, Complainant must demonstrate that he is a member of a protected class who was capably performing the responsibilities of his 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 his membership in a protected class by virtue of his age, 63, at the time of his termination. Because Complainant had been employed by Respondent since 1965 and Respondent did not dispute Complainant's ability to perform the tasks of a pantographer/router, I will assume that he was adequately performing the requirements of the job. Complainant was terminated from his position. Finally, some months after Complainant's transfer from routing to pantograph, a 20-year-old man, Johnson, was hired into the routing department where he performed some of the tasks previously performed by Complainant. Therefore, I conclude that Complainant has established a prima facie case of discrimination.

Once Complainant has 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. Respondent offered numerous reasons for terminating Complainant's employment, including economics, dissatisfaction with his production rate, and his poor relationships with co-workers and supervisors, and finally his unauthorized walkout on November 17th. Several witnesses testified credibly that Complainant harbored a simmering resentment against the company after having been excluded from ownership, resulting in a poor work ethic, refusal to cooperate with company rules and strained relationships with supervisors and co-workers. Respondent's witnesses testified credibly that despite the long-standing wishes of managers to terminate his employment, the owners retained Complainant because of his skills and experience with the company. Respondent finally terminated Complainant's employment after he walked off the job, an incident that was described by owner David Larsen as the "straw that broke the camel's back". I find that Respondent has met its 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 has established that one of Respondent's articulated reasons for terminating his employment was false. One of the reasons advanced by Respondent was economic, however, that reason was contradicted by the evidence. Complainant was the only person laid off in 1999, and Respondent hired other employees at around the same time. Further, other witnesses testified that economics did not play a role in the decision to terminate Complainant's employment. In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind. Lipchitz, supra. While I found the

asserted reason of economics to be false, I do not draw the inference of discriminatory motive, because Complainant did not establish pretext with respect to the other reasons offered by Respondent for terminating Complainant's employment. Abramian, supra. (employer may show that even if his articulated reason for the adverse action is untrue, he had no discriminatory intent, or that his action was based on a different, nondiscriminatory reason.)

Respondent in this matter produced substantial, credible evidence that its other articulated reasons were legitimate and non-discriminatory. Many witnesses testified to management's longstanding dissatisfaction with Complainant's bad attitude, poor interpersonal relationships and inadequate production dating back many years. The evidence revealed a long-standing split between owners and managers on the matter of Complainant's continued employment with the company. The managers repeatedly requested that Complainant be terminated while the owners wanted to keep him on because of his skills and experience, notwithstanding his shortcomings. Respondent finally terminated Complainant's employment when he walked out of work without permission and the owners could no

longer tolerate his behavior. Complainant did not persuade me that these reasons were pretextual.

Further, Complainant has offered evidence that a statement made by one of Respondent's owners in 1994, tended to support animus based on age, however, I did not credit this testimony.

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 22nd day of March, 2004.

JUDITH E. KAPLAN
Hearing Officer

