

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & NICOLA BALDUCCI,
Complainants

v.

DOCKET NO. 02-BEM-03288

PLEASANT POLY
INTERNATIONAL, INC.,
Respondent

Appearances: Rosemary A. Macero, Esquire for Nicola Balducci
Roberto Maltagliati, pro se, for Respondent

DECISION OF THE HEARING

I. PROCEDURAL HISTORY

On August 9, 2002, Nicola Balducci filed a complaint with this Commission charging Respondent Pleasant Poly International, Inc. with unlawful discrimination on the basis of age, in violation of M.G.L.c.151B§4¶1B. The Investigating Commissioner issued a probable cause finding. Attempts to conciliate this matter failed and the case was certified to public hearing. A public hearing was held before me on September 26 and 27, 2006. After careful consideration of the entire record before me, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant, Nicola Balducci, resides in Ossipee, New Hampshire. His date of birth is March 10, 1941.

2. Respondent Pleasant Poly International, Inc., formerly known as U.S. Plastics Corp., was, at all times relevant to this matter, located in Lynn, Massachusetts. The company manufactured various types of plastic bags. Respondent closed its plant in November 2004 due to financial losses. Roberto Maltagliati is Respondent's sole officer, director, owner and manager.

3. Respondent's manufacturing operation consisted of two departments; Extrusion, where plastic was heated and formed into film and certain types of plastic bags; and Conversion, where plastic film from the Extrusion department was made into other types of plastic bags.

4. Complainant was hired by Respondent as a machine operator in its Extrusion Department in approximately August 1970. Shortly thereafter, he was promoted to a supervisory position. In approximately 1990, Complainant was transferred to the Conversion Department as a first-shift supervisor. Throughout his career at Respondent, Complainant worked the day shift. Complainant testified credibly that he never received warnings throughout his employment with Respondent and received regular raises.

5. During the 1990s, the Conversion Department obtained some modern, faster machinery that was used in addition to some of its older machinery. In 1994, the Conversion Department was expanded, Respondent created the position of Conversion Department Manager and assigned the position to John Igbinenikaro (date of birth 3/28/62) in addition to his duties as First Shift Supervisor for the new machinery. Igbinenikaro had been employed by the company since August 1988. At that time, Complainant remained first shift supervisor for the old machinery in the Conversion Department.

6. Complainant testified that, over the years, John Igbinenikaro and Gerardo Picariello thwarted his attempts to learn to operate the newer machines in order to ensure their own job security. I do not credit Complainant's testimony that these co-workers prevented him from learning the operation of the newer machines.

7. Complainant testified that in late September 2001, Maltagliati called him into his office and asked him if he wanted to take some time off, because "he hadn't been feeling well earlier in the year." According to Complainant, Maltagliati told him that he would be recalled to work when business picked up and did not offer him any other position at the company. I credit this testimony.

8. Documents submitted into evidence indicate that Complainant was treated for angina in March 2001 and that he later collected short term disability benefits through Respondent's group policy from September 2001 through March 2002 until his benefits ran out.¹ The insurance documents indicate that Complainant had a 10 pound lifting restriction and was considered available for "light duty".² (Exh. C-1)

9. Roberto Maltagliati testified that Respondent was a family-run company that once employed 168 people. Respondent began to lose money in 1998 and by the time it ceased operations in November 2004, it employed only 42 people. Maltagliati testified that prior to layoffs, 1/3 of Respondent's workforce was over the age of 40, and after layoffs, 50% were over age 40. I credit this testimony.

¹ Complainant offered no testimony regarding the receipt of disability benefits during the time of his lay-off. Maltagliati stated that Complainant may have arranged through Respondent's office to collect such benefits.

² Complainant did not allege handicap discrimination and the issue of whether his termination was because of a handicap or perceived handicap is not before this Commission.

10. Maltagliati stated that Complainant was one of 20 employees laid off in September 2001. Complainant was the only supervisor who was laid off at that time. He testified that he told Complainant at the time of his lay off to return periodically and if business picked up, he would re-hire him. I credit this testimony.

11. Maltagliati testified that at the time of his lay off, he offered Complainant non-supervisory work on other shifts; however, Complainant responded that he had worked the day shift for 30 years and did not want to work nights. I do not credit this testimony.

12. Maltagliati testified that during 2001, Respondent eliminated the third shift in the Conversion Department and reduced the number of shift workers by 50% on each of the first and second shifts. It also eliminated the position of Conversion Department Manager held by John Igbinenikaro. As a result only three or four employees remained on the first shift. Because the company could no longer afford to keep two supervisors on the first shift, it decided to eliminate one of the two supervisor positions. As Complainant could not operate the new machinery, the Company elected to retain Igbinenikaro to fill the sole remaining supervisory position. (Exh. C-31) (testimony of Maltagliati)

13. Maltagliati testified that he laid off Complainant for financial reasons and because of Complainant's inability to understand and operate all the equipment in the Conversion Department. He stated that other supervisors in the Conversion Department who were younger than Complainant were able to operate both the newer and older machines. I credit this testimony.

14. Complainant testified that after his lay off, he would check back at the plant every few weeks. He testified that on one of these occasions in late March 2002, he observed that a third shift had been added.

15. Complainant testified that the following day in late March 2002, he met with Maltagliati, who told him that he no longer had a job and that he had anticipated Complainant would have already obtained another job. Complainant responded that he could not have been expected to obtain another job when Maltagliati had agreed to call him back to work at Respondent. I credit this testimony.

16. Maltagliati testified that work steadily declined in the Conversion department. He stated that at various points he would eliminate and then reinstate the third shift in the Extrusion department, depending on the amount of work available and that for this reason Complainant may have observed more shifts working. He stated that he told Complainant in March 2002 that he had laid off more people, the company was losing money and he did not have a job for him. I credit this testimony.

17. Complainant testified that prior to being laid off, he earned over \$15.00 per hour, worked 44 to 46 hours per week, and received health insurance benefits and a matching 401K plan.

18. Complainant testified that when he was laid off in September 2001, there was only one employee who was older than he working for Respondent.

19. Complainant was 61 at the time of his termination. He testified that he had planned to work until at least age 65, depending on his health. He testified that after he learned his job was eliminated, he tried to find other jobs, but that age 61 it was difficult to work for \$8.50 per hour, far less than he made at Respondent.

20. Michael Foley, whose date of birth is June 4, 1939, worked as a supervisor in Respondent's Extrusion Department. Foley testified that he had supervised Complainant in that department earlier in his career. Foley testified that Complainant learned to operate the machines in Extrusion with ease and that he had no problems working with Complainant.

21. Foley testified that Respondent laid him off in August 18, 2003. At the time Foley was the oldest person in the company. Other supervisors remained in the Extrusion department after his termination. Foley testified that he filed an age discrimination complaint with the MCAD after his termination but his complaint was dismissed for lack of probable cause. Foley withdrew his appeal of that finding after Respondent went out of business.

22. Complainant testified that his supervisor, Earl Stickney, then aged 62, was laid off in the summer of 2001. Documents show that Stickney took early retirement at that time.

23. Maltagliati made none of the lay-off decisions regarding union employees, who were equipment operators.

III. CONCLUSIONS OF LAW

M.G.L.c.151§1B makes it unlawful to discriminate in employment on the basis of age. In this case, Complainant does not dispute that Respondent was undergoing an economic downturn requiring lay-offs, but contends that Respondent's decision to eliminate his position was motivated by unlawful age discrimination.

In order to establish a prima facie case of age discrimination where there is a reduction in force, Complainant must show that he is 1) a member of a protected class; (2) that he performed his job at an acceptable level; 3) that he was terminated and that his lay off occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005)

As a 61 year old man, Complainant is protected by G.L. c. 151B. Complainant demonstrated that he was competent in the position of supervisor. Complainant was laid off and supervisors who were more than five years younger than he were not. Knight v. Avon, 438 Mass. 413,424 (2003) Complainant was qualified for his position because of his good work record, seniority and work skills as a supervisor. I conclude that Complainant has established a prima facie case of age discrimination.

Once Complainant establishes a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for its termination and failure to rehire Complainant. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

Respondent's articulated reasons for initially laying off Complainant for the position were the company's troubled finances, the elimination of his position and Complainant's lack of skill in operating some of the machines in his department. The evidence presented at the hearing showed Respondent was in financial trouble and underwent numerous lay offs, including 20 lay-offs in September 2001 around the time of

Complainant's lay-off. Respondent eventually closed. Respondent stated that it laid off Complainant instead of Igbinenikaro, because it no longer needed two first shift supervisors and because of Igbinenikaro's ability to operate more of the machinery in his department. The evidence showed that Respondent held a legitimate belief that Complainant lacked the ability to utilize some of the newer machinery in his department.

Once Respondent has set forth evidence of a legitimate, non-discriminatory reason for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant did not offer credible evidence of pretext. He failed to demonstrate that the reasons articulated by Respondent were not the real reasons for his lay-off and termination or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001). Complainant did not deny that he was unfamiliar with some of the newer machinery in the conversion department. Rather, he blamed his lack of knowledge on other supervisors, claiming that over the years they prevented him from learning the new machinery in order to protect their positions. I did not find that testimony credible. Furthermore, he did not dispute that Respondent was having severe financial difficulties and had undergone several layoffs, and ultimately closed its doors. While I did credit Complainant's testimony that Maltagliati recommended he take time off due to prior medical issues, I conclude that Complainant acquiesced in this suggestion by applying for and collecting short-term disability benefits for a six month period.³ The insurance documents indicate he was restricted from lifting more than ten pounds. There was no evidence that age was a factor in the decision to lay-off Complainant. Complainant

³ As earlier stated, Complainant did not allege handicap discrimination, and there was no evidence as to whether he could perform the essential functions of the position, either during his leave or at any other time.

remained on Respondent's books, listed as being on "disability" during the time period he was laid off. Complainant sought to return to work only when those disability benefits ran out. At that time he was told Respondent no longer had work for him and he filed his age discrimination complaint.

I conclude that Respondent's lay-off and failure to re-hire Complainant for the position of Supervisor was for reasons related to Respondent's financial situation and Complainant's lack of skills on the new machinery, and was unrelated to his age. Therefore, the complaint in this matter shall be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. 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 30 days of receipt of this order.

SO ORDERED, This 14th day of February, 2007

JUDITH E. KAPLAN
Hearing Officer