

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
PAUL GALLAGHER,
Complainant

v.

DOCKET NO. 98-BEM-0332

LAZ PARKING, LTD.,
Respondent

Appearances: Terence P. McCourt, Esq. for Complainant
Arnold E. Cohen, Esq. for Respondent

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

I. PROCEDURAL HISTORY

On February 2, 1998, Complainant, Paul Gallagher filed a complaint with this Commission alleging that he was discriminated against on account of his age in violation of G.L. c. 151B s. 4 (1B), when he was terminated from his employment with Respondent, Laz Parking, Ltd. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and efforts at conciliation were unsuccessful. The matter was certified for a public hearing and a hearing was held before the undersigned hearing officer on February 5 and 6, 2002. The parties submitted post-hearing briefs. Having reviewed the entire record of this matter and the submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Paul Gallagher, resides in Randolph, Massachusetts and was 79 years of age at the time of the public hearing in this matter.

2. Complainant was hired by Respondent, Laz Parking Ltd., in June of 1995 to work 30 hours per week as a ticket agent at the Braintree Logan Express park and shuttle facility, located in Braintree, MA. At the time Complainant was 72 years of age. Complainant worked for Respondent until January 29, 1998, on which date his employment was terminated.

3. Respondent is in the business of managing parking facilities, most of which it does not own. Respondent operated the Braintree facility pursuant to a three-year contract entered into with the Massachusetts Port Authority (Massport) after a public bidding process. VIP Parking had operated the Braintree Facility from 1992 to 1995 under a similar contract with Massport. Complainant had been employed by VIP Parking as a ticket agent at the Braintree facility before he became a Laz employee in 1995. (Gallagher Tr. 20-21 Lutwack, Tr.4-5,6; Ex. R-3)

4. The Braintree facility includes a 700 car parking lot. Customers of the Logan Express can park their cars at the lot, or be dropped off, and board a shuttle bus for transport to and from Logan Airport in Boston. The ticket agents, including Complainant, worked at a terminal at the facility, selling bus and parking tickets, and boarding the in-coming buses to collect pre-paid tickets or to collect bus fares from passengers without prepaid tickets. The Braintree facility was open 24 hours a day, 7

days a week, with at least one ticket agent on duty at all times. (Gallagher, Tr. 23-24, 48, 50; Lutwack Tr. 11)

5. After Respondent took over the contract, Complainant had an interview with Marc Lutwack, Respondent's Vice President of Operations. Lutwack oversaw approximately 25 of Respondent's facilities, mostly in the Boston area. Subsequent to meeting with Lutwack, Complainant was hired by Respondent, as were most of the former VIP staff. He was 72 years old at the time. (Gallagher Tr. 21-22; Lutwack Tr.10).

6. Kathy Naylor (now Kathy Kent) had been a ticket agent at the Braintree facility when VIP Parking managed the facility. Approximately six months before Respondent assumed operation of the facility, Naylor was made manager of the Braintree facility. She was retained as the manager by Respondent and she served in that capacity until Respondent's contract with Massport expired in November of 1998. (Lutwack, Tr. 8,10,12; Naylor Tr.-6.)

7. Respondent's managers had the authority to hire employees as needed at their facilities. They also had authority to terminate employees, although occasionally Lutwack would be involved in a termination. Warnings to employees were at the discretion of the managers. (Lutwack Tr. 14-15).

8. Naylor made all hiring decisions at the Braintree facility exclusively and without any involvement from Lutwack or Massport. She testified that she did not take age into consideration in making hiring decisions and was under no directive from Respondent or Massport to do so. (Naylor, Tr. 8-9)

9. Gerald Nolan was employed by Massport as the Assistant Manager of Ground Transportation until his retirement on December 31, 2001. Nolan's duties were to

oversee the various contracts for the bus operations, parking lots, cleaning, electrical, etc. for the Logan Express park and shuttle operations in Braintree and at two other locations. (Nolan Tr. 5-6).

10. According to Nolan, Massport had a strong commitment to customer service. Part of Nolan's job was to ensure that customers were treated courteously and fairly by Logan Express contractors. As part of its effort to monitor the quality of service, Massport made available to customers of the shuttle, "comment cards" which they could fill out to evaluate the service. The criteria to be evaluated included courtesy by Respondent's employees and bus company employees. Completed cards were placed in a box at the facility and only Nolan had access to the completed comment cards. In addition to the cards, Nolan would sometimes receive letters or phone calls from customers relating to the Logan Express service. (Nolan Tr. 6-8, 18).

11. Nolan testified that there was a pattern of complaints from Logan Express customers concerning Complainant prior to the incident on January 22, 1998 that precipitated his termination. Most of the incidents that were the subject of complaints occurred on Saturdays, when Complainant worked alone. Nolan specifically recalled two calls from women who complained that Gallagher had been "rude" and "nasty" had refused to answer questions and had called them "dearie," in a manner they found offensive and condescending. Nolan was able to confirm that Complainant was the ticket agent in question because he was the only agent on duty at the time of the incidents.

12. On another occasion, Nolan observed Complainant being rude to a woman customer whose English was not good. Another ticket agent interceded to calm the situation. On February 16, 1997, a Sunday when Complainant was working alone, a

customer named Bill Izbicki submitted a comment card stating that the “the ticket agent was rude and unwilling to give information verbally. His response to questions was ‘read the sign’ or ‘read the ticket.’ I think a lesson in customer service is in order.” Mark Richardson, Complainant’s supervisor, wrote a letter to the customer apologizing for Complainant’s rude behavior. A note on the comment card in Nolan’s handwriting states he spoke to Naylor about the incident, and Naylor indicated she would discuss it with the clerk (i.e. Complainant). A copy of the comment card and Richardson’s letter was sent to Lutwack and placed in Complainant’s personnel file. (Nolan Tr. 18-24 , Lutwack Tr. 24 ; Ex. R-4).

13. Naylor testified that she received many reports from Nolan of customer complaints about Gallagher. She testified that Gallagher was “very confrontational”, “antagonistic” and argumentative” with customers. On occasion Naylor witnessed Complainant walking from a bus, still arguing with a customer. He would say things like “what’s your beef buddy” to a customer. After receiving complaints from Nolan, Naylor would attempt to defuse situations with Complainant when a customer was upset. Complainant would respond, “Don’t worry, I know what I’m doing.” Although other ticket agents would occasionally have disputes with customers, unlike Complainant, they would attempt to help the customer and defuse the situation. In contrast, Complainant appeared to “love confrontations.” He would “egg on” the upset customers aggravating them more and exacerbating the situation. (Naylor Tr. 10-15, 17, 25-26).

14. Nolan testified that he spoke to Complainant on a number of occasions and urged him to be less gruff and not so short with customers. He stated that on these occasions Complainant would brush him off stating that the customers always complain about

nothing. Nolan testified that he had on occasion counseled other ticket agents about rudeness and the problem would be resolved once he spoke to them. (Nolan Tr. 23-24).

15. On Thursday, January 22, 1998, Nolan received a telephone call from a Logan Express customer named Terry Youns who was at the Braintree facility and was very agitated. The customer informed Nolan that as he disembarked from the Logan airport bus having already paid for his ticket, a ticket agent challenged him and wanted him to pay again. The customer told the agent he had already paid and as he proceeded from the bus into the terminal, the ticket agent followed him, berating him and calling him names. There was a face-to-face confrontation from which the customer walked away. Nolan testified that the customer seemed to calm down as they were discussing the incident. Nolan told the customer that he would speak to the agent and perhaps remove him from service. Nolan then noted the customer's name, address and phone number on a "buck" slip. (Nolan Tr. 12-14, Ex. R-7).

16. After hanging up with the customer, Nolan directly called the Braintree facility. A ticket agent answered, and told Nolan he should speak to Complainant to learn what had happened. When Complainant came on the phone, Nolan asked him if there had been an incident. Complainant first denied any problem, but then said, "you know these chiselers, they always make up stories." Complainant acknowledged that there was a customer who was yelling in the terminal. After speaking with Complainant, Nolan made the decision to ask Respondent to remove Complainant as a ticket agent. Nolan testified that he was concerned there was the potential for Complainant to get into a physical confrontation or fight with a customer if he were not removed. (Nolan Tr. 15-17, 24).

17. Nolan testified that he called Naylor that day or the next day and told her that Complainant would have to be removed as a ticket agent at the facility. Nolan also told Lutwack the same thing. Naylor testified that she could see this coming, due to the frequency of complaints about Complainant. (Nolan Tr. 17-18, Naylor Tr. 25-26).

18. Lutwack discussed Nolan's request with Naylor, who confirmed that the January 22, 1998 incident was the latest in a series of complaints about Complainant's confrontational behavior. Given this information, Lutwack concluded that Nolan's request was appropriate. He did not consider transferring Complainant to another Laz lot because of concern that the same problem would re-occur. He instructed Naylor to terminate Complainant's employment. Lutwack testified that he was not aware of Complainant's age during these conversations. (Lutwack Tr. 17-21).

19. Naylor told Complainant of the decision to terminate his employment when Complainant arrived for work on January 29, 1998. She informed him that the reason for his termination was the large number of customer complaints received about him. Complainant was given the option of finishing his shift for the day, which he exercised. (Naylor Tr. 14, Complainant Tr.66).

20. Complainant understood that the decision to terminate him was the result of Nolan's request that he be removed. Complainant called Nolan from work that day to ask why Nolan had called for his removal and Nolan told him it was because of customer complaints. Nolan did not make any reference to Complainant's age. Complainant raised the issue of his age asserting that the decision was made because he had just turned 75. Complainant testified that Nolan then said to him that he was "getting up in years" and should "be enjoying life" with his wife. Complainant asked Nolan to reconsider, but

Nolan refused. Nolan's account of the conversation generally comports with Complainant's version, but Nolan denied saying anything about Complainant's age or suggesting that he should retire. (Complainant Tr. 71-72, 75 Nolan Tr. 25)

21. Complainant testified that the assertion that there were numerous customer complaints against him was a "fallacy." However, he acknowledged the incident involving a customer with a lost ticket on January 22, 1998, but testified that he had been a "complete gentleman" throughout. Complainant also acknowledged that Nolan had called him about the incident, and might have asked him if he had called the customer a "chiseler." Complainant testified, "I probably did [call him a chiseler] which he was." When Complainant was asked "Are you saying the customer was a chiseler?" he answered "I think I might of said that, yes. He was. They always say the truth hurts." Complainant also testified, however, that he said this to the other ticket agent and not directly to the customer. I do not credit this and believe that Complainant indeed insulted the customer to his face and this is what prompted the customer to complain.

(Complainant Tr. 51-54)

22. Article 4(c) of the contract between Massport and Laz is entitled "Removal of personnel form parking lot" and states: "[Massport] in its sole discretion may require [Laz] to remove any of [Laz's] personnel from working on the parking lot." (Exhibit R-3). It was under the authority of this provision that Nolan asked Naylor and Lutwack to remove Complainant. Laz also had full discretion to terminate any of its employees at the facility, if it deemed such action to be necessary. (Nolan Tr. 10)

23. Complainant alleges that as a result of his termination he suffered Post-traumatic stress syndrome ("PTSD"). Complainant's therapist, a psychiatric nurse who treated him

at a Veteran's center, testified that Complainant suffered from PTSD stemming from his experiences in World War II and from a serious family problem involving his daughter. He also testified that Complainant had begun seeing him in May of 1995 and that one of the problems that Complainant presented with from the start of his treatment in 1995 was his tendency to get angry, to lose his temper, and to "fly off the handle at the littlest things." In notes to his therapist Complainant admitted that he angers easily and has a short fuse. He also mentioned that he completely flew off the handle and lost it at work one Sunday and that his supervisor had to counsel with him about his temper. (Ex. R-2; Hannon Tr. 23, 24, 26, 28, 31)

23. Shortly after Complainant was terminated Naylor hired a 42 year old female to cover some of the hours that he had worked. On March 29, 1998 Naylor hired a 69 year old male to cover some of the other hours Complainant had worked. (Naylor T. 15, 23; Lutwack Tr. 26-29, Ex. R-5)

24. Complainant testified that Nolan did talk to him about customer complaints, however he believed Nolan was joking and not serious. Complainant also testified that he had a "marvelous" relationship with Naylor, and that she never discriminated against him, never discussed the issue of his age, and never told him he should retire.

Complainant did not interact with Lutwack at any time after he was hired. (Gallagher Tr. 27, 77-81)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4 (1B) prohibits discrimination on account of age in the workplace and makes it an unlawful practice to fire an individual on account of his age. Complainant has the burden of establishing a prima facie case of age

discrimination in employment. In order to establish a prima facie case of age discrimination for termination from employment, Complainant must show that he was (1) a member of a class protected by G.L. c. 151B, in this case over 40 years of age; (2) that he was performing his job adequately; (3) that he was subjected to an adverse employment action; and (4) that he was replaced by someone who is at least five years younger, or present other evidence that the termination occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. Knigh t v. Avon Products, 438 Mass. 413, 425 (2003).

The Complainant in this case was 74 years of age at the time of his termination and therefore protected by G.L. c. 151B. There is a dispute about whether he was performing his job at an acceptable level, because he was the subject of a number of customer complaints, at least one of which required him to be counseled for discourtesy and inappropriate behavior with customers. The evidence suggested that Complainant did not have the appropriate disposition and manner to deal with customers, that he lost his temper quickly, treated customers rudely in an antagonistic and confrontational fashion and addressed them in a brusque, harsh or condescending manner. Despite the issues with his temperament, there was testimony that Complainant was a good employee who regularly came in early and never missed a day of work. Complainant was terminated from his position after one such incident. He was replaced by two employees, one age 69 and the other age 42. I conclude that while Complainant has met three prongs of the prima facie case, he has not demonstrated that he was performing at an acceptable level.

However, assuming that a reasonable fact-finder could find otherwise, I will proceed to analyze this case pursuant to the three-staged burden shifting model used in employment discrimination cases. Wheelock College v. MCAD, 371 Mass. 130 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437 (1995).

Assuming arguendo that the Complainant has established a prima facie case, the burden of production shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions, and to produce credible evidence that the reason advanced was the real reason. Blare, supra. at 442. In this case Respondent has met its burden of production. It has stated that it terminated Complainant because of a pattern of customer complaints and his inability to deal courteously and professionally with Logan Express customers, which culminated in the incident of January 22, 1998. This assertion was supported by credible testimony from Nolan and Naylor and actual customer complaints. Both Nolan and Naylor testified that they talked to Complainant several times about customer complaints, but that Complainant did not take this issue seriously and did not alter his behavior with customers.

Once the Respondent has articulated a legitimate non-discriminatory reason for its action, the Complainant must prove by a preponderance of the evidence that Respondent acted with “discriminatory intent, motive, or state of mind.” Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). Complainant had not met this burden of proof that Respondent’s actions were a pretext for age discrimination. To begin with, Respondent hired Complainant when he was 72 years of age. One of his replacements was 69 years of age. The only evidence of age discrimination that Complainant proffered was Complainant’s assertion that Nolan told him he was “getting up in years” and he should be “enjoying his

life.” Nolan denied making any reference to Complainant’s age or suggesting that he should retire. He did testify that Complainant brought up his age and speculated to Nolan he had been terminated because he had just turned 75. I credit Nolan’s testimony that he did not make these comments, but even if he had, they could be properly interpreted as stray remarks and not the kind of evidence “suggestive of impermissible bias” of the sort to place this case in the mixed motive category. Johansen v. NCR Comten, Inc. 30 Mass. App. Ct. 294, 302 (1991). Therefore, I conclude that Complainant has failed to prove that his termination was motivated by discriminatory animus on account of his age.

IV. ORDER

Given the foregoing findings of fact and conclusions of law, it is hereby ordered that the above referenced complaint be dismissed.

So Ordered this 5th day of March, 2003.

Eugenia M. Guastaferrri
Hearing Officer