

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and EDWARD BOTELHO,

Complainants

v.

Docket No. 09 BEM 01282

WILLOW PACKAGE STORE, INC.,

Respondent

For Complainant: Christopher . Brown, Esq.

For Respondent: Tracey L. Taylor, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 2, 2009, Edward Botelho (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that Willow Package Store, Inc. (“Respondent”) discriminated against him on the basis of age by cutting his hours as a store employee and forcing his constructive discharge. On December 8, 2010, the Commission issued a probable cause finding and on November 23, 2011, the case was certified for public hearing.

A public hearing was conducted on May 22, 2012. The following individuals testified at the public hearing: Edward Rosario Sr. and the Complainant.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant, Bruce Botelho, is a resident of Beverly, MA who was born in 1938. He was employed as a store clerk at Respondent Willow Package Store from the mid-1990s to mid-2005 and from June of 2006 to June 3, 2009.
2. Respondent Willow Package Store is a retail liquor store located at 696 Yarmouth Road, Hyannis, MA. It was owned and operated by John Rosario, Sr. until his death in 2006 and subsequently owned and operated by his son Edward Rosario, Sr. In addition to the owner, the store had five employees during the times at issue.
3. Complainant was initially hired by John Rosario, Sr. Complainant worked as a store clerk, stocking shelves and coolers and operating the cash register. Complainant was terminated by John Rosario, Sr. in 2005.
4. Complainant testified that he was “released” by John Rosario, Sr. in 2005 because the owner was concerned that Complainant was going to move to Tennessee and for that reason was no longer comfortable with Complainant as an employee. I do not credit this testimony and conclude, instead, that Complainant was terminated for insubordination and personality conflicts with other employees and customers.
5. In June of 2006, Complainant approached Hilda Rosario, John’s widow, and asked to return to the store as an employee. The store was then owned and operated by Edward Rosario, Sr. (“Rosario”), the son of John and Hilda. Complainant met with Rosario and his mother. Rosario told Complainant that he didn’t want a recurrence of previous problems and would not tolerate any outbursts. Rosario re-hired Complainant to work as a cashier, to re-stock shelves

- with wine and to re-stock the walk-in beer cooler with cases of beer from the back of the store. Rosario testified credibly that he re-hired Complainant because he was having a hard time finding employees.
6. Brian Gallo, Complainant's senior by eight to ten years, also worked at the package store. Gallo worked at the store for twelve or thirteen years performing the same job as Complainant. Rosario testified that he had no problems with Gallo. Gallo voluntarily left Respondent's employ when he travelled to Italy and subsequently retired in 2009.
 7. Rosario's mother also worked at the store. She is two years older than Complainant.
 8. Rosario testified credibly that Brian Gallo told him that Complainant argued with customers.
 9. In the spring of 2008, Rosario hired "Hristina," a twenty-five year old female as a bookkeeper. She worked 9:30 a.m. to 5:30 p.m. According to Rosario's credible testimony, Hristina was responsible for an improvement in sales by making suggestions about the marketing of products which, in turn, required more re-stocking of product.
 10. Rosario testified credibly that Complainant and Hristina initially got along, but they developed a personality conflict when Hristina starting asking Complainant to perform chores in her expanded role as a de facto manager. Hristina complained to Rosario that Complainant didn't want to follow her directives.
 11. Complainant alleges that Hristina falsely accused him of not doing his job and told him he was "old." Complainant maintains that he complained to Rosario

who said that in Bulgaria, Hristina's country of birth, men retire at age sixty and that "age makes a difference" with regard to job performance. I do not credit these assertions.

12. Between 2006 and 2008, Complainant generally worked thirty-five hours per week beginning at 4:00 p.m. daily. Rosario testified that Complainant initially was energetic but at some point slowed down, began taking frequent smoking breaks outside the store, stopped re-stocking shelves, stopped rotating products on the shelves, and argued with customers. According to Rosario, the re-stocking and rotating work that Complainant failed to perform was done by his mother and by Hristina.
13. In the spring of 2009, Rosario talked to Complainant about reducing his hours or taking a cut in pay. Rosario testified credibly that he wanted to use the money he saved to pay another employee to perform the re-stocking/rotating work that Complainant was not doing and to separate Complainant from Hristina as much as possible. At the same time, Rosario sought to retain Complainant as the store's "closer" because he was good at that function.
14. Rosario reduced Complainant's hours from thirty-five to twenty-eight and had Complainant work a split shift involving both morning and evening hours. Rosario used the money he saved from reducing Complainant's hours to hire his son's friend, Joe Magnus, to re-stock shelves. Magnus turned out to be a poor worker so Rosario terminated him. After terminating Magnus, Rosario arranged for his son to work extra hours re-stocking shelves and the cooler.
15. On June 3, 2009, Complainant stopped working for Respondent after performing

a split on only several occasions. Complainant returned the keys to the store and told Rosario that he couldn't do the revised schedule. At the time he stopped working, Brian Gallo was still employed by Respondent but retired shortly thereafter.

III. CONCLUSIONS OF LAW

General Laws c. 151B, sec. 4(1B) makes it an unlawful practice for a private employer to discharge from employment or otherwise discriminate against an individual in the terms, conditions, or privileges of employment because of the individual's age. Although Complainant alleges that Hristina called him "old" and that Rosario told him "age makes a difference," such allegations are not credible. Accordingly, the case will be analyzed as an indirect case of age-based employment discrimination.

Complainant may establish a *prima facie* case by showing that Complainant: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of his protected class(es). See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts). Where age-based discrimination is alleged, Complainant must show that he was denied a condition or privilege of employment granted to someone at least five years younger or present other evidence that the disparate treatment occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003).

Applying the above criteria to the proven facts, Complainant has arguably established a prima facie case in that he was seventy-one years old during the events at issue, his hours of employment were cut, and some of his work was shifted to a contemporary of Rosario's son who was in his twenties at the time. There is conflicting evidence about whether Complainant was a satisfactory employee, but he is entitled to a benefit of the doubt on this point, having been rehired in 2006 and retained as an employee until he decided to leave. Accordingly, Complainant has made out a prima facie case.

Once Complainant establishes a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

In regard to the second and third stages of analysis, the evidence shows that Rosario had valid, job-related reasons for reducing Complainant's hours. The reasons were due to Complainant's failure to perform necessary chores and his argumentative attitude towards co-workers and customers. The credible evidence does not support Complainant's allegations that Hristina called him "old." Rather, the evidence supports

Rosario's allegations that Hristina was exasperated with Complainant because he failed to perform his stocking responsibilities.

During much of the time that Complainant worked for Respondent, Hilda Rosario and Brian Gallo also worked at the package store. The fact that these individuals are older than Complainant buttresses Respondent's position. Although Gallo stopped working around the same time that Complainant quit, Gallo was not fired or forced to retire as Complainant alleges. I credit Rosario's testimony that Gallo was a valuable and effective employee who could have continued to work at the store had he chosen to do so. Thus, Complainant has failed to prove that the reasons for the change in the terms of his employment were related to his age or a pretext for age discrimination.

Following Complainant's reduction in hours and assignment of a split shift, he quit his job. Complainant characterizes this separation as a constructive discharge, but the facts fail to support his claim. Notwithstanding the less convenient schedule, the conditions at the package store were not so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997). Consequently, Complainant has failed to prove a claim of constructive discharge based on his age.

For the reasons set forth above, I conclude that Respondent did not violate G. L. c. 151B. The Complaint is hereby dismissed.

So ordered this 20th day of February, 2013.

Betty E. Waxman, Esq.
Hearing Officer

