COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
HAROLD FOSSATTI,
Complainants

v. DOCKET NO. 11-NEM-02983

REGAL INTERIORS, INC.,
Respondent

Appearances:
Lisa S. Carlson, Esq. for Harold Fossatti
Scott W. Lang, Esq. for Regal Interiors, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 9, 2011, Harold Fossatti filed a complaint with this Commission charging Respondent with discrimination on the basis of his age. Specifically, Complainant alleged that Respondent laid him off at the age of 57, while retaining younger employees. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on March 4 & 5, 2014. Harold Fossatti and Paul Silva testified at the public hearing. After careful consideration of the entire record before me 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. Complainant Harold Fossatti resides in Taunton, Massachusetts. He was 57 years old when his filed the instant complaint.

2. Paul Silva, age 59, has worked in the flooring trade since the age of 19. Silva purchased the company Regal Floor Covering in 1981. Regal Floor Covering, a union shop, is not a party to this matter. In 2001, Silva established Respondent, Regal Interiors, Inc., a non-union shop. Respondent and Regal Floor Covering occupy the same building in Fall River, MA and are in the business of installing all types of residential and commercial floors.

3. In 2011, Respondent was owned by Paul Silva and his son Jordan. Silva was president of Respondent and was responsible for the company's day-to-day operations, as well as payroll, accounts receivable, sales and estimates. (Testimony of Silva) At the time of the public hearing, Paul Silva had turned over sole ownership of Respondent to his son, but continued to be involved in Respondent's operations.

4. Complainant began working as an installer for Regal Floor Covering in 1981 as a sub-contractor. In 1983 he became an hourly employee, installing all types of commercial and residential flooring in Rhode Island, Massachusetts and Connecticut.

5. Complainant was skilled at installing all types of flooring and was one of Silva's top installers, as was John Pacheco. Respondent's other more skilled installers, Carlos Pacheco 61 and Jose Dias, 57, were union members who worked primarily for Regal Flooring, but would work for Respondent when no union work was available. (Testimony of Complainant; Testimony of Paul Silva)

6. In 1987, Complainant was injured in a motorcycle accident and was out of work for more than a year. When he recovered he was rehired by Regal Floor Covering.

7. Sometime around the year 2000, Complainant voluntarily left Regal Floor Covering in order to work for a competitor, because Regal was not offering him enough work. He was laid off from the competitor nine months later.

8. Sometime around 2001, Complainant contacted Silva seeking employment. Silva hired Complainant to work at Respondent, the non-union shop he had recently established. Paul and Jordan Silva were Complainant's supervisors. From 2001 to 2011, Complainant worked primarily the day shift with occasional overtime. He did not work weekends or holidays. (Testimony of Complainant; Testimony of Silva)

9. Complainant testified that he got along fine with the Silvas and his co-workers.

10. Silva testified that Complainant performed most of the day work because, as the years passed, he repeatedly refused to work outside of the Fall River area, nights, weekends and holidays. I credit Silva's testimony. Complainant denied telling Silva that he declined to work out of the area town and testified that from 2001-2011, he worked in Rhode Island, Massachusetts and in Connecticut. I credit Complainant's testimony that he worked out of the area during his tenure at Respondent. However, I do believe he told Silva that he did not want to work on such jobs.

11. Respondent's project managers, Jordan, Scott, Frank and Paul Silva, wrote up work orders, scheduled jobs and assigned installers based on their availability. Project managers oversaw the installation projects and consulted Paul or Jordan Silva if problems arose that they could not handle.

12. Complainant typically arrived at the shop between 6:00 a.m. and 7:30 a.m. New employees were often assigned to work with him because of his skill and experience. After receiving their work orders, installers loaded their trucks and went to the work sites. Throughout the day, someone from the shop would call to assess how the job was progressing. (Testimony of Complainant)

13. Complainant testified that Respondent favored other installers over him with respect to job assignments and that one project manager named Adolph assigned more jobs to John Pacheco, who was a personal friend, and to Jose Dias than to Complainant. Pacheco and Dias were Complainant's age.

14. Three out of his last four years at Respondent, Complainant was permitted to work four days a week in the summer, using Fridays as vacation days. He elected to work a four day week because installing was a hot, difficult job. (Testimony of Complainant)

15. From 2009 to 2011, Respondent's regular installers were Complainant, age 57; Jeremy Chabot, age 30; Elias Gouveia, age 31; Jason Pacheco, age 36; John Pacheco, age 57; Matthew Pauline, age 34; James Quentel, age 51 and Brian Pacheco, age 30.

16. Paul Silva testified that the financial crisis of 2008 had long-lasting effects on his business, including necessitating his laying off employees on a yearly basis. In 2011, Respondent began working smaller commercial jobs in hospitals, banks and hotels. These jobs required installers to work the second shift so as not to disturb the business. The also did jobs at schools, which were usually in the summer when school was not is session. Silva testified credibly that installers had to be flexible because the nature of the work had changed significantly.

17. In January 2010, Complainant was laid off for about three months and was re-called when work picked up. During that time period, Jason Pacheco, age 36, was laid off for several weeks. Jim Quentel, age 51, was laid off from late December 2010 until April 4, 2011.

18. Sometime around November 2010, Respondent hired Jeremy Chabot, who was 30 years old. Chabot was experienced, versatile, needed no training, and worked night shifts and day shifts. (Testimony of Complainant &Silva; Exhs. R-6; R-7; C-2)

19. Silva testified credibly that some of the union workers from his other business, Regal Flooring, worked for Respondent at night or on out of town jobs when no union work was available. These union workers included Dinis Machado, age 50; Justin Martins, age 22;Carlos Pacheco, age 61; James Pacheco, age 43; Jose Dias, age 57; Kendrick Dias, age 29; Taylor Ettress, age 62; Joseph Ettress, age 29; Helder Ferreira, age 33 (short term); Oliver Duffy, age 34 (short term), Carlos and James Pacheco occasionally performed day jobs as well.

20. On January 6 or 7, 2011, when Complainant had returned from a job in Rhode Island, Jordan Silva advised Complainant that business was going to be slow for a couple of weeks and he was being laid off and would be re-called when work picked up. Complainant asked Jordan if Chabot was still working and Jordan did not respond. Complainant became upset that he was laid off while Chabot continued to work and walked out of the shop. Jordan Silva followed him out and retrieved the key to the company van. (Testimony of Complainant)

21. Complainant testified that the following day he drove by Respondent and observed Chabot getting in the company van that had previously been assigned to him.

22. Complainant drove by Respondent the following Monday and Friday and observed that Chabot was working. In the next few months he drove by several times to check on who was working and he observed that the parking lot was full.

23. Complainant testified that in June or July, 2011, he drove by Respondent and when he saw the Silvas' vehicles in the lot, he entered the building, approached Paul and Jordan Silva and asked why they had not called him back to work. Paul Silva told Complainant he had a poor attitude and was unwilling to work. Complainant responded that he was there to work and would "stand on his head" to work. According to Complainant, Paul Silva then instructed his son to

give Complainant a couple of days' work, but Jordan did not respond. Paul Silva then shook Complainant's hand and Complainant left. (Testimony of Complainant)

24. Paul Silva recalled Complainant came into the shop in the spring and not in June of 2011. He stated that he told Complainant that day shift work had not picked up and that when they could guarantee him 40 hours per week they would call him back.

25. Complainant was not recalled to work. He filed for and collected unemployment benefits for the next two years.

26. Complainant testified that he believed he was the victim of age discrimination when two months after his June 2011 visit to the shop he had still not been called back and Chabot continued to work. At his deposition however, he stated that he believed he was treated adversely because of his age when he was laid off in January of 2011.

27. Paul Silva testified that he assigned some day work to installers who were also willing to work nights, including Chabot, in order to keep them fully employed. He denied telling his son Jordon to give Complainant some hours of work and denied that he was present during any conversation with Complainant in June of 2011.

27. Other workers, including Jason Pacheco and Quental, were laid off for several months in 2011. Chabot was laid off on September 29, 2012 and recalled on January 2, 2013. In June 2013, Chabot left Respondent in order to work for his previous employer. After Chabot resigned, his hours were assigned to other employees or subcontracted out. (Testimony of Silva)

28. Respondent's time cards indicate that from August 7, 2010 to December 3, 2010, prior to Complainant's lay off, he worked 11½ hours of overtime and no nights or weekends.

During that time period, John Pacheco worked 366 night hours and 12 hours of overtime; Jeremy Chabot worked 76 night hours and 31.5 hours of overtime. (Exhs. R-6; R-7)

III. CONCLUSIONS OF LAW

A. Timeliness

Complainant must file a discrimination complaint within 300 days of the last alleged discriminatory act. M.G.L.c.151B§5. Respondent asserts that Complainant's complaint should be dismissed for lack of jurisdiction because it was filed on November 9, 2011, 307 days after Complainant's lay off which took place on January 7, 2011, at which time he believed he was the victim of age discrimination; Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination & another, 431 Mass. 655 (2000). The statutory period for filing a complaint of discriminatory termination does not begin to run until the employee has sufficient notice of that specific act. Here, because Respondent told Complainant he would be recalled from layoff, as he had been in the past, I conclude that the lay-off on January 7, 2011 did not trigger the statute of limitations, because lay-offs had become commonplace during the economic downturn and the winter season when work slowed. Other employees were laid off for different periods of time during 2011, with no consideration of age. Complainant had not received unequivocal notice that he would not be returning to work, and he did not have sufficient reason to believe his age the reason for a temporary lay-off. Wheatley vs. American Telephone & Telegraph Co, at al., 418 Mass. 394 (1994) I conclude that the statute of limitations did not begin to run until Complainant understood unequivocally after visiting Respondent in the spring or summer of 2011 that he was not going to be recalled, well within the 300 day statutory period.

B. Age Discrimination

M.G.L. c.151B §§4(1) and (1B) prohibit employers from discriminating against an employee on the basis of age. In order to establish a prima facie case of age discrimination, Complainant must produce evidence that he is a member of a class protected by G. L. c. 151B; he performed his job at an acceptable level; he was subjected to adverse action; and that similarly situated persons not of his protected class were treated differently or that his termination occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34 (2005); Knight v. Avon Products, Inc., 438 Mass. 413 (2003); Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000). An employer that seeks to reorganize its workforce is not "free to make its employment decisions on impermissible grounds: even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons." [citations omitted] Sullivan, supra. at 42.

Complainant has satisfied a prima facie case in that he was age 57, he was performing his job at an acceptable level and Respondent laid him off and did not re-call him, effectively terminating his employment. Complainant asserts that he was treated differently from a recently hired 30 year old installer who was retained and worked night jobs and performed some of the day jobs that Complainant had worked. Complainant contends that the decision to lay-off him instead of Chabot was motivated by his age. 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 his termination. 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). As part of its burden of production, 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 Complainant's termination were that the company had to adapt to the financial crisis by taking more jobs involving evening work that Chabot and others were willing to perform and that Complainant's long-standing refusal to work nights and weekends made him the preferred candidate for lay off.

The credible evidence supported Respondent's position that it was altering its business model in order to keep up with the changing economy and needed to retain employees willing to work flexible hours. I conclude that Respondent has articulated and produced credible evidence to support legitimate, nondiscriminatory reasons for its action.

Once Respondent meets its burden, then Complainant 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). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). 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, 434 Mass. at 504. If the Complainant presents such evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See Lipchitz at 504,; Abramian, 432 Mass. at 117.

As evidence of pretext, Complainant asserts that the reasons Respondent set forth for terminating his employment were untrue. Complainant argues that there was enough day work for him because up until his layoff he was regularly working full weeks. He also asserts that because Chabot worked days as well as evenings, Respondent's asserted non-discriminatory reasons for terminating his employment were pretextual. However, Respondent's witness testified credibly that in order to retain versatile, flexible workers such as Chabot, Respondent had to supplement their night work with day work. Furthermore, the evidence demonstrates that Respondent's most prolific and most valued installer, John Pacheco, worked a substantial number of night time hours and overtime and was the same age as Complainant. Pacheco and other installers who worked days and were the same age or older than Complainant were not laid off and continued to work for Respondent.

Complainant has not persuaded me that Respondent's legitimate, non-discriminatory reasons articulated at the public hearing were a pretext for discrimination or were not the real reasons for his termination. Complainant did not present credible evidence to counter the fact that his inflexibility was the reason for his termination. That Complainant limited his hours in the summers to working a four day week was further evidence that he was not amenable to work extra hours.

Other evidence supports Respondent's assertion that age was not a factor in Complainant's termination. Complainant acknowledged that Respondent's stated reason for terminating his employment was his unwillingness to work. He also testified that he believed Respondent played favorites by assigning more work to other installers. Notably, the workers he asserted received preferential treatment, John Pacheco and Jose Dias, were the same age as Complainant and continued to work for Respondent and Regal Floor Covering respectively.

Thus his own testimony undercuts Complainant's assertion that Respondent's conduct was motivated by age discrimination. Ultimately, I conclude that Complainant has not proven that Respondent's reasons for terminating his employment position are a pretext for unlawful age discrimination.

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 to 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 6th day of November 2014

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JUDITH E. KAPLAN
Hearing Officer