THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
RICHARD LAMMLIN,
Complainants,

v. DOCKET NO. 10-SEM-00741

SEDER FOODS CORP.,
Respondent

Appearances:
Robert D. Noonan, Esquire for Richard Lammlin
Edward R. Greenbaum, pro se, for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 12, 2010, Complainant Richard Lammlin filed a complaint with this Commission charging Respondent Seder Foods with discriminatory termination on the basis of age, disability[1] and ethnicity. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on September 10, 2015 at the Commission's Springfield office. After careful consideration of the 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 Richard Lammlin, who is white, was hired as a sales consultant for Respondent in June 2004 at the age of 59. His employment was terminated in December 2009 at

[1] The disability claim was not raised at the public hearing and is hereby dismissed.

the age of 64. At that time he was the most senior and the oldest salesperson at Respondent. For the 25 years prior to working for Respondent, Complainant worked for a very large retail grocer as a retail business consultant.

2. Respondent Seder Foods was a wholesale grocer located in Palmer, Massachusetts that sold to small stores. Edward Greenbaum, who is in his 60s, was the Respondent's CEO and sole owner. Respondent closed in June 2010 and its assets were sold to a company called Iberia Foods. Respondent was dissolved in 2014.[2]

3. Greenbaum was a co-owner of JEM Transport, which supplied the transportation to Respondent. JEM is no longer in business. Greenbaum also owns Greenbaum Industries, which owned the property on which Respondent was located. That property has been sold.

4. Greenbaum testified that Respondent began as a wholesaler to inner city bodega type stores. He stated that in 2006 and 2007 he was under pressure from his accountants to divest from that market. His primary goal in hiring Complainant was to expand from that model and develop accounts with larger stores and a new market in upstate New York, where Respondent had existing contracts with New York state prisons.

5. Complainant was one of four sales consultants at Respondent. The other salesmen were all at least 20 years younger than Complainant. He was paid a salary of $43,000 per year, with no commissions. His territory included Worcester, MA, Hartford, New Haven, Waterbury, New Britain, and Bridgeport, CT, Utica, Syracuse, Albany and Buffalo, NY and one account near Lake Ontario. He primarily sold to small supermarkets that he visited regularly. Complainant's duties included visiting clients, walking the stores with owners, writing up orders, ensuring that customers made the minimum order, and reviewing new items and special

[2] Complainant's counsel represented to the Commission that the organization is not dissolved and that Respondent has existing interconnected business interests. This was not established at public hearing.

promotions with owners. He also collected payments from clients which he turned in to Respondent's accounts receivable clerk every Friday. He dealt with hundreds of store owners and drove 60,000 miles per year.

6. In order to solicit new business, Complainant made cold calls, searched for new accounts on the internet, or stopped at stores along his route in upstate New York. This was a fertile area for acquiring new accounts, because Respondent had prison accounts in the area and Respondent's delivery trucks could easily make deliveries to small stores on their way to the state prisons.

7. In addition to visiting stores, Complainant represented Respondent at food shows and trade shows in order to promote special deals and solicit customers.

8. Complainant worked with retailers on many documents, including credit application forms and order forms. All of Respondent's forms were printed in English and he conducted business in English. Complainant conducted business with store owners who were Indian, Pakistani, Dominican and Puerto Rican among others and he never had problems communicating with customers in English.

9. Complainant testified that he generated many new accounts, mainly in New York, when another wholesaler went out of business. Complainant opened approximately 25 new accounts during his employment at Respondent, 75% of which were in New York. He testified that he brought the business of 11 Latino retailers into the company. Three of the Latino accounts were located in Connecticut and eight were in New York. According to Complainant, it was more difficult to open new accounts in Connecticut due to the presence of a wholesaler who undercut Respondent's costs. Ex. C-12. Company CFO Robert Sylvester testified that Complainant's sales were average.

10. Complainant testified that he never had a performance review or performance problems during his tenure with Respondent. He was assigned to train new sales people, an indication to him that he was doing a good job.

11. Robert Sylvester was Respondent's CFO from April 2000 to December 31, 2009. He was the second in command at Respondent and reported to Greenbaum. He was in charge of IT, payroll, Human Resources, accounts payable and receivable and collections. An IT employee and an accounts receivable employee reported to him.

12. In March 2009, Respondent lost its largest account, Finkle Distributors, with little notice. This account was 10% percent of Respondent's sales. The loss of the Finkle account resulted in Respondent losing territory to competitors. This loss, coming during a faltering economy, put severe financial pressure on Respondent. (Testimony of Greenbaum; Testimony of Sylvester) Respondent lost 15% of its revenue from the preceding year from all sectors, including the prison business. (Testimony of Greenbaum)

13. Sylvester testified that in 2009 Respondent implemented a number of business strategies to improve its financial situation. Greenbaum also attempted unsuccessfully to sell the business in late 2009.

14. In October 2009, Respondent met with its secured lender, Webster Business Credit. The lender informed Respondent that it was out of compliance with the terms of its asset based loan agreement. Webster placed Respondent in a forbearance status and made it clear that for the lender to continue to do business with Respondent, Respondent's outstanding debt to the bank had to be significantly reduced over the following several weeks. As a result, Respondent could pay only a few critical bills, based on a formula, and could cover only the most necessary

operating costs; the balance of its receivables was to be paid to the bank to pay down its debt. (Testimony of Greenbaum; Testimony of Sylvester; Ex. R-10)

15. In October 2009, Greenbaum announced that all of Respondent's employees would receive a pay cut. After the announcement, at least seven employees resigned from the company. Sylvester gave his notice but stayed on until December 31, 2009. (Testimony of Sylvester)

16. James Beshaw has worked on and off for Respondent since the 1970s. At other times, Beshaw was self-employed or worked as a supplier to food retailers. He last worked for Respondent as a merchandiser from 2008 to 2009. He testified that Respondent's business was faltering in 2009 and when Respondent reduced his hours, he voluntarily left the company at the age of 60. I credit his testimony.

17. Greenbaum testified that due to severe financial pressure and the worsening economy, it was best for Respondent to return to its core business of servicing urban Latino stores. At that time, Complainant's new sales came primarily from New York and he had difficulty penetrating the urban Latino stores in the Connecticut cities where he spent the majority of his time.

18. In October 2009, Greenbaum determined that increasing the number of ethnic retailers would best be accomplished by hiring bi-lingual, Latino sales staff which required terminating Complainant's employment. He testified that, in his experience, Latino store owners, even if they spoke English, had a greater comfort level speaking Spanish with Latino sales representatives who understood their culture and could connect with them.

19. On December 2, 2009, Greenbaum informed Complainant that he was going to have to terminate his employment because he needed a Spanish-speaking employee in sales. Complainant cleaned out his company car, called his son to pick him up, and then gave his work

phone and GPS to Robert Sylvester. Complainant testified that he was "not very happy" because he had never been terminated from a position before. Complainant, who knew only a few Spanish phrases, stated that Greenbaum had never asked him about his ability to speak Spanish.

20. Sylvester testified that shortly after Complainant was terminated, Greenbaum told Sylvester that he needed a "younger, more aggressive salesman who can speak Spanish." I credit his testimony.

21. Greenberg denied telling Sylvester that he wanted a younger, more aggressive salesperson, but acknowledged stating that he wanted someone who could speak Spanish. I do not credit his testimony that he did not tell Sylvester that he wanted a younger, more aggressive salesperson.

22. Sylvester testified that once or twice Greenbaum referred to Complainant as an "old paperboy," a term Sylvester had never heard before. Greenbaum explained to him that Complainant was like a paperboy who delivered to the same houses time after time and never went anywhere new. Sylvester never told Complainant about Greenbaum's use of the term "old paperboy" to refer to him. I credit his testimony. Greenbaum denied referring to Complainant as an "old paperboy." I do not credit his testimony.

23. Sylvester stated that no one at Respondent spoke fluent Spanish and that in 2009 Respondent had hired a new sales manager who did not speak Spanish.

24. Sylvester subsequently filed a suit against Respondent after his unsuccessful attempts to negotiate a severance package.

25. Edward Greenbaum testified that he respected Complainant's lengthy experience in the industry. However, he stated that a small percentage of Complainant's accounts were in the Latino community. According to Greenbaum, Complainant spent 75% of his time in the Eastern

Connecticut area where he had only a handful of accounts and that the remainder of the Connecticut and Western Massachusetts districts were underserved.

26. Greenbaum testified that Complainant was replaced by a bi-lingual Latino man in his 40s who had experience working for Kraft foods. The Latino man was assigned the portion of Complainant's territory that covered Bridgeport, Connecticut and Western Massachusetts. The remaining portions of Complainant's accounts were distributed among Respondent's younger, non-Hispanic sales representatives.

27. Greenbaum stated that the Latino sales representative developed five new accounts in the Latino community, which was more than Complainant had done in years.

28. Greenbaum testified that Complainant had over $2.4 million in sales in 2008, but that number was down to $1.4 million by the end of 2009.

29. According to Greenbaum, in 2009, 30% of the people on his payroll were over age 50; 9% were over 60 and he had one employee who was over 70.

30. Earl Stockwell was tractor-trailer driver for Respondent and then JEM Trucking until his retirement at age 83. Stockwell named three other drivers who worked for JEM into their sixties and then voluntarily retired. (Testimony of Stockwell)

31. In June 2010 Respondent ceased operating and liquidated its assets in an attempt to satisfy its loan from Webster Bank. The inventory was sold off to raise funds to re-pay bank. The entire secured debt could not be paid. The bank retrieved 85-90% of the funds loaned to Respondent. Respondent corporation was dissolved in 2014.

32. In June 2010 Respondent's remaining assets were sold to Iberia Foods, which hired a small number of Respondent's employees, including Verant Minassian, who worked as a buyer and merchandizer for Respondent and is currently a vice president of Iberia Foods.

33. After his termination, in 2010, Complainant filed for and received unemployment compensation of $400 per week. He sought work at Polep Brothers, a food distributer and applied for non- sales positions at various local businesses including Wal-Mart and a pharmacy.

34. After unsuccessfully looking for work, in 2010, Complainant studied for and passed the Connecticut real estate examination and obtained a real estate license. He did not have a sale for seven months and could not afford to renew his license which has since lapsed.

35. Complainant earned $43,000 per year working for Respondent. Had he not been terminated, he would have worked until Respondent ceased doing business in June 2010 and his wages would have been $21,500.00 for the six month period between his termination and the company's close of business.[3] During this 26 week period, Complainant received $10,400 in unemployment compensation. ($400 per week x 26 weeks) Subtracting his unemployment compensation, Complainant's lost wages equal $11,100 ($21,500.00 -$10,400).

III. CONCLUSIONS OF LAW

M.G.L. c.151B§§4(1) and (1B) prohibit employers from discriminating against an employee on the basis of age and race. In the absence of direct evidence of discrimination, Complainant must establish discrimination under the three stage burden shifting model. Wheelock College v. M.C.A.D, 371 Mass. 130 (1976); Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000).

In order to establish a prima facie case of race and 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 similarly situated persons not of his protected class were treated differently or his termination occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual

[3] Estimated, based on testimony that business closed "in June" 2010.

Insurance Company, 444 Mass. 34 (2005); Knight v. Avon Products, Inc., 438 Mass. 413 (2003). In cases where there is direct evidence of discrimination, the burden shifting paradigm is altered somewhat. Once Complainant has established a prima facie case by direct evidence that one of the motives was unlawful, the burden is on Respondent to show that the lawful reason was the primary motivating force for the action. Here Complainant has established by direct evidence that Respondent's termination was motivated by Complainant's race and age. Respondent testified that he terminated Complainant in order to replace him with a bi-lingual, Hispanic salesperson and made references to Complainant's age as a factor in his inability or unwillingness to secure new business and sticking to his established routines[4].

Respondent's owner stated that he sought to replace Complainant with a salesperson who not only spoke Spanish, but who was culturally Latino. Sylvester testified that Respondent told him he was looking for someone younger and more aggressive. It is clear that in Respondent's view, a younger, more aggressive, Latino sales representative would have a greater rapport in part based on cultural affinity with Latino store owners, which would result in increased sales for Respondent. Engaging in employment decisions that limit, segregate or classify employees because of race is unlawful. See, Johnson v. Zema Sys. Corp., 170 F.3d 734, 743-44 (7th Cir. 1999) (Jury could infer that the employer's stated nondiscriminatory reason for firing African-American plaintiff was pretext for unlawful segregation and job limitations, i.e. African-American salespersons were required to serve predominantly African-American accounts, and White salespersons were required to serve accounts owned or frequented by Whites); Ferrill v. The Parker Group, Inc., 168 F.3d 468, 472-73 & 475 n.7 (11th Cir. 1999) (finding liability under

[4] Seeking a bilingual employee for legitimate business reasons is not unlawful and does not constitute discrimination based on race or national origin. See, e.g. Sanchez v. Southern Pac. Transp. Co., 29 Fair Empl. Prac. Cas. (BNA) 746, 753 (S.D.Tex. 1980) ; Cota v. Tucson Police Department, 783 F. Supp. 458, 473-74 (D. Ariz.1992)

§ 1981against telephone marketing firm that admittedly assigned Black employees to make calls to Black households, and White employees to make calls to White households).

In addition to the direct evidence based on age and ethnicity, Respondent articulated a legitimate, non-discriminatory reason for terminating Complainant's employment. Respondent's articulated reason for terminating Complainant's employment was that due to financial problems, Respondent was returning to its original business model of selling to small, inner-city, largely Latino-owned stores and that Complainant was producing no new sales in the portion of his territory where such businesses existed. Respondent asserted it was refocusing its efforts in a last-ditch attempt to prop up its faltering business. There was evidence to support Respondent's assertion that Complainant had no recent sales in the urban Connecticut and Western Massachusetts portions of his district.

While the decision to terminate Complainant's employment may have been motivated, in part, by concerns about his declining sales, Complainant's age and his ethnicity also clearly motivated the termination. I conclude that Respondents had "mixed-motives" for terminating Complainant's employment. Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries his initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299.

Respondent has failed to persuade me that he would have terminated Complainant's employment had it not been for his age and ethnicity. The evidence establishes that Complainant was treated more harshly in this regard because of his age and ethnicity. Rather than re-configure Complainant's sales territory, Respondent terminated Complainant outright while a younger Latino man was given a portion of his territory and his existing accounts were divided among significantly younger sales staff. While Complainant's sales may have decreased, the entire company had suffered through layoffs, decreases in pay and resignations due to the economy. There is sufficient direct evidence that Respondent singled out Complainant for termination in favor of retaining younger sales representatives and hiring a younger, more aggressive, Latino sales person who spoke Spanish and understood Latino culture to take over the urban portion of Complainant's territory.

I conclude that impermissible considerations of Complainant's age and ethnicity were the primary reason for terminating his employment. I conclude that Respondents' actions were motivated by unlawful discriminatory animus and not by lawful considerations as it contends and it is liable for Complainant's unlawful termination. M.G.L.c. 151B§4.

IV. REMEDY

Pursuant to G.L. c.151B §5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment by Respondent. Stonehill College v. MCAD, 441 Mass. 549 (2004); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Emotional Distress

An award of emotional distress "must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." Stonehill College, supra. at 576. In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." Id. at 576.

Complainant provided no other testimony regarding his emotional distress, except to say that he "wasn't happy" about being terminated because he had never been fired from a job. I conclude that Complainant was likely distressed by his unlawful termination. However, given the meager evidence proffered regarding his emotional distress, including the absence of testimony regarding its nature, severity and duration, I am constrained by the guidelines set forth in the Stonehill case to make a de minimus award of damages for emotional distress in the amount of $5,000.

B. Lost Wages

Complainant is entitled to the wages he would have received had he not been unlawfully terminated by Respondent. Complainant earned $43,000 per year at the time of his termination. Had he not been terminated, he likely would have continued to work at the latest, until Respondent ceased doing business in June 2010, some six months after his termination. I

conclude that Complainant is entitled to damages for lost wages for this period totaling $11,100. (Lost wages of $21,500.00 minus $10,400 in unemployment compensation)

V. ORDER

Respondent is hereby ordered:

1) To cease and desist from discrimination based on age and ethnicity in the operation of any of its businesses;

2) To pay to Complainant Richard Lammlin the sum of $11,100 for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court judgment and post judgment interest begins to accrue.

3) To pay Richard Lammlin the sum of $5,000 in damages for emotional distress, with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court judgment and post judgment interest begins to accrue.

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 thirty days of receipt of this order.

SO ORDERED, this 20th day of January 2016.

JUDITH E. KAPLAN,
Hearing Officer