

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
THOMAS MIRABITO,
Complainants

v.

DOCKET NO. 07-BEM-02244

WINDOWSOURCE and ALAN
GORDON,
Respondents

Appearances: Jeffrey C. McLucas, Esq. for Complainant
Jeanine M. Kilgallen, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 16, 2007, Complainant filed a claim of discrimination against his former employer, Respondent WindowSource and the company's owner Alan Gordon, alleging that his termination some 300 days earlier on October 20, 2006 was on account of his age and in violation of G.L. c. 151B s. 4(1B), (4A) and the ADEA. The Investigating Commissioner found Probable Cause to credit the allegations of the complaint. Respondent WindowSource ceased operations sometime prior to the issuance of the Probable Cause Finding. Respondent Gordon claims that he closed his business, suffered a stroke, and moved to a new residence during the interim. Notice of the Conciliation Conference scheduled for June of 2010 was sent to Respondent Gordon's previous address in Brookline, where he no longer resided at the time, and

Gordon did not appear at the conference. All subsequent notices to Respondent including notice of certification for hearing, notice of pre-hearing conference and Complainant's discovery requests, were returned to the Commission or Complainant as undeliverable. Respondent did not respond to Complainant's discovery. At some point prior to the pre-hearing conference in this matter, Complainant's daughter contacted Respondent Gordon by telephone to verify his address. Respondent did not appear at the pre-hearing conference but after receiving a copy of Complainant's pre-hearing memorandum he sought counsel and asked that the Hearing scheduled for August 15, 2013 be rescheduled. The request was granted and the hearing was rescheduled to January 7, 2014. Complainant sought sanctions against Respondent immediately prior to the hearing for his failure to respond to discovery requests mailed to Respondent's previous residential and business addresses. Respondent asserted that Complainant could have uncovered his whereabouts easily, as demonstrated by Complainant's daughter contacting him by phone, but that he chose not to. This assertion ignores the fact that Respondent had an obligation to apprise the Commission of any change of address. His failure to do so resulted in his not attending or participating in a number of scheduled proceedings over the years. For these reasons, the undersigned Hearing Officer granted sanctions precluding Respondent from presenting witnesses in defense of the claim, but denied Complainant's request for default and allowed Respondent to cross-examine the Complainant. Since WindowSource had ceased doing business and no longer existed at the time of the Hearing, the sole remaining Respondent is the company's owner Alan Gordon, and the matter proceeded against Gordon only.

On February 26, 2014, Respondent filed a Motion to Expand the Hearing Record arguing that Complainant's Motion in Limine to exclude a defense by Respondent was filed only 24 hours before the hearing which had been scheduled for months and was therefore untimely.

Respondent also asserts that this severe restriction was unwarranted given Complainant's failure to locate Respondent during the lengthy pendency of the action which languished for a period of years with no activity. Respondent asserted that his only failure was to not properly apprise the Commission of his change of address over a period of three years and he sought to expand the Hearing Record with the following: (1) official notice of Respondent's current address dating back to 2006; (2) Respondent's objection to Complainant's Motion in Limine dated January 6, 2014; (3) Respondent's Pre-Hearing Memorandum dated November 22, 2013; and (4) Respondent's initial Answer and Position Statement dated October 25, 2007. The latter two documents are not appropriately a part of the Hearing Record. The first is immaterial, as it is not the responsibility of the Commission or an opposing party to seek out the whereabouts of a party who has gone missing and failed to respond to official notices. The fact that Complainant's daughter may have had Respondent's telephone number for a period of time matters not to the Commission, since the information was not communicated. Since Complainant's Motion in Limine was admitted as an exhibit in this matter (Ex. C-2) it is wholly appropriate to allow Respondent's Objection to the Motion in Limine; therefore, the Hearing Record is hereby expanded to include that document as an exhibit to be marked as Ex. R-2. The remainder of my sanctions order remains intact and I decline to expand the hearing record to include affidavits from the two witnesses who were excluded from testifying on Respondent's behalf.

On March 10, 2014 the parties filed post-hearing briefs. Complainant simultaneously filed a Motion to Strike Respondent's brief for being in excess of 10 pages. The Motion to Strike is denied, as the number of pages referenced by the hearing officer was merely a suggested guideline and not a constraint. However any references in Respondent's post-hearing brief to evidence that is not in the record, including Respondent's position statement submitted

during the investigation will not be considered. Proceedings pursuant to section 5 of chapter 151B are *de novo* and investigative materials are not part of the Hearing record.

Likewise, Respondent's April 14, 2014 Motion seeking to strike Complainant's post-hearing brief as untimely, is hereby denied. Having reviewed the hearing record and the post-hearing submissions of the parties based on evidence adduced at the hearing, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Thomas Mirabito, began his employment at WindowSource in April of 2003 when he was 68 years of age. He was hired by Respondent Alan Gordon, President of WindowSource, to be the Vice President of Manufacturing. Gordon contacted Complainant about coming to work for WindowSource.

2. Complainant had a long career working in the window manufacturing industry dating back to 1958. Complainant knew Alan Gordon from his previous employment at Gordon Aluminum in Peabody Massachusetts in the early 1990's. Gordon was the President of that company where Respondent worked for a number of years until the company closed. Complainant worked for several other employers before being hired again by Gordon to manage production at WindowSource.

3. WindowSource was a company engaged in the manufacturing of vinyl replacement and new construction windows. Its manufacturing facility was located in Lawrence, Massachusetts. The company's customers were window retailers, local hardware stores, and small contractors. Complainant located the site for the facility, set up the production lines and hired eight to ten employees, many of them former contacts of his. Complainant's duties

included scheduling production, overseeing the manufacturing employees, ordering/purchasing equipment and materials, assisting with loading and unloading material, making minor repairs to equipment, training employees in manufacturing and production requirements, and performing management functions related to production. His compensation was approximately \$1000 per week or \$52,000 per year with no additional benefits from the time of his hire until his termination in October, 2006.

4. Complainant oversaw the manufacturing process at WindowSource. He testified that although Gordon knew the industry, he had very limited knowledge of the details of the manufacturing process and was more of a “finance guy” and “office” person. Gordon’s office in their previous collaboration at Gordon Aluminum was in the distribution center and not the manufacturing facility. At WindowSource, Complainant saw Gordon three to four times a week. Gordon did not supervise the work on the floor and did not know how to operate the machinery.

5. According to Complainant a number of the employees were Spanish-speaking and there were some communication issues regarding production. Complainant utilized another Spanish speaking employee who ran the screen department to assist with translating and to assist him with purchasing. He also instituted the use of EXCEL spread sheets for the scheduling of the manufacturing process which he had created and used in a previous job and which he considered his personal property.

6. In mid-2006, WindowSource changed the type of insulation glass used in its Windows from hard-coat, surface glass, to soft-coat, low E glass. According to Complainant, this decision was made by Gordon and was driven by cost as the latter was less expensive. Complainant had no prior experience with this type of glass product. The manufacturer of the glass held an on-site training at WindowSource lasting at least two days demonstrating how to

handle the glass during the manufacturing process. Complainant and three other employees were trained in the proper way to handle the glass and how to cut and set the glass and the proper placement of the insulation coating. Complainant testified that he and the employees were trained that the glass insulation piece had to be handled by the outer edges only and had to be placed on the third surface of the window only. Improper placement of the insulation piece on the fourth surface resulted in a soapy-like spotted appearance when sunlight hit the window. According to Complainant this problem could not be detected until the product was already out in the field.

7. In September of 2006, problems began to surface with the soft-coat low E glass windows after they were shipped to customers and homeowners. The windows were showing spots in the glass, and Respondent was required to replace these windows and to bear the cost of the replacement of approximately 50 to 75 windows during a 30 to 45 day time period. Complainant understood the problem to be caused by the insulation coating being placed on the wrong surface of the glass and stated that the correct surface had to be identified from the time the glass was cut. Complainant testified that he discussed the problem with Gordon on a number of occasions and was going to contact the glass company to help solve the problem. He contacted the manufacturer's representative and was informed that other companies had experienced similar issues. The representative suggested that Respondent purchase a special meter that would detect what surface the coating was on and track the surface with the coating throughout the manufacturing process. Complainant testified that availability of the meters may have been discussed in the training from the glass company but he believed the employees had received sufficient training in how to handle the glass. He trusted the employees to know what they were doing despite some difficulty with communication issues because he believed them to

be experienced glass handlers. Respondent ended up purchasing the meters and according to Complainant once they did so, the issue was resolved.

8. Complainant testified that an additional problem surfaced in 2006 with the low E, soft coat glass. Smudges and hand prints appeared on the glass because production employees working with the glass were not handling it properly. He testified that some of the problems may have arisen because he did not speak Spanish and he had to communicate through another employee as all the other employees in plant spoke Spanish, except Complainant.

Complainant testified that employees handled the glass properly when he was present. Nonetheless, he understood he was the production manager responsible for supervising the production crew, overseeing the manufacturing process and ensuring that the windows were properly made. Complainant denied having knowledge as to the amount of financial loss to the company resulting from these production problems, but admitted that the replacement costs would have been significant. He testified that he discussed the issue with Gordon two or three times focusing on what he was doing to rectify the problem but that Gordon never discussed replacement costs with him.

9. In October of 2006, Gordon asked to speak with Complainant in his office at the manufacturing facility. According to Complainant, Gordon seemed nervous and began the conversation by stating words to the effect of, “we’re not getting any younger, are we” or “we’re both getting to old for this business,” and told Complainant the company was going in a new direction. When Complainant asked if Gordon was asking him to leave, Gordon responded in the affirmative and reiterated words to the effect of “we’re not getting any younger.” Complainant then packed up his possessions and left the building. He took with him his EXCEL software and the CDs that he had created, which he claimed were his property. When Gordon

contacted him about the CDs, Complainant stated that the information was his, that he had created them and that there was no proprietary information on them. Complainant testified that he was angry, broke one of the CDs which he said was blank, and told Gordon that Gordon would have to pay him \$10,000 for the CDs. Complainant returned the CDs to Gordon after Gordon's brother threatened to sue him for expropriating proprietary information.

10. Complainant testified that shortly after Complainant was hired by Respondent at age 68 he lost his driver's license for 90 days due to a DWI and told Gordon he would not be able to work any longer. In lieu of Complainant's resigning, Gordon paid for a car service to drive him to work from his home in Windham, New Hampshire to Lawrence Massachusetts where Respondent's manufacturing facility was located. Complainant denied having a temper but admitted that there were times when he might have "lost his cool" while working at WindowSource. Complainant vaguely recalled a prior incident when Gordon wanted to terminate him, but stated he could not recall the details and agreed that Gordon gave him a second chance. Complainant's professed loss of memory regarding this matter was not credible. Complainant was 71 years of age when his employment at WindowSource was terminated. He alleges that Respondent replaced him with a younger individual in his early 40's.

III. CONCLUSIONS OF LAW

General Laws c. 151B, section 4(1B) makes it unlawful for an employer in the private sector to discharge an individual from employment because of his age. Complainant asserts that he was terminated from his position as Vice President of Manufacturing at WindowSource by the owner of the company, Respondent Gordon on account of his age. To establish a prima facie case of age discrimination Complainant must demonstrate that he is a member of the protected

class, i.e. over the age of 40, that he was performing his job adequately, and that he was terminated under circumstances that give rise to a reasonable inference that his age was the cause of his termination, or that he was replaced by an individual who is at least five years younger than he was at the time. *Sullivan v. Liberty Mutual Insurance, Co.* 444 Mass. 34 (2005) *Knight v. Avon Products, Inc.* 438 Mass. 413 (2003).

Complainant at age 71 was a member of that protected age group, and he testified that Gordon made comments to him at the time of his termination about them not getting any younger, which raises an inference that age discrimination was a factor in his termination. Given these circumstances, it could be argued that Complainant satisfied the first and third elements of the prima facie case. While there was no evidence other than the assertion of Complainant based on multiple hearsay that Respondent had hired a younger individual to replace him, the lack of evidence on this issue may fairly be attributed to Respondent's failure to respond to discovery.

More importantly, however, Complainant failed to prove that he was performing his job adequately at the time of his termination. He admitted that he was responsible for the manufacturing process of vinyl soft coat low E glass windows and that he oversaw the employees who did the actual cutting of the glass and placing it in the window frames. His job was to ensure that windows were properly made. Complainant admitted that he had no experience with this type of glass and that despite several days of training by the manufacturer of the glass, his employees handled the glass improperly causing it to be smudged. An even more significant failure was the improper installation of an insulation coating on the wrong glass panel causing a soapy look to appear in the windows when sunlight hit them. Complainant admitted that the use of a meter to assist in this process was discussed during the training, but that he did not believe it was needed. Complainant admitted that there at least 50 to 75 windows had to be

replaced at a cost to Respondent. While he claimed to not know the cost of this failure, which Respondent implied was in the neighborhood of \$100,000, he admitted that the amount of money was significant. Given the nature of his position and his inability to insure that the work was done properly, I conclude that Complainant has failed to demonstrate that he was adequately performing his duties and therefore has not established a prima facie case.

Even if one could find that Complainant had established a prima facie case of age discrimination, there are numerous other factors based on evidence in the record that support the conclusion that Complainant's age was not a reason for his termination. First, he was 68 years of age at the time Respondent Gordon hired him to be Vice President of Manufacturing. He had worked for Gordon previously and Gordon recruited him to the job. It strains credulity that Gordon would have recruited a 68 year old former colleague to the job if he were motivated by bias based on his age. Moreover, the evidence established that when Complainant was unable to drive himself to work because he lost his driver's license, Gordon paid for a car to pick him up and drive him to work from his home in New Hampshire to the Respondent's facility in Lawrence, MA. Complainant also admitted that he had lost his temper on the job on occasion and despite this being a source of some friction between him and Gordon, Gordon had given him a second chance. Even if one were to find that Complainant was generally satisfying the minimum requirements of the job, the evidence supports the conclusion that his failed oversight of the manufacturing process of the soft coat low E glass windows caused Respondent significant problems with customers and the loss of significant amounts of money. Finally, I conclude that the remarks made by Gordon at the time of Complainant's termination fall into the category of stray remarks that given the circumstances are weak and not sufficient evidence of impermissible bias. *See Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 302 (1991).

Given all of these factors, Complainant has failed to prove by a preponderance of the evidence that the reason for his termination was because of his age or that Respondent violated G.L. c. 151B in ending his employment.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may pursuant to 804 CMR 1. 23(1) 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 22nd day of July, 2014.

Eugenia M. Guastaferrri
Hearing Officer