

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, and
JOSEPH SASSO,
Complainants

v.

DOCKET NO. 08-BEM-01588

SERVISAIR, LLC,
Respondent

Appearances: Nicholas Keramaris, Esq. for Complainant
Scott C. Merrill, for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On June 4, 2008, Complainant Joseph Sasso filed a complaint of discrimination against Respondent, Servisair, LLC., alleging that Respondent eliminated his position as a manager of operations in the ramp department at Respondent's Boston's Logan Airport facility, and failed to offer him one of two positions that were advertised in other departments, on account of his age, and his disability in violation of G. L. c. 151B §§4(1B) and (16) and in retaliation for his having complained of age discrimination in 2006, in violation of G.L. c. 151B, §4(4). The Investigating Commissioner found probable cause to credit the claim of age discrimination only and dismissed the claims of disability discrimination and retaliation. The claim of age discrimination was certified for a public hearing after efforts at conciliation were unsuccessful. A hearing was held before the undersigned hearing officer on February 6 and 7, 2013. The parties filed post-hearing

briefs in April and May of 2013. Having considered the record of the proceedings and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Joseph Sasso was born in 1950 and was 58 years old at the time of the events at issue in this case. Complainant has a high school education and had worked for Respondent some thirty-four years from 1974 until 2008, the year of his separation from the company. (Tr. Vol. II, p. 6)

2. Respondent Servisair provides aviation and airline services to airlines and airports, including ground handling (ramp services), ground transportation, aircraft cleaning, and passenger service handling. (Tr. Vol. I, pp. 144-146) Respondent provides these services in Boston and other locations throughout the country through contractual agreements with airlines. (Id.)

3. Respondent's Logan Airport operation consists of the following departments: ramp services, aircraft cabin cleaning, passenger service (ticketing, check-in), fueling, cargo, maintenance and snow removal (de-icing), and administration. (Tr. Vol. II, p. 182, Wissell Deposition, p. 8)

4. Respondent's management structure is as follows: the Station Manager/General Manager oversees all of the Respondent's operations at the Boston location. This position was held by Richard Wissell, who reported to corporate headquarters in Houston, Texas.¹ Next in order were Department Managers, Duty Managers, and Supervisors. (Tr. Vol. I, pp. 19-20) In 2007 and 2008, Cinzia Biancaniello (nee Perkins) was the Ramp Manager at Logan and Josephine Finch

¹ Wissell was unavailable to testify at the hearing in this matter due to the fact that he is seriously ill and lives out of state. His video-taped deposition testimony was admitted into evidence in lieu of live testimony.

was the Passenger Services Manager. There were three Duty Managers and three Ramp Supervisors in the Ramp department during this time.

5. Complainant held various positions at Respondent over the course of his thirty-four year career. He was hired initially as a Passenger Service Agent and promoted after a year to Passenger Service Supervisor. (Tr. Vol. II, pp. 7-8) He was an Assistant Ramp Supervisor and a Ramp Supervisor from 1977 until 1979 when he was promoted to Ramp Manager. He worked as a Planning Manager from 1986 to 1993 and worked as Ramp Manager at Respondent's Ft. Lauderdale location from 1993 to 1997. (Tr. Vol. II, pp. 7-8)

6. In 1998, Complainant became the Manager of Operations for administration of the Ramp Department at the Logan Airport location. He remained in this position until his separation from the company in 2008. Complainant's direct supervisor was Ramp Manager, Cinzia Biancaniello. The Ramp department oversees aircraft baggage handling and also performs aircraft de-icing during winter weather conditions. (Tr. Vol. I, p. 21; Vol. II., p. 20)

7. Complainant performed administrative tasks in the Ramp Department including payroll and billing, manpower and equipment planning, distribution of uniforms, handling budget issues and negotiating contracts. He approved the payroll for Ramp Agents, Supervisors and Managers at the Logan Airport location. With respect to billing, Complainant ensured the accuracy of Ramp Department invoices and approved service orders and invoices from the Passenger Service and Cabin Cleaning Departments. Complainant was responsible for generating estimates of the stations' manpower and equipment needs throughout the year. He also performed de-icing of aircraft in winter conditions. The latter task required him to be at work during all potential snow storms. (Tr. Vol. II, pp. 9- 11) By all accounts that were no issues with Complainant's job performance. Wissell testified in his deposition that Complainant's job was unique and that no

other Boston employee held a comparable position. (Wissell Deposition Transcript, p. 8)

Complainant testified that his pay-grade was a level 7 which was higher than that of the Ramp manager, Biancaniello, and that there were only two individuals at that level, himself and the administrative manager for the entire station. (Tr. Vol. II p. 55)

8. Respondent's payroll function had historically been performed by hand. At some point, Respondent introduced an automated computerized payroll system call Kronos. Respondent asserts that this system enabled other employees in the Ramp Department to perform payroll functions and made it possible to do payroll a lot faster. (Tr. Vol. I, 23) There was testimony that a Ramp Supervisor and a number of others, including Ramp Duty Manager Michael Maguire did some work with Kronos. Maguire testified that it was not necessarily more efficient because more people had to spend a lot of time on the computer. (Tr. Vol. I, p. 20, 23)

9. Complainant testified that he would perform the manpower planning by hand with plot sheet and graph paper. He stated that sometime in the late 1990's or early 2000's Respondent introduced a computer software system designed for American Airlines called SABRE to assist with manpower planning but that the system did not work well for their operation. Complainant stated that because Respondent had to cross utilize its labor force to keep labor costs in check, this software system was not feasible to use and no one used it. (Tr. Vol. II, pp. 18-19) Ramp Duty Manager Maguire stated that the SABRE software system was never in use during his tenure. (Tr. Vol. I, p. 18) Respondent asserted that Ramp Manager Cinzia Biancaniello began learning the program in 2006 and that it was formally introduced in Boston in 2008, after Complainant was laid off. (Tr. Vol. II, pp. 129-130) Biancaniello testified that the system has been used in Boston for manpower planning since then and is primarily operated remotely by someone in the Houston corporate office. (Tr. Vol. II, pp. 130-131)

10. In 2007 Respondent lost the contract to handle British Airways' ramp operation which was one of its largest customers at the time. (Wissell Depo. p. 10) The loss of the British Airways contract was expected to significantly impact Respondent's Ramp Department. One of the three Ramp Duty Managers left Respondent for the company that secured the contract. (Tr. Vol. I, p. 20) Maguire testified that after this employee left, Complainant picked up the bulk of the work and began performing the duties of a Ramp Department Duty Manager, which he continued to do until he was laid off. (Tr. Vol. I, p. 22 Vol. II, p. 22) Maguire testified that Duty Managers were also referred to as Assistant Managers or Shift managers and that these job titles were fluid. (Tr. Vol. I, p. 17) Duty managers in the Ramp Department conducted the daily planning to ensure there were sufficient crew members to handle baggage and cargo duties. Maguire was laid off in March of 2008 at the age of 60 after being out of work on a disability leave due to a heart condition for several months. During his leave, Complainant performed most of his work. (Tr. Vol. I, p. 22, Vol. II, p. 21) Complainant testified that he continued to perform his own job responsibilities throughout this time. (Tr. Vol. II, p. 22)

11. Subsequent to the loss of the British Airways account, which was expected to significantly impact the Ramp department, Respondent circulated a memorandum announcing that all negatively affected ramp employees would have the opportunity to transfer to another department instead of being laid off. (Ex. C-1) Wissell issued this memo in September of 2007 to advise unionized ramp employees that efforts would be made to move those employees into positions in other departments as an attempt to avoid lay-offs. This was the result of an agreement between management and the unions to allow employee's in the ramp department's bargaining unit to bump into positions in other bargaining units, a right that did not otherwise exist. (Wissell Depo. pp. 11-12) This memorandum did not apply to managerial employees and

did not impact Complainant. Maria Ferreira, Respondent's Human Resources manager testified that whenever there were lay-offs Respondent would try to place ramp agents and sometimes supervisors and non-union employees who were impacted into other departments and that Human Resources would assist with this process. (Tr. Vol. I, pp. 32-34, 94-95) Respondent asserts that this practice did not apply to managerial employees and it had no obligation to consider Complainant for other positions. However the notice issued by Respondent on September 17, 2007, is to all Servisair employees at Boston, Logan Airport, does not distinguish between non-managerial and managerial employees, and states that *any* employee negatively affected by the operational change resulting from the loss of British Air's ramp handling operation, will be provided with another employment opportunity. (Ex. C-1)

12. Complainant testified that he spoke to the General Manager Wissell when Maguire was laid off and asked if he were going to be next and Wissell assured him that his job was secure. (Tr. Vol. II, pp. 22-23) On or about April of 2008, Two Duty Manager positions became available at Respondent's Boston location. (Tr. Vol. I, pp. 38-39) One was for a Duty Manager in the Passenger Service Department, and the other was for a Duty Manager in the Cabin Cleaning Department. (Ex. C-2) An advertisement for the positions in the Airport Journal provided that applicants should preferably have "2-4 years' experience in aircraft cleansing, airline hospitality, passenger services or related field." Id.

13. Complainant saw the ads and inquired about the positions with various decision makers at Respondent. He first spoke with Josephine Finch, the Manager of the Passenger Service and Cabin Cleaning Departments. Finch was responsible for choosing candidates to fill the Duty Manager job openings, subject to Wissell's approval. Complainant testified that in response to his first inquiry about the available positions, Finch told him he "[was]fine where [he was]." (Tr.

Vol. II, pp. 24-25) Complainant spoke to Finch again about the job openings one week prior to his layoff, at which time he told her he “would definitely be interested” in one of the positions, and Finch responded that she would “speak to Richie Wissell.” I credit Complainant’s testimony over that of Finch who testified Complainant merely indicated in passing that he could do the job and who stated that she could not recall her entire conversation with Complainant. I did not find Finch to be a credible witness.

14. Complainant also spoke to Respondent’s Human Resources Manager, Maria Ferreira, about the Duty Manager positions. (Tr. Vol. I, p. 46; Tr. Vol. II, p. 25-26) Ferreira testified that Respondent was having a difficult time finding candidates with the appropriate experience to fill the available positions. (Tr. Vol. I, pp. 46-47) Consequently, Ferreira asked Finch if she would consider Complainant for the positions and Finch replied that she would not. (Id.) I credit Ferreira’s testimony on this issue. Ferreira testified that Finch preferred to hire younger candidates who had fewer responsibilities and more flexibility and who could work all shifts at any time and that Finch was never there at night. (Tr. Vol. II, pp. 50, 53, 54, 92) I credit her testimony. She also testified credibly that the Duty Manager for cabin cleaning would oversee all the aircraft cleaners and the contracts and would be in charge of the supervisors. (Tr. Vol. 1, p. 39)

15. Complainant also spoke about the Duty Manager job postings twice with his supervisor, Ramp Manager, Cinzia Biancaniello. Complainant’s first conversation with Biancaniello concerning the Duty Manager job openings was approximately two weeks prior to his layoff. (Tr. Vol. II, p. 25) Complainant testified that when he expressed an interested in applying of these jobs, Biancaniello told him he was fine where he was. (Id.) He spoke with her again about the available openings just two days before he was laid off, and she assured him that

he was fine where he was, despite knowing that he was about to be laid off. (Tr. Vol. II, pp. 26-27; Ex. C-24A, pp. 4-6) Biancaniello recalled Complainant asking her if he should apply for the job and responded it was not up to her to decide. (Tr. Vol. II, p. 129) She testified in her earlier deposition that she did recall having any conversations with Complainant regarding the available positions. I did not find Biancaniello to be forthcoming as a witness.

16. Complainant, Maguire and HR Manager Ferreira all testified that when internal candidates were interested in an available position at Respondent there was no formal internal application process and a resume was not required to apply. (Tr. Vol. I, pp. 15-16; 44-45; Tr. Vol. II, p. 27) Respondent hired one internal candidate and one individual from outside the company to fill the Duty Manager positions. (Tr. Vol. I, pp. 48-52; Tr. Vol. II, p. 105) One of these individuals was approximately 34 years old at the time she was hired, and she had only about six months of experience in the airline industry in a non-managerial position. (Ex. C-25) The other individual hired was approximately 23 years old and had approximately five years of experience in the airline industry. (Ex. C-26) In addition to Complainant's thirty-four years of experience in the airline industry, he testified that he was very familiar with safety and security protocols, rules and regulations particularly after the events of September 11, 2001. (Tr. Vol. II, pp. 259-260) Moreover, Complainant testified that he was qualified for the cabin cleaning manager position because he had run cabin services in New York and Chicago and for four years in Ft. Lauderdale as the manager. He had also set up the cleaning schedules when Respondent opened a station in Las Vegas. (Tr. Vol. II, pp. 28-29)

17. Complainant's employment was terminated on May 1, 2008. (Ex. C-18) Complainant received a letter stating that he was being let go because "the Company reached a decision to consolidate all of the day-to-day business functions of [his] position." Following

Complainant's lay-off, his job responsibilities were split among several employees at Respondent. Biancanello testified that she assumed the majority of Complainant's job duties, and that the Supervisors in the Ramp Department assumed his duties with respect to payroll, daily manpower planning, and ordering uniforms. In Respondent's answers to interrogatories, which she signed, she stated that she took over Complainant's payroll functions. Complainant testified that the Manager of Respondent's Administrative Department and another employee called him frequently with questions regarding billing after his termination. (Tr. Vol. II, pp. 30-32) He testified that another supervisor called him frequently with planning and scheduling questions and issues related to the union contract. (Id.)

18. Of the remaining managerial employees in the Ramp department who assumed Complainant's duties after his lay-off, Ramp Manager Biancanello was younger than Complainant by some sixteen years and the two of the remaining supervisors in the Ramp Department were significantly younger than Complainant by some seventeen and eighteen years. The other was approximately eight years younger. (Ex. 24B, p. 34)

19. Respondent contends that the loss of business from 2006 to 2008 and particularly the British Airways contract in December of 2007, led the company to examine lay-offs as a means to cut costs. Respondent asserts that in addition to Complainant, ten other employees were laid off and that 50% of those laid off were under the age of 40.

20. Wissell testified that he made the decision to eliminate Complainant's job because he believed the administrative functions Complainant performed could be spread among other personnel, and that the position was no longer needed in Boston. (Wissell Depo. p. 14-19; Ex. R-2) He stated that the automation of payroll functions with the Kronos computer system would allow others in the Ramp Department to do payroll work. (Id.) Wissell testified that the

manpower scheduling and planning work that Complainant did manually was to be phased out with the introduction of the SABRE computer software program and Complainant made it clear that he was not interested in learning and using this program. (Id.) Respondent asserts that it was evident that Complainant's duties were not so extensive so as to consume an entire shift, since he testified he was able to perform all of his daily duties, as well as those of Maguire, during a single shift, while Maguire was out on a medical leave. (Tr. II, pp. 21-22) Thus, Complainant was informed on May 1st that the decision was made to "consolidate all of the day-to-day business functions" of Complainant's job as of May 4, 2008. (Wissell Depo. pp. 17-18)

21. Respondent asserts that interested candidates for the available Duty Manager positions posted in April of 2008 were advised to apply by submitting their resumes to Human Resources Manager, Maria Ferreira. (Ex. C-3;C-4) Since Complainant did not submit a resume they assert he was not a candidate for the positions because he did not comply with the application procedure. (Tr. Vol. II, p. 99) Ferreira received resumes from interested applicants and forwarded them to Finch for her review. Finch interviewed the candidates and recommended two individuals for hire to Wissell, though she had the final decision as the department head. (Tr. Vol. II, 96-97,100)

22. Complainant's layoff came as a shock to him since Wissell had informed him upon Maguire's lay-off in March of 2008, that his position was safe. (Tr. Vol. II, pp. 22-23) He was 58 years old at the time, and testified that he was devastated and suffered extreme emotional distress following his lay-off. He suffered from anxiety, stress and depression that manifested in sleeplessness and various stomach problems including diarrhea and vomiting, which he characterized as irritable bowel syndrome. (Tr. Vol. II, 36-37, 39) As a result of his physical symptoms, Complainant saw his physician some two weeks after being laid off and a May 14,

2008 doctor's report reflects that he was "not doing well," felt "extremely anxious," and was "devastated" as a result of losing his job. (Ex. C-19) Complainant also became depressed and reclusive following his lay-off. He stated that he was a "wreck", that "it wasn't a happy home life," and that "he put his family through some pretty bad times." (Tr. Vol. II, p. 39) His brother testified that prior to his lay-off, Complainant was a "very aggressive, very hard working" individual, but after his termination he appeared "totally deflated," "he didn't want to go anywhere," and "he wouldn't leave the house." (Tr. Vol. I, pp. 132-134) Complainant admitted that after his lay-off, he became a recluse, didn't want to talk to people, wasn't taking phone calls. (Tr. Vol. II, p. 38-39) Complainant's wife testified that he the lay-off negatively affected their relationship to the point where there "was no relationship," because Complainant became non-communicative and would "shut [her]out." (Tr. Vol. I, p. 127) She testified that it was devastating for him to work for a place for 34 years and then be told he had no job. (Tr. Vol. I, p. 126) Complainant's depression continued for some period of time as Complainant was still discussing the issue with his doctor in February of 2010, who reported that Complainant was getting increasingly depressed over not being able to work longer. He testified that emotionally, his being let go still affects him. (Tr. Vol. II, p. 42)

23. Complainant's financial insecurity contributed to his emotional distress following his layoff. His wife was also laid off from her employment at approximately the same time and his son was attending college at the time. (Ex. C-19; Tr. Vol. II, p. 37) He stated that others who were laid off received severance, but that he got nothing. (Tr. Vol. II, p.32) He reported to his doctor and his wife testified that he was worried a great deal over how he would pay his bills. (Tr. Vol. II, p. 38; Tr. Vol. I, 126)

24. At the time of his layoff, Complainant was earning an annual salary of \$63,048.96 and he had family medical and dental insurance coverage and life insurance. (Ex. 24B, p. 36) Following his layoff, Complainant could not afford to continue his medical insurance, which cost \$1500 per month, and this caused him to forego taking certain prescribed medications which he could not afford to pay for out of pocket. (Tr. Vol. II, p. 50)

25. Complainant sought alternative employment after his layoff and worked with an employment recruiter. He applied for approximately thirty to forty positions including jobs outside the airline industry. (Tr. Vol. II, 43-44) Complainant testified that he suffered from a number of medical problems including cervical disc disease for which he had spinal surgery in 2006, osteo-arthritis which caused joint pain, diabetes which he developed in the year 2000, hypertension and irritable bowel syndrome. (Tr. Vol. II, pp. 40 -41; Ex. C-20) He stated that these medical problems hindered him in finding alternative employment and that he could not do work as a laborer. (Tr. Vol. II, pp. 42,45) He reported to his physician that a number of these conditions were exacerbated by the stress of his lay-off and the financial strain of losing his job. (Ex. C-20) Complainant was offered a position with Swissport, a competing airline services company, however he concluded that he could not perform the job's physical requirements. (Id. p. 45) Complainant was also offered a position as a manager with another airline services company, but declined the position because it required working split shifts, from 9:00 a.m. to 1:00 p.m. and from 10:00 p.m. to 2:00 a.m., seven days per week, and he couldn't work these hours. (Id.) The annual salary for the Swissport position was approximately \$40,000, and the annual salary for the Ready Jet position was approximately \$38,000. (Id. p. 85) There was testimony from Ferreira that the internal candidate promoted to one of the two available Duty Manager positions filled at Respondent in 2008 was paid \$44,000. (Tr. Vol. I, p. 49; Ex. C-5)

26. Subsequent to his layoff complainant applied for unemployment benefits and he received \$625 per week in unemployment benefits from May of 2008 until April of 2009. He testified that he applied for Social Security Disability in January of 2009² and was awarded benefits in April of 2009, retroactive to November of 2008. (Tr. Vol. II, p. 48-49) A physician's report dated March 31, 2009, described Complainant as presenting with the physical symptoms of numbness in his neck, arms and legs, limited range of motion in his neck and neck pain, dizzy spells, blurring sensation, and swelling in his hands with numbness. The diagnosis was chronic cervical disc herniation, with residual pain, paresthesias of arms and legs, bilateral carpal tunnel syndrome, diverticulitis, diabetes, and hypertension. His physician opined that Complainant had been medically disabled since May of 2008 and was permanently disabled from working. (Ex. R-6) Complainant received \$4,208 in Social Security Disability benefits for November and December of 2008 and \$26,712 in Social Security Disability benefits for 2009. (Ex. C-23)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4(1B) makes it an unlawful practice for an employer in the private sector to among other things, discharge from employment or refuse to hire an individual because of his age. Complainant alleges that his employment with Respondent was unlawfully terminated when his job was eliminated and he was laid off in May of 2008. Complainant also asserts that Respondent's refusal to consider him for, and actively discouraging him from applying for two available positions at the time was discrimination based on his age.

² Documents submitted into evidence by Respondent indicate he provided information to the Social Security Administration on February 10, 2009.

In order to establish a prima facie case of discrimination based on his age, Complainant must produce evidence that he is a member of a protected class, in this case, over the age of forty, that he was adequately performing his job and suffered an adverse employment action and that he was replaced by, or rejected in favor of, an individual who was significantly younger than Complainant, by at least five years. *Knight v. Avon Products, Inc.* 438 Mass. 413(2003). Satisfying the fourth element of the prima facie case, i.e. showing that the employer filled the Complainant's position with an individual of similar qualifications is often not possible in cases of reduction in force, where the employee is not replaced. *Sullivan v. Liberty Mutual Insurance Co.*, 444 Mass. 34 (2005) In such instances, Complainant may satisfy the fourth element by producing some evidence that his layoff occurred in circumstances that would raise a reasonable inference of unlawful discrimination. *Id.* at 45. To ultimately prevail on a claim of age discrimination, Complainant must prove discriminatory animus and causation. *Id.* at 39; citing *Lipchitz v. Raytheon*, 434 Mass. 493, 502 (2001) In the absence of direct evidence of the elements of animus and causation, Complainant may rely on the inferential model of proof and burden shifting analysis adopted in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973) and adopted by the SJC in *Wheelock College v. MCAD*, 371 Mass. 130, 134-136 (1976) In the absence of direct evidence of discriminatory animus the fact-finder is permitted to infer discriminatory animus and causation from proof that the employer has advanced a false reason for the adverse employment decision. *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 116 (2000)

Complainant was 58 years old at the time of his layoff and had worked for Respondent for some 34 years in various capacities. He was laid-off in May of 2008 after Respondent suffered the financial consequences of the loss of a major service contract with British Airways and

decided to eliminate his position. Complainant asserts that his lay-off from the position of Operations Manager of the Ramp Department and the elimination of his position was on account of his age. He points to others over the age of 40 who were laid off and asserts that he was performing a number of necessary duties at the time of his lay off, including the shift duties of Ramp Department Duty manager Maguire who had been laid off two month earlier in March of 2008. I find that Complainant has established a prima facie case of age discrimination with respect to his lay-off.

Once Complainant has established a prima facie case, Respondent may rebut the presumption of discrimination raised by articulating a legitimate non-discriminatory reason for the adverse employment action, supported by some credible evidence. This is a burden of production only and it is not onerous. *Abramian, supra.* at 116-117; *Blare v. Huskey Injection Molding Systems, Inc.*, 419 Mass. 437, 442 (1995).

Respondent asserts that the elimination of Complainant's position was in the first instance driven by financial concerns resulting from a decline in Respondent's business. In addition to Complainant, a number of other employees were laid off around the same time period. Respondent asserted that Complainant was chosen for lay-off because his duties were limited and his administrative responsibilities could easily be distributed among remaining employees. The company had begun using an automated payroll system called Kronos to perform Complainant's payroll functions and this duty was primarily assumed by the Ramp Department Manager, Biancanello. Respondent also asserted that most of the manpower planning and scheduling which Complainant performed manually could be done much more efficiently by a computer software program which Complainant refused to learn and use. Wissell testified that he made the decision to eliminate Complainant's job because he believed the administrative

functions he performed could be spread among other personnel, and that the position was no longer needed in Boston. He stated that the automation of payroll functions with the Kronos computer system would allow others in the Ramp Department to do payroll work. Wissell also testified in his deposition that he chose to lay-off Complainant instead of Ramp Department Manager Biancaniello, because Complainant could not do the Ramp manager job.³ He stated that he knew this intuitively because he has worked with and supervised Complainant for many years and knew his weaknesses. I find that Respondent had articulated a legitimate non-discriminatory reason for his lay-off.

The burden of proof remains with Complainant to prove that Respondent's reasons are a pretext and that his lay-off was motivated by discriminatory animus. *Lipchitz, supra.* at 502. I conclude that the Complainant has failed to prove that the decision to eliminate his position was motivated by discriminatory animus. The financial issues Respondent faced were real and I believe that Wissell genuinely believed that the administrative functions Complainant performed did not consume an entire shift and could be assumed by Biancaniello and others. Complainant admitted that he was able to perform his own job functions and the duties of Maguire that he assumed during the course of his regular shift without working overtime. I do not believe that Wissell was motivated by Complainant's age when he made the determination to eliminate this position.

However, Complainant also asserts that he was qualified to perform the duties of the two advertised Duty Manager positions in Passenger Services and Cabin Cleaning and that he should have been considered for and offered a transfer to one of these two positions in lieu of being laid-off. To establish a prima facie case for discriminatory failure to promote or transfer,

³ It must be noted the Complainant was not seeking Biancaniello's Ramp Department Manager job and does not assert that she should have been laid off in his stead.

Complainant must show that he belongs to a protected class, that he was qualified and applied for a position, that he was denied the position and that other employees of similar qualifications who were not members of his protected class were given the position. *Radvillas v. Stop & Shop, Inc.*, 18 Mass. App.Ct. 431 (1984)

Complainant asserts that he was qualified to fill either of the two advertised positions. He had worked in various capacities in the airline industry for 34 years and had a deep well of experience and understanding regarding the operations of these various departments. I also credit Complainant's testimony that he performed Maguire's duties as the Duty Manager in the Ramp Department in Maguire's absence, and was capable of performing the functions of a Duty Manager. Maguire corroborated Complainant's testimony that Complainant filled in for him and performed all his duties when he was out on leave for five months and after he was laid off. I found both Complainant's and Maguire's testimony on this issue to be credible.

Complainant testified credibly that he made several inquiries to managers at Respondent regarding the two advertised Duty Manager positions. He testified to two conversations with the Finch during which he indicated he "would definitely be interested in the positions," and also discussed the positions with his manager and the Human Resources Manager, Ferreira. While Respondent asserts that he did not formally apply for the positions and was not considered because he did not submit a resume, I do not credit this assertion. Moreover, I reject the testimony of Respondent's witnesses that he did not inquire about or indicate an interest in these positions. I did not find Respondent's witnesses' testimony on this issue to be at all believable. I credit the testimony that Complainant inquired about and indicated an interest in these jobs. The credible evidence also suggests that internal transfers were routinely accomplished informally and an interested employee need only indicate an interest to be considered for any opening and

was not required to submit a resume or formal application. Ferreira testified credibly that Respondent was having difficulty finding qualified candidates for the positions and that she inquired of Finch as to whether Finch would consider hiring Complainant. There was testimony that Finch was the real decision maker with respect to these two positions and she categorically rejected Complainant from consideration for the positions. Ferreira testified that Finch preferred younger candidates for these positions because she believed they would work any shift and work nights. I credited this testimony over that of Finch. Complainant has also demonstrated that Respondent hired two individuals who were significantly younger than he was and who had considerably less experience in the airline industry. Given these facts, I believe that Complainant has established a prima facie case that his age was the reason he was not considered for the available duty manager positions.

Beyond its assertion that Complainant never formally applied for either duty manager positions, Respondent asserts that he was not qualified for either position. There was testimony that Complainant could be abrasive at times and did not have the personality and customer service skills to succeed in passenger services. Respondent also asserted that he did not have up to date knowledge of security rules, regulations, and protocols necessary for the Cabin Cleaning position. I do not find these assertions to be credible.⁴ Complainant credibly asserted that he had the knowledge, skills and experience to perform either duty manager position and was well versed in security regulations and protocols. His performance was not an issue and by all accounts he performed his job well and was a reliable employee. I conclude that Complainant

⁴ Even if I were to credit Respondent's assertion the Complainant lacked the personality and "people skills" to succeed as a manager in passenger services, which involved interaction with customers, this would not have been an issue in the cabin cleaning position.

was qualified to perform either duty manager position, but at the very least, the cabin cleaning duty manager job.

Given Complainant's many years of experience in the industry and his vast knowledge and understanding of Respondent's operations, I conclude that the reasons asserted by Respondent for the failure to consider him for either position were pretextual. In light of Ferreira's testimony regarding Finch's preferences in hiring, and the fact that much younger and significantly more inexperienced candidates were hired to fill the positions, I find that these reasons were a pretext for age discrimination. This conclusion is bolstered by the fact that several of Respondent's managers mislead him about the security of his own job, while actively discouraging him from the open positions.⁵ I conclude that Respondent's refusal to consider Complainant for the open positions and the failure to transfer him to one of these positions, was motivated by unlawful considerations of his age in violation of G.L. c. 151B.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and benefits, lost future earnings, and emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. It has broad

⁵ Complainant relied to his detriment upon the misrepresentations that his own job was secure, that he was fine where he was, and that he need not think about the other available jobs.

discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 601(1st Cir. 1987).

Consistent with my conclusion that Respondent's failure to offer Complainant a transfer to an available position was motivated by discrimination based on his age, Complainant would generally have been entitled to back pay from the date of the failure to hire, to the date the Complaint was filed. However given that Complainant would likely have taken a \$20,000 pay cut if he had been transferred to a Duty Manager position, the fact that he received unemployment benefits based on his salary at the time of his lay-off and most significantly the fact the he was deemed to be totally disabled as of May 2008, and received Social Security Disability benefits retroactive to November of 2008, I find that he is precluded from an award of back pay. Complainant may have determined that he had no other option but to apply for these benefits after he was offered two positions with other companies which were too physically strenuous for him to perform, and because his unemployment benefits were due to expire in April of 2009 and he had no other source of income. However, it is unclear to what extent his physical symptoms may have been exacerbated by the stress and anxiety of his termination, or for how long he would have been able to continue working had he been transferred to a Duty Manager position.

Complainant has proven that he suffered significant emotional distress as a result of Respondent's refusal to consider him for, and offer him, a transfer to another available position. He is entitled to an award of damages for emotional distress he suffered as a direct result of Respondent's unlawful conduct. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the

suffering and any steps taken to mitigate the harm. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004).

While it is difficult to separate the distress of losing his job from the distress of not being considered for, or offered, another available position with the company, the end result for Complainant was the same. He was without employment, felt betrayed by his long-time employer, suffered the stress of financial hardship, and the pain and humiliation of feeling cast aside because of his age. Complainant testified that he suffered a great deal from anxiety and depression after his lay-off. The fact that there were available positions and that he was discouraged from these positions, all the while being led to believe that his job was secure, only exacerbated his distress and sense of betrayal. It is therefore not unreasonable to attribute a significant portion of his distress to Respondent's discriminatory conduct.

Complainant testified that the stress and anxiety he suffered exacerbated his stomach and bowel problems, and he was unable to sleep. He sought medical help for his physical symptoms within a short time, and his physician's report states that Complainant reported being extremely anxious and devastated because he was no longer working. Complainant, his wife and brother all testified credibly and compellingly that he had been a very social person, but he became depressed, stopped going out with friends, was uncommunicative and withdrew into himself. His wife testified that it was devastating for Complainant to work for a place for 34 years and then be told he had no job. Complainant continued to discuss his symptoms of depression with his doctor until at least 2010, when he continued to feel emotionally upset about no longer working. His distress was palpable during his testimony at the hearing and the emotional impact of Respondent's actions was still very much evident. I found Complainant to be a very earnest and sincere witness and believe that he suffered severe and long-lasting distress. I conclude that

he is entitled to damages in the amount of \$125,000 for the emotional distress he suffered as a direct and probable consequence of Respondent's discriminatory actions.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination based upon age when considering employees' eligibility for alternative positions within the company.
- 2) To pay to Complainant, Joseph Sasso, the sum of \$125,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment, and post-judgment interest begins to accrue.
- 3) To conduct, within one hundred twenty (120) days of the receipt of this decision, a training of Respondent's Managers at the Boston Logan Airport Location who have hiring authority or the authority to approve transfers of current employees on issues related to age discrimination in hiring and transfer. Respondent shall utilize a trainer certified by the Massachusetts Commission Against Discrimination. The trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date, and location. Following the training session, Respondent shall send to the Commission the names of persons who attended the training. Respondent shall repeat the training session at least one time for any of the above described managers who fail to attend the original training and for new managers hired or promoted after the date of the initial training session.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 9th day of April, 2014.

Eugenia M. Guastaferr
Hearing Officer