

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEVEN ST. MARIE,
Complainant

v.

Docket No. 04 SEM 01589

ISO NEW ENGLAND, INC.
Respondent

Appearances: Mark H. Bluver, Esq. for Complainant
Robert H. Morsilli, Esq., for Respondent

DECISION OF THE HEARING OFFICER
ON REMAND FROM APPEALS COURT

I. PROCEDURAL HISTORY

On March 12, 2008, the undersigned Hearing Officer concluded, after a seven-day hearing, that Respondent's termination of Complainant was motivated primarily – although not solely – by his pursuit of an age discrimination claim against Respondent. This conclusion was premised, in part, on the Hearing Officer's February 13, 2007 order precluding Respondent from relying on events that occurred prior to the execution of the Settlement Agreement on September 12, 2003.

Respondent sought review of the Hearing Officer's decision. On October 24, 2011, the Full Commission affirmed the decision although it determined that evidence of Complainant's pre-settlement performance should not have been excluded.

On July 9, 2012, Respondent appealed the Full Commission's decision to the Massachusetts Superior Court. The Superior Court issued a decision on March 17, 2014

upholding the Full Commission decision regarding Respondent's liability for retaliation but agreeing that evidence of Complainant's pre-settlement performance history should have been considered.

Respondent sought a further review with the Massachusetts Appeals Court. On August 26, 2015, the Appeals Court held that the Superior Court erred in concluding that the exclusion of pre-settlement incidents was harmless, vacated the Full Commission decision, and remanded the matter to the Commission for consideration of pre-settlement matters as a basis for Complainant's discharge. See ISO New England v. MCAD, 36 N.E. 3d 78 (2015) (Memorandum and Order Pursuant to Rule 1:28). After attempts at resolution of the matter proved unsuccessful, the Full Commission ordered a remand to the undersigned Hearing Officer in compliance with the Appeals Court order. I convened a public hearing on November 1, 2016 to take additional evidence in conformity with the Appeals Court order. Complainant testified on his own behalf. The parties submitted fourteen (14) joint exhibits. Complainant introduced one (1) additional exhibit. The parties also submitted a stipulation in lieu of additional testimony.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions. For purposes of clarity, I reiterate certain findings from my 2008 decision.

II. FINDINGS OF FACT

1. In 1996, prior to the formation of ISO-NE ("Respondent"), Complainant, along with six other employees, filed a complaint with the MCAD alleging age discrimination against their then-employer, Northeast Utilities. The employees alleged that they were bypassed for promotion to Shift Supervisor because of their age. In 1997, Respondent ISO-NE was

formed and it hired the seven litigants notwithstanding their age discrimination claims against the predecessor company, Northeast Utilities. While the original charge of age discrimination was pending, Complainant filed a second complaint with the MCAD against Respondent ISO-NE and its Human Resource Manager Linda Swanson charging that they retaliated against him in response to the 1996 charge. All of the pending actions were consolidated and were removed to Superior Court. (2008 Hearing Officer Decision at 3-4).

2. In 1998, Respondent promoted St. Marie (hereafter “Complainant”) and five of the six other age discrimination litigants to the position of Shift Supervisor.

3. In 2000, all seven litigants participated in mediation. A settlement was reached that required Northeast Utilities to pay each participant \$15,000 and to pay their attorney \$25,000. Complainant initially agreed to the settlement but later rescinded his agreement. (2008 Hearing Officer Decision at 5). Nonetheless, the Superior Court enforced the settlement agreement and dismissed the action. As of September of 2001, the only matter left unresolved by dismissal of the Superior Court action was Complainant’s appeal of the dismissal of his age discrimination and retaliation claims.

Id.

4. On or about March 5, 2001, Complainant was the shift supervisor on duty in the Control Room. At the time, the New England area was expecting a significant weather event in the form of a blizzard. (Transcript (11/1/16) at 116). According to Complainant, Respondent provides accommodations for operators when a storm situation makes it difficult for them to get to work on time and/or they need to remain in close proximity to the Control Room. (Transcript (11/1/16) at 21).

5. At approximately noon on March 5th, with snow already falling, Complainant left the Control Room and exited the building. (Transcript (11/1/16) at 117, 130). Shift supervisors generally leave the Control Room only once or twice a day while on duty and do not generally leave the building. (Id. at 118). A shift supervisor is not expected to leave the Control Room at all during an emergency. (2008 Hearing Officer Decision at 7-8).
6. After exiting the building on March 5, 2001, Complainant proceeded to a nearby Holiday Inn to reserve hotel rooms for ISO-NE staff. Complainant testified that he intended to reserve fifteen or sixteen rooms and believed that he needed to secure the rooms in person with a credit card rather than over the phone. (Transcript (11/1/16) at 22). Complainant did not attempt to call the hotel and offer his credit card information over the phone. (Id. at 212).
7. Donald Gates, ISO-NE Operations Manager in 2001, testified that there was “absolutely no reason” for a shift supervisor to go in person to book rooms. (Transcript (9/5/07) at 177; Transcript (11/1/16) at 115).
8. Complainant testified that as he was leaving ISO-NE to secure hotel rooms on March 5th, he “holler[ed] out the window” of his car to Control Room Supervisor McGovern and Operations Manager Gates, who were in a another car, that he was going in person to secure the rooms and that another individual was covering for him. (Transcript (11/1/16) at 24-25, 124-125).
9. The individual “covering” for Complainant was ISO employee John Norden. Norden did not work in the Control Room at that time, but he had previously worked as a Shift Supervisor and a Control Room Supervisor. (Transcript (11/1/16) at 23, 191-192).

10. While Complainant was out of the Control Room on March 5, 2001, he also went to the Pioneer Building, about a half-mile past the Holiday Inn, to explore the possibility of using the facility in the event of an emergency evacuation of the Control Room. (Transcript (11/1/16) at 31, 34). Complainant spoke to Customer Service Representative Kathy Goodman at the Pioneer Building about the facility's capability to serve as a back-up Control Center. (Id. at 36, 38). Complainant testified that an issue of potential security breaches at the Pioneer Building was raised during his discussion with Goodman and he was told by Goodman that Complainant "could ... not say anything to anybody" while her boss, Paul Liepe, investigated security matters. (Id. at 40).
11. According to Complainant, he remained out of the Control Room for approximately a half hour. After he returned, the weather started to intensify around mid-afternoon. (Transcript (11/1/16) at 41).
12. Control Room Supervisor McGovern and Operations Manager Gates told Complainant earlier that day that it wasn't necessary to explore an emergency evacuation location and to refrain from doing so. (Transcript (9/5/07) at 176). Complainant did not inform McGovern or Gates about his visit to the Pioneer Building or about his conversation with ISO-NE employee Kathleen Goodman. (Transcript (11/1/16) at 123-125).
13. No evacuation of the Control Room had ever previously occurred and there was a back-up Control Center in Berlin, Connecticut staffed by regional coordinators. (Id. at 121-122, 214).
14. On March 8, 2001, Control Room Supervisor McGovern learned about Complainant's visit to the Pioneer Building. (Id. at 134). McGovern e-mailed Complainant to express displeasure at Complainant leaving the Control Room during a snow storm to visit the

Pioneer facility in order to insert himself into a matter that McGovern was already handling. (Id. at 135-136; Joint Exhibit K at p. 4).

15. On November 29, 2001, Complainant, in a self-described humorous gesture to lighten tension between himself and McGovern, made a copy of a photograph of McGovern, placed it inside a small rope noose, and left it in McGovern's office (the so-called "effigy incident). (Transcript (11/1/16) at 48-49). Complainant had fashioned the noose six months earlier and at that time put it on a desk which he shared with other shift supervisors. It remained on the desk until it was placed by an unknown individual on the door to McGovern's office. (Id. at 44-45, 48-52).
16. McGovern was not amused at having his photograph placed in a noose. Upon discovering his picture inside the noose, he wrote an e-mail to all individuals on shift the night before which said, "Sometime last night . . . my office was targeted." Joint Exhibit C. He questioned whether the incident was a "threat." (Id. at 55).
17. Complainant sent an e-mail to Control Room employees acknowledging that his action was a "foolish, distasteful prank of which [he was] ashamed" and stating that he "deserve[d] to be reprimanded for [his] poor judgment and [his] insensitivity to others." Joint Exhibit C. He also sent an apology e-mail to McGovern. (Joint Exhibit D).
18. In December of 2001, all ISO employees except Complainant who had participated in the age discrimination case reached a settlement and received settlement funds. The settlement and disbursement of funds had been delayed approximately one year due to Complainant's opposition to the settlement. (2008 Hearing Officer report at 5; Transcript (6/12/07) at 21; 11/1/16 Transcript (11/1/16) at 188-189; Joint Exhibit 53).

McGovern was one of the ISO employees whose receipt of settlement funds from ISO-NE was delayed.¹

19. Complainant was reprimanded for the effigy incident by Operations Manager Gates who characterized Complainant's conduct as a "serious matter" that was "unprofessional, immature and [displaying] a total lack of judgment and leadership skill" (Joint Exhibit E). Complainant was suspended without pay for one day, effective February 4, 2002. (Transcript (11/1/16) at 108; Joint Exhibit E). Following the reprimand, Complainant and Gates exchanged additional correspondence. Complainant stated that his action had simply been a bad joke and was not intended as a threat. Gates disagreed. (Joint Exhibits F & G). Complainant asked that the reprimand be removed from his personnel file but Gates denied the request. (Transcript (11/1/16) at 110-111).
20. During 2001, comic strips and a picture of a military officer were anonymously placed on the walls of the Control Room with the photos of various ISO employees superimposed on the items. (Id. at 59, 62-64, 181; Joint Exhibit H (1-3)). Complainant denied any involvement in the altering and posting of the items. (Transcript (11/1/16) at 62, 64, 182).
21. According to Complainant, there was a picture of a hangman's noose displayed in an office cubicle in 2001 with the inscription "Your Neck Is On The Line." (Joint Exhibit H-4). Complainant testified that he had no involvement in posting this picture. (Id. at 65).

¹ Donald Gates was one of the employees whose receipt of a promotion sparked the age discrimination lawsuit. Transcript (11/1/16) at 191.

22. On or about March 1, 2002, Complainant received an annual performance appraisal for calendar year 2001 in which he was graded as “needs improvement” in one out of four general categories: “providing direct supervision to the Control Room staff in performance of their duties.” (Joint Exhibit 32). As the basis for this grade, his supervisor, Seamus McGovern, wrote that, “During extreme reliability events, it was observed that Steve did not perform the Shift Supervisor functions to the level expected for someone in a Supervisor position with his experience and knowledge.” (Id.) Other performance factors (albeit not general “categories”) in which Complainant received a “needs improvement” rating are as follows: 1) Communications (“inconsistent in listening to and giving directions”); 3) Judgment/Decision-Making (“sometimes slow to act in power system emergency and will rely on subordinate inexperienced operators ...”); 4) Leadership (“does not apply his experience and knowledge in a proactive manner . . . especially in stressful situations”); and 5) Integrity (“left his real-time dispatch leadership/supervisor position to investigate an issue that had already been decided upon by Operations Management”). (Id.). The appraisal characterized the effigy incident as a Code of Conduct violation. (Id.). Notwithstanding the “needs improvement” grade in the category of direct supervision, Complainant received an overall rating on his 2001 performance appraisal of “meets expectations.” (Id.).
23. A “needs improvement” grade in one category of a performance appraisal as opposed to a “needs improvement” overall rating does not result in the imposition of follow-up procedures outlined in Joint Exhibit L. (Stipulation of the Parties).
24. In April of 2002, Complainant learned that ISO-NE was considering withholding from him a significant Standard Market Design (“SDM”) bonus because of the effigy

incident.² Although characterized as a one-time bonus, payouts of the bonus were made in three or four increments over a several-year period. (Transcript (11/1/16) at 166). Complainant asked Respondent to reconsider his ineligibility for the SDM bonus based on: 1) his remorse; 2) the fact that manager Tom Dutkiewicz displayed on his office windowsill a wooden miniature of a gallows with a puppet hanging from a noose; 3) the fact that comic strips and a military picture were displayed in the Control Room containing the superimposed photographs of managers; and 4) the fact that a photocopied picture of a noose was displayed in an employee's cubicle. (*Id.* at 61-69, 184; Joint Exhibits H1-3; Complainant's Exhibit A). Complainant asked for a meeting to discuss the SDM bonus. The meeting was held on April 12, 2002 with ISO-NE Chief Operating Officer Steven Whitley and Human Resource Manager Linda Swanson.

25. Whitley wrote to Complainant on July 31, 2002 to say that he had decided to ask the Board of Directors to grant an exception to the rule that a Code of Conduct violation precluded receipt of an SDM bonus, but he refused to change Complainant's 2001 performance appraisal. (Joint Exhibit I; 11/1/16 Transcript at 159-161). Whitley characterized Complainant's work as Shift Supervisor as "decidedly inadequate" with "numerous instances where your performance has been unacceptable" and noted that the Company had considered termination as a possible consequence for the effigy incident. (*Id.*). He explained that he decided to seek an exception so that Complainant

² The effigy incident was considered by Management as a Code of Conduct Violation. Provisions for awarding the SDM bonus included a provision that any employee who received a Code of Conduct violation would not be eligible. 11/1/16 Transcript at 68.

could receive the SDM bonus as an incentive for Complainant to improve his performance. (Joint Exhibit 1).³

26. At the time that Whitley sought the exception, Complainant's appeal of the dismissal of his discrimination suit against Respondent (filed on September 10, 2001) was still pending. (Transcript (11/1/16) at 170-173).

27. Complainant received the next year's performance appraisal (calendar year 2002) in early 2003. He received a "meets expectations" in all categories and an overall "meets expectations." (Joint Exhibit 33). The appraisal states that Complainant had improved on his overall performance from the previous year but in the section devoted to "development needs" the appraisal states that Complainant needs to become "proactive in monitoring the performance/interaction of his team members" and spend more time "following up on control room generated issues, details and problems, become critical in reviewing team member performance." (Id.).

28. In March of 2003, Complainant received an annual merit pay increase of 3.3% which is less than the 3.9% average merit increase for Respondent's employees in 2003. (Transcript (9/7/07) at 91).

29. On September 12, 2003, Complainant settled his previously-filed age discrimination and retaliation claims against the Company. (Joint Exhibit 23). Pursuant to the Settlement Agreement, Complainant received \$25,000 of which Respondent (as opposed to Complainant's former employer) paid \$5,000. The settlement states as its purpose: "to fully and finally settle and terminate any and all differences, disputes,

³ As a result of the exception, Complainant received a 2002 bonus of \$13,816 and a 2003 bonus of \$41,719. The bulk of the bonuses were attributable to SMD payments and lesser amounts to an annual bonus. Transcript (11/1/16) at 169.

claims, and disagreements between them regarding [Complainant's] employment and the alleged discrimination and retaliation against him. (Id.).

30. On December 1, 2003, Cape Cod and southeastern Massachusetts suffered an electrical outage causing a blackout lasting approximately two hours. Complainant, who was Shift Supervisor at the time, was terminated effective January 27, 2004 as a result of the outage. Dennis McGroaty, who was the Senior System Operator, and David Cyr, who was the Security Operator, each received a one-day suspension.⁴ McGroaty and Cyr had no prior discipline at the time they received the one-day suspensions. (Joint Exhibit E; Transcript (9/5/07) at 181).

31. On June 15, 2004, Complainant filed a complaint with the MCAD alleging that Respondent retaliated against him by terminating his employment for pursuing discrimination claims against Respondent and other entities. (Joint Exhibit 20).

32. On August 26, 2015, the Appeals Court remanded the case to the MCAD for consideration of the pre-settlement incidents when determining whether employees were similarly-situated in regard to their performance qualifications and conduct on the day of the outage. See ISO New England Inc. v MCAD, 36 N.E. 3d 78 (2015) (rule 1:28 Memorandum and Order).

III. CONCLUSIONS OF LAW

My prior conclusion regarding liability was premised, in part, on a determination that the parties' 2003 Settlement Agreement precluded Respondent from relying on events which transpired prior to its execution. I arrived at this conclusion based on the

⁴ Cyr and McGroaty grieved their discipline and a settlement agreement was negotiated which expunged Cyr's one-day suspension and which provided that references to McGroaty's one-day suspension would be removed from his personnel file provided he had no further performance issues for three years. (Joint Exhibit 44).

Settlement Agreement's stated objective of resolving all employment disagreements which occurred prior to its execution.

Pursuant to the Appeals Court order, however, two pre-settlement disagreements between the parties are deemed to bear on the instant matter, to wit: the March 5, 2001 snow event and the November 29, 2001 effigy incident. Accordingly, the case was remanded for consideration of the incidents as a potential basis for discharge. The incidents are relied upon by Respondent as legitimate, nondiscriminatory reasons for Complainant's discharge in rebuttal to Complainant's prima facie case. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004) (stage two analysis requires production of lawful reasons for employment decision and credible evidence in support thereof); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (same).

Insofar as the snow incident is concerned, credible evidence indicates that on March 5, 2001, Complainant left his duties as shift supervisor to secure hotel rooms for his staff when, in all probability, the rooms could have been secured over the phone. Complainant did not attempt to call the hotel and offer his credit card information in order to eliminate the need to leave the Control Room at the start of a blizzard. While pursuing this errand, Complainant also traveled to the Pioneer Building, another company facility, to discuss an evacuation plan. He did so despite the fact that the Control Room had never previously been evacuated, a back-up Control Center existed in Connecticut, and potential evacuation matters were already being handled by Control Room Supervisor McGovern who told Complainant earlier that day that it wasn't necessary to explore an emergency evacuation location. Complainant did not inform his supervisor of

his visit to the Pioneer Building based on the unpersuasive reason that a customer service representative told him not to “say anything to anybody.”

Turning to the second incident, credible evidence establishes that on November 29, 2001, Complainant made a copy of a photograph of his supervisor, placed it inside a small rope noose, and left it in McGovern’s office. McGovern, rather than being amused, questioned whether he was being threatened and his office targeted. Although Complainant characterized his action as a “foolish, distasteful prank, it was treated as a serious matter by the Company, resulting in both a reprimand and a one-day suspension.

The foregoing matters, deemed relevant by the Appeals Court, distinguish Complainant’s situation from that of Senior Systems Operator Dennis McGroaty and Security Operator David Cyr, who each received a one-day suspension for the December 1, 2003 blackout. At the time of the power outage, Complainant had already received the one-day suspension and reprimand for his previous misconduct whereas McGroaty and Cyr had no prior discipline. Thus, the one-day suspensions imposed on McGroaty and Cyr for the events of December 1, 2003 mirrored in severity the Complainant’s prior discipline for the effigy incident.

Other matters illuminated by the evidence on remand are that the effigy incident which Complainant portrayed in the original public hearing as a joke was a matter of grave concern to Control Room Supervisor Seamus McGovern. The acknowledged tension between himself and Complainant prior to the effigy incident lends a serious air to this matter in contrast to the comic strips, wooden gallows, and other photocopied material on display in the Control Room.

The prior incidents also highlight a history of the Company's dissatisfaction with certain shortcomings it attributed to Complainant. In his performance appraisal for calendar year 2001, Complainant was taken to task for a showing a "lack of respect for operations management authority" during the snow storm incident and being "slow to act during emergencies, reliant on inexperienced subordinates, not proactive in stressful situations and not consistent in demonstrating professional conduct." Thus, Complainant did not come into the electrical outage in 2003 with a clean slate.

Complainant has argued eloquently throughout a thirteen-year campaign to challenge his discharge that it was primarily motivated by retaliatory animus for filing age discrimination claims against Respondent and its predecessors and for delaying the settlement of said claims. Yet, the evidence on remand indicates otherwise. A different picture emerges when the events pertaining to the outage are considered in light of Complainant's prior employment history. Complainant's personnel record caused Respondent to harbor serious misgivings about his supervisory performance prior to the December 1, 2003 power outage. Whitley informed Complainant some sixteen months prior to the blackout that his work was "decidedly inadequate" and noted that the Company had considered termination as a possible consequence for the 2001 effigy incident. In this context, it can no longer be concluded that Complainant's filing of and refusal to settle an age discrimination claim against Respondent was the real reason for his discharge and that the reasons advanced by Respondent were a pretext for retaliation. See Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 683 (2016) (Defendants' stage-two obligation is to produce both lawful reasons for their employment action and credible evidence in support thereof) Lipchitz v. Raytheon Co., 434 Mass 493, 501 (2001) (where

Respondent at stage two proffers legitimate, nondiscriminatory reason(s) supported by credible evidence, Complainant must establish that they are not the real reasons for adverse action).

Also supporting a conclusion that the discharge was not retaliatory is evidence that the Company awarded Complainant an SDM bonus in mid-2002, *after* he filed an age discrimination claim and *after* he refused to join in a class-wide settlement of age-based claims. The sequence of events establishes that, Chief Operating Officer Steven Whitley asked the Board of Directors to grant Complainant an SDM bonus, worth tens of thousands of dollars, despite Complainant's appeal of the dismissal of his discrimination suit. According to Whitley, he sought the bonus on Complainant's behalf as an incentive for Complainant to improve his performance. Rather than demonstrate a retaliatory impulse, such action indicates that Whitley was motivated by a desire to improve Complainant's employment situation prior to the power outage. Such a step is inconsistent with the claim that Respondent was motivated to fire Complainant due to his protected activity.

To be sure, additional protected activity occurred on September 12, 2003 when Complainant settled his previously-filed discrimination claims against Respondent. Rather than exacerbate tensions between Complainant and Respondent, however, such activity likely had the effect of promoting good will since the settlement involved minimal cost to the Company and resolved all age-related litigation between the parties.


Whatever harmony existed at the time was thereafter shattered by the power outage on Cape Cod three months later on December 1, 2003. Complainant, during his first MCAD public hearing, made a strong showing that his discipline for the power

outage was out of proportion to the treatment of Senior System Operator Dennis McGroaty and Security Operator David Cyr, who each received one-day suspensions for their roles in the incident. When viewed in the context of Complainant's disciplinary history, however, the evidence makes clear that his discharge was not solely for the power outage but was the culmination of a series of professional missteps. These missteps, when considered in their totality, establish that the action of Respondent was not the result of retaliatory animus. See Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 683 *citing* Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass 437, 443 (1995) (in order to prevail at stage three, plaintiff must provide evidence sufficient to allow decision maker to infer that employer's reasons are not true but a pretext).

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. 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.

So ordered this 16th day of May, 2017.


Betty E. Waxman, Esq.
Hearing Officer