

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & WILLIAM TRUDEAU,
Complainants

v.

07-BEM-01358

CITY OF MELROSE FIRE DEPARTMENT
& JOHN O'BRIEN,
Respondents

Appearances:

John J. McNaught, Jr., Esq. for William Trudeau
David C. Jenkins, Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about June 1, 2007, William Trudeau filed a complaint with this Commission charging Respondents with discrimination on the basis of age, in violation of M.G.L. c.151B §4. 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 April 19 and 20, 2011. 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 William Trudeau (date of birth April 19, 1950) resides in Melrose Massachusetts. Complainant worked for the City of Melrose as a firefighter from April 5, 1978 until May 2009.¹

¹ In addition to his firefighter position, since 1975 Complainant has worked as an estimator for Archer Corporation, where he makes his own hours.

2. In 2007, Respondent Melrose Fire Department (“The Department”) operated three fire stations throughout the city. A ladder truck “Ladder One” and a paramedic ambulance were assigned to headquarters. Engine 2 and Engine 3 were assigned to firehouses within the city. In 2007, the Department was staffed by Respondent, Fire Chief John O’Brien, seven captains, nine lieutenants and approximately 32 firefighters. With the exception of Chief O’Brien, all members of the fire department belong to a union, Local 1617.

3. Chief O’Brien has worked for Respondent since June 1983. He became acting Chief in August 2003 and in December 2003 was appointed Chief.

4. Firefighters’ assignments are bid on based on seniority. In 2007, Complainant was assigned or bid to Engine 3, along with Lt. Daniel White², his supervisor, and firefighter Daryl MacLeod.

5. All Melrose firefighters work a schedule that is 24 hours on, 24 hours off, 24 hours on, followed by five days off. Each 24-hour shift starts at 8:00 a.m. Chief O’Brien works from 7:00 a.m. to 3:00 p.m., Monday through Friday.

6. Complainant testified that he had “harsh words” with Chief O’Brien on countless occasions. O’Brien concurred and stated that Complainant was a “thorn in his side” with whom he frequently clashed over policy matters, such as what was appropriate attire for firefighters to wear under their protective gear. Chief O’Brien stated that Complainant was resistant to the changes he implemented upon becoming Chief and Complainant constantly complained about the condition of equipment and apparatus. I credit the testimony of Complainant and O’Brien with respect to their difficult relationship.

² The Department also employs Lt. Dan White’s brother, Capt. John White.

7. Complainant testified that Chief O'Brien frequently remarked that firefighting was a "young man's game." Firefighter Robert Forsey testified to hearing O'Brien use the phrase "often;" however, at his deposition, Forsey testified that O'Brien used the phrase "two or three times over 26 years." Forsey stated that he is not aware of the Chief using age as a factor in any employment decision. I credit their testimony that the Chief used this expression on occasion.

Incidents in 2005

8. Complainant testified that in the summer of 2005, O'Brien asked him on two occasions when he planned to retire. These incidents occurred at the Mt. Hood Golf Course, where Complainant and O'Brien belonged to the same golf league. On both occasions O'Brien, Complainant and other firefighters were present at the golf club, either having dinner or drinks. Complainant testified that on one occasion, as he passed by O'Brien's table, O'Brien asked him, "Hey, when are you going to retire, anyway?" Complainant responded, "When I have to. Why do you want to know?" Complainant then asked O'Brien when he was going to retire. O'Brien responded that he would probably retire in a few years and Complainant responded that O'Brien would be gone before he was. Later that year, O'Brien had a similar conversation with Complainant at the Golf Course. Complainant and O'Brien each testified credibly that these remarks were made in the context of casual discussions among several firefighters gathered at the golf course bar who were all asking one another when they planned to retire and that Complainant was not singled out on these occasions.

Incidents in 2006

9. Respondent's "cascade system" is a large tank of pressurized air from which firefighters fill the smaller air tanks they wear on their backs. Complainant testified that after returning from a fire, he went to fill his air pack at the cascade tank and found it to be in poor condition and in danger of exploding. According to Complainant, he brought the issue to the attention of the safety officer, who laughed it off and told Complainant to inform the Chief. On Friday, August 25, 2006, Complainant sent an email to O'Brien informing him of his concerns about the safety of the cascade system. (Ex. C-1)

10. Monday, August 28, 2006, O'Brien emailed Complainant that he would provide Complainant with the telephone number of the company to schedule a repair.³ (Ex. C-1)

11. An hour later, on Monday August 28, Complainant emailed O'Brien: "When does the ladder truck need it's [sic] annual inspection?" O'Brien responded: "Check into it when you come in Wed let me know." (Ex. C-1)

12. Complainant testified that subsequent to his complaint about the cascade system, O'Brien assigned Complainant's company to roll up hoses across town at Engine 2. According to Complainant, it was not the usual practice to take firefighters "off their bid" and assign them to work at another company. Complainant testified that he believed the assignment of rolling hoses at another company was punishment for complaining about the condition of the air compressor and was not based on his age. I credit his testimony.

³ O'Brien testified that the cascade system was inspected on a yearly basis and after receiving Complainant's email, he produced to Complainant the inspection certificate, which is kept in his office.

13. O'Brien denied that the assignment was punitive, stating that the task was assigned to Engine 3 because Engine 2 was closed that day due to budget cuts. While I do not credit O'Brien's testimony that Complainant's company was assigned the task of another company because Engine 2 was closed, I find that O'Brien assigned the task to Complainant's company to punish Complainant for complaining about the cascade system.

14. Complainant testified that following his questioning the condition of the ladder truck, O'Brien removed him and Lt. White from their usual assignment at Engine 3 and ordered them to drive the ladder truck to a company named Greenwood Fire Apparatus in Attleboro for an inspection. Someone assigned to the ladder truck would ordinarily perform this duty. Complainant drove the ladder truck to Greenwood Fire Apparatus, and Lt. White followed in a pick-up truck, which they used to return to Melrose. Complainant claimed that requiring him to drive the ladder truck put him in danger because the truck was in disrepair and he had not driven it for two years. Firefighter Robert Forsey, who was assigned to the ladder truck in 2007, testified that there were on-going problems with the brakes on the ladder truck. However, at the time Complainant took the truck to Attleboro it was in service and used on a daily basis. Robert Forsey retrieved the ladder truck from Attleboro within days after Complainant had dropped it off.

15. O'Brien testified that he ordered Capt. John White to have the ladder inspected for its annual certification. O'Brien testified that the inspection was for the ladder apparatus only, wherein the pullies, bearings and outriggers are checked. O'Brien claimed that he asked Complainant and Lt. Dan White to take the ladder truck to

Attleboro, instead of a firefighter assigned to the ladder company, because Capt. John White, the captain assigned to the ladder truck at headquarters, was required to remain in the city and because O'Brien wanted to keep Capt. White's company together, no one from the ladder company was able to leave headquarters at the time. I do not credit this testimony because it was illogical and was contradicted by Forsey being permitted to separate from the ladder company two days later in order to retrieve the ladder truck. I find that O'Brien sent Complainant on this assignment because Complainant had inquired about the ladder truck needing inspection.

16. Complainant testified that O'Brien "most definitely" ordered him to drive the ladder truck to Attleboro in response to Complainant's email inquiry about when the ladder truck would be inspected. I credit his testimony.

Events of 2007

17. Complainant testified that in February 2007, he was at Respondent's headquarters, outside O'Brien's office, with Lt. Dan White, Capt. John White and Daryl MacLeod. On that occasion, Complainant asked O'Brien for the documents required to request a transfer to another fire department. O'Brien refused to provide Complainant with the papers and responded, "Who's going to take you? You're too old." Complainant asked O'Brien if he realized what he had said, and O'Brien laughed. Complainant told O'Brien that he wanted to transfer to a "real fire department" because "this place sucks." Complainant acknowledged that he never sought transfer papers again after this incident. Complainant testified at his deposition that he did not believe Chief O'Brien refused him the transfer papers because of his age.

18. O'Brien acknowledged making the remarks attributed to him and testified that he did not give Complainant transfer papers because the usual transfer procedure requires that a firefighter to first obtain approval from the department he wishes to transfer to, which processes the paperwork and returns it to Melrose. Two firefighters, Joseph Nunley (d.o.b. 1/21/59) and Don Calvert (d.o.b. 8/31/66) transferred to the Cambridge Fire Department on January 21, 2007. According to O'Brien, he was contacted by the city of Cambridge with regard to the Nunley and Calvert transfers after Cambridge approved the transfers. Neither Nunley nor Calvert requested transfer papers from Chief O'Brien. I credit his testimony.

Orris Street Fire

19. On Tuesday, May 29, 2007, at approximately 2:00 p.m. all Melrose firefighters, as well as firefighters from nearby towns, were called to a large house fire on Orris Street in Melrose. Chief O'Brien testified that he was both safety officer and incident commander at the fire and his duty was to monitor the condition of the building and the firefighters.

20. Complainant's company, including himself, firefighter MacLeod, and Lt. Tricca, who was filling in for Lt. White, was called to the scene of the fire. Complainant testified that after connecting a hose to the hydrant he noticed that the ladder truck had no wheel chocks and its position had shifted. Fearing that the ladder truck was unsafe, he yelled to the operator, "Watch out!"

21. O'Brien testified that he observed Complainant yelling about the position of the wheel chocks on the ladder truck and directed him to stay with his crew because it was not his job to monitor the safety of equipment.

22. Lt. Tricca testified that while Complainant started preparing the hydrant, he walked to the front of the house to get their next assignment from O'Brien. He testified that O'Brien asked him where his crew was and directed Tricca to take a 2 ½ (a large, heavy hose) from the fire truck and hit the flames coming out of the front window. Tricca asked firefighter Dave Sutton for help with the line and they proceeded to put water on the front window and then moved around to the back of the house. Tricca believed that Sutton then joined the Engine 2 crew.

23. Complainant testified that O'Brien directed him to put on his gear and go into the fire. Complainant testified that he went into the house with Tricca and another firefighter, but that after 10 or 15 minutes, the fire was roaring out of control, and everyone was ordered out of the building.

24. Complainant testified that his crew was ordered back into the building 10 or 15 minutes later. He then came out with MacLeod who had become weak but was able to walk. Complainant and Tricca accompanied MacLeod to an ambulance.

25. According to Complainant, O'Brien then approached him and told him he had two more minutes to get back in to the fire. Complainant testified that he went into the fire for a fourth and final time. Tricca testified that he never heard O'Brien tell Complainant to get back in the fire, and he later saw O'Brien inside the house.

26. Complainant testified that firefighters are usually in a fire for about 10 minutes, after which they emerge, remove their heavy apparel, and should not return to the fire until instructed to do so by the safety officer.

27. Tricca testified that he worked the fire for about an hour and left at the end of his shift and was replaced by James Winslow. Tricca's testimony regarding the fire was otherwise vague and he acknowledged that he "doesn't really remember it."

28. O'Brien testified that he told Complainant to stay with his crew but denied ordering Complainant into the building. He testified that he did not know how long or how many times Complainant was in the building. O'Brien testified that he called for a rehab bus that provides firefighters with a cool place to rest. He was monitoring the fire as well as the safety of all the firefighters and did not tell Tricca to order Complainant back in the building.

29. After leaving the fire at about 5:00 p.m., Complainant completed his 24-hour shift at the fire station. Complainant testified that for a few days following the fire he was beat up, tired and sore and took it easy. However, his time sheets from Archer Corporation show that he worked the following day, Wednesday, May 30, 2007 from 7:30 a.m. to 4:00 p.m.(Ex. R-3).

30. While fighting the fire, Complainant did not ask O'Brien if he could rest. Complainant testified that a day or so later he told O'Brien that he was beat and that O'Brien should have let him rest. O'Brien just laughed and said he could do anything he wanted.

31. A written report of the fire by Captain John White dated May 31, 2007 states in part that, "Crews are being rotated into the building but are becoming tired," and that three firefighters were injured and taken to the hospital during the fire. (Ex R-6)

III. CONCLUSIONS OF LAW

Complainant alleges that he was subjected to disparate treatment because of his age, with respect to the number of events between 2005 and 2007. M.G.L. c. 151B, s. 4(1B) makes it unlawful "[f]or an employer . . . because of the age of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification." The statute protects persons of age 40 and over. The elements of a prima facie case of discrimination vary depending on the type of discrimination alleged. See Knight v. Avon Products, 435 Mass 413, 420, n.4 (2003).

In order to establish a prima facie case of age discrimination in this case, Complainant must demonstrate that he is a member of a protected class who was adequately performing the responsibilities of his position and was denied a condition or privilege of employment granted to someone at least five years younger, or present other evidence that the disparate treatment occurred under circumstances that would raise a reasonable inference of unlawful age discrimination. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000);

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass 665, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See

Knight v. Avon Products, 438 Mass. 413 420, n. 4 (2003). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. If the Complainant presents such circumstantial evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See *id.*; Abramian, 432 Mass. at 117.

A. Admissibility of Statements Made in 2005

Complainant testified that he was first subjected to alleged discrimination by Respondents in the summer of 2005 when O'Brien twice asked him when he was going to retire. The comments of the chief are not acts of discrimination *per se*; however, I found they were relevant and admitted them as background information in determining whether Respondents were motivated by unlawful age animus with respect to subsequent conduct.⁴

However, by Complainant's own admission, these queries were part of casual discussions among off-duty firefighters at a golf course restaurant concerning when they were planning to retire, and there was no evidence whatsoever that Complainant was singled out or treated differently from other firefighters in this regard or that they were intended to pressure him to retire. However, even if these comments were evidence of a

⁴ Respondent asserted that any claims of discrimination occurring in 2005 are not timely filed and should be barred by the Commission's 300-day statute of limitations.

discriminatory animus that the chief harbored going back years, any such animus was not manifested in any future acts of discrimination based on Complainant's age.

B. Claims of Age Discrimination Occurring in 2006 and 2007

I need not apply to the burden-shifting model to Complainant's claims that O'Brien ordered his company to perform additional duties such as rolling hoses at another fire station and ordering Complainant to drive a ladder truck to Attleboro for inspection. Complainant admitted that O'Brien's orders in this regard were in reprisal for Complainant's complaints about the safety of equipment. I conclude that the evidence is in accord with Complainant's testimony and that these orders were not motivated by unlawful age animus.

Complainant alleges that in February 2007, Chief O'Brien refused to provide him with the papers necessary to facilitate a transfer from Melrose to another fire department and that O'Brien stated to Complainant, "Who'd want you? You're too old." O'Brien acknowledged making the statement and refusing to provide the requested transfer paperwork to Complainant. According to O'Brien's unrebutted testimony, he refused to provide the paperwork because the appropriate procedure was for a firefighter to first process transfer papers with the receiving fire department, as two other Melrose firefighters had done before transferring to the Cambridge Fire Department in January 2007. Complainant acknowledged that he made no further attempt to transfer to another fire department and acknowledged stating at the time that he wanted to transfer to a "real fire department" because "this place sucks." While Chief O'Brien's remark about Complainant's age is troubling, and should not be condoned, there is no evidence that his refusal to provide Complainant with transfer papers was for discriminatory reasons, and

Complainant acknowledged in his deposition that he did not believe Chief O'Brien refused him the transfer papers because of his age.⁵

In Complainant's most serious charge, he alleges that on May 29, 2007, Chief O'Brien endangered his life by ordering him several times into a house fire without giving him adequate time to rest, causing him to be exhausted and sore in the days after the fire. I conclude that Complainant has failed to establish that what occurred at the fire was evidence of age discrimination. The testimony about the fire was vague and subjective and it was clearly a confusing and stressful event. There was no evidence to substantiate Complainant's claim that he was treated differently from other firefighters at this multiple alarm blaze in which firefighters were called to the scene from several surrounding cities and three fire fighters were sent to the hospital with injuries. Lt. Tricca, who was in charge of Complainant's company for a portion of Complainant's time at the fire, had only a vague recollection of the events that occurred that day and did not recall how many times Complainant was sent into the fire. There was no evidence of the ages of the other fire fighters. The evidence was that numerous firefighters were rotated in and out of the building, and that the Chief himself entered the house during the course of the fire. Thus, I conclude that Complainant has failed to establish a prima facie case of age discrimination.

The overwhelming weight of the evidence in this case establishes that the enmity between Complainant and Chief O'Brien resulted from their frequent clashes over safety and policy matters. While O'Brien's testimony about the reasons for assigning certain tasks to Complainant was not credible, I conclude that he was not acting out of age

⁵ If O'Brien wanted to force Complainant out of the department as he suggests, it would have been to the Chief's advantage to assist Complainant with his transfer. The Chief's actions suggest otherwise.

animus. It is clear he was asserting his authority to assign Complainant to tasks outside his usual duties in order to punish him for complaining about safety matters, a fact that *Complainant acknowledged*. Whether reprisal for Complainant's concerns about safety was justified is not within the purview of this Commission. Chief O'Brien's remark about Complainant's age notwithstanding, Complainant failed to persuade me that Respondents' conduct was based on discriminatory age animus. For the reasons stated above, I hereby order that this matter be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal 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 the 12th day of August, 2011

JUDITH E. KAPLAN
Hearing Officer