

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. & FRANCINA CAFARELLA,  
Complainants

v.

06-BEM-02657

GERRITY STONE, INC.,  
Respondent

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Appearances:

Simone Liebman, Esquire, Commission Counsel  
Peter Bennett, Esquire and Joanne I. Simonelli, Esquire for the  
Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about October 27, 2006, Francina M. Cafarella filed a complaint with this Commission charging Respondent with discrimination on the basis of age, gender and sexual harassment in violation of M.G.L.c.151B§4. The Investigating Commissioner issued a probable cause determination with respect to the age and gender claims and dismissed the sexual harassment claim for lack of probable cause. Thus, only the claims before me were for age and gender discrimination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on February 15-18, 2011 and March 16, 2011. After careful consideration of the record 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 Francina Cafarella (“Complainant”) was born May 27, 1948 and currently resides in Winchester, Massachusetts. On May 2, 2005, Complainant was hired

at the age of 56 as a sales associate in Respondent's Woburn showroom. Complainant's employment was terminated in October 2006 when she was 58 years of age.

2. Respondent Gerrity Stone ("Respondent") commenced business in August 1997. Respondent's business is retail sales of fabricated stone products, such as kitchen countertops and bathroom vanities, typically to homeowners, either directly or through contract accounts. Respondent also sells unfinished stone slabs at wholesale prices through its Black Bear Granite division. Respondent operates a showroom in Woburn, Massachusetts.

3. Susan Tuller worked for Respondent from 1999 to February 2006 and was president of Respondent from 2000 or 2001 until February 2006.

4. Kevin Moran began working as CFO for Respondent's parent company, Gerrity Company, Inc., in April 1993. Except for a brief period of time, Moran has remained with the Gerrity Company, which purchased Respondent in 1997. Moran was Respondent's president from March 2006 until March 2008, when he became Respondent's CFO.

5. The Gerrity retail/fabrication side of the business employed inside sales representatives and outside sales representatives. The Black Bear wholesale side of the business employed only outside sales representatives.

6. Inside sales representatives have their own customers, usually walk-ins. Inside sales representatives quote jobs, negotiate, close sales, follow the sales process through scheduling, address customer complaints and are responsible for collection of accounts receivable on the jobs they close. Inside sales representatives receive a salary and commissions.

7. Outside sales representatives for both Gerrity Stone and Black Bear solicit sales on the road. They have their own customers, receive commissions for their own customer sales and are paid a draw that is applied against commissions earned. Gerrity Stone outside sales representatives quote retail fabrication jobs, close sales, follow the sale process through scheduling, address customer complaints and are responsible for collection of accounts receivable on the jobs they close. All outside sales representatives are also required to spend one day per week in the showroom assisting customers on a rotating basis.

8. According to Kevin Moran, Respondent was profitable during its first five years of operation, and under the leadership of Susan Tuller, the company expanded, establishing a separate showroom in Woburn, adding storage space, and opening a showroom in Rockland. In 2003, Respondent opened a warehouse in Canton, purchased a company in Hookset, NH where it opened a warehouse, showroom and office space, and opened a facility in Salem, NH. Moran testified that, although the Respondent had increased revenue during this expansion, the revenue was insufficient to cover the costs of the 2003 expansions. For the fiscal year ending November 30, 2004, Respondent had a net loss of \$323,760.

9. Susan Tuller testified that in 2005, the Woburn store experienced an increase in business that the existing sales staff could not handle. Tuller therefore created a new position of sales associate to assist with customers of both Gerrity retail/fabrication and Black Bear. On May 2, 2005, Tuller hired Complainant as a full-time sales associate. Unlike the sales representatives, this position did not receive commissions.

10. Complainant worked a 40-hour week at a salary of \$680.00 per week. Complainant's duties included greeting customers, gathering customer information, explaining the products, providing tours of the facility and assisting potential customers in selecting products. Complainant testified that her main goal was to sell products to anyone who came in the door. Outside sales representatives also sent their customers to Complainant to assist them with choosing products in the showroom. Complainant waited on the customers of Black Bear and Gerrity outside sales, as well as walk-ins, but she did not have her own clients.

11. Complainant testified that she spent most of her time in the warehouse and rarely sat at her desk. Complainant would provide customers with a ballpark cost, but unlike the commissioned sales representatives, she was not authorized to quote prices or perform any collection work. Tuller testified credibly that Complainant was very good at her job and was good with customers.

12. On May 16, 2006, Tuller hired Denise McNulty (DOB 10/20/1955) for a part-time position similar to that of Complainant's. McNulty, who was referred by Complainant, worked approximately 26.5 hours per week and received no benefits. Neither Complainant nor McNulty were given sales goals as were the commissioned sales representatives. Both were trained by sales manager Jack Donohue and reported to him.

13. Complainant and McNulty were considered part of "inside sales," notwithstanding that neither had her own customers or received commissions. I find that their positions were intended to be different from the outside and inside sales representatives, in that they did not have their own customers, were not allowed to price

materials, were not paid sales commissions and were not responsible for accounts receivables.

14. In 2006, there were two inside sales representatives in Respondent's Woburn showroom, Adam Graber and Ely Merino, who were both born in 1979. Graber and Merino quoted prices for their customers and booked sales under their own names.

15. In 2006, the outside sales representatives for Woburn were Kristin Capizzo (d/o/b 4/26/1970), Tom Harvey (d/o/b 11/1/1958) and Robb Silva (d/o/b 10/2/1965). The outside sales representatives negotiated prices and closed sales.

16. In 2006, the outside sales representatives for Black Bear were Mark Valli (d/o/b 3/16/1960), Mike Joyce (d/o/b 1/5/1971) and Chris Lenhart (d/o/b 8/4/1948)

17. Complainant testified that she spent 40% of her time with Mark Valli's customers and 40% with Tom Harvey's customers. She spent the remaining 20% of her time with walk-in customers.

18. Valli testified that his duties as a Black Bear outside sales representative were to visit and maintain relationships with customers and to obtain new clients. Valli's sales area included Boston and north, while Joyce and Lenhart had other areas. Valli testified that Complainant was his inside representative and therefore he sent his customers to her for assistance.

19. Moran testified credibly that although Respondent's revenue increased by over \$1million from 2004 to 2005, Respondent's loss in the fiscal year ending November 30, 2005 was \$877,137.

20. According to Moran, during the first quarter of 2006, Respondent's financial position worsened. On March 1, 2006, he was named president of the company, replacing Tuller. He then began a restructuring process.

21. On March 7, 2006, as a cost saving measure, Moran laid off the Black Bear sales manager, James Erickson (d/o/b10/10/1969) and thereafter, the Black Bear outside sales representatives reported directly to Moran.

22. Respondent also closed its Hooksett facility in March 2006, and in June 2006 began preparing to close the Black Bear Canton facility, which ultimately closed in October 2006. Respondent also closed the Salem facility, consolidating that office's functions with Woburn and acquired more space in Woburn for fabrication and offices.

23. In June or July 2006, Complainant approached Moran and requested an increase in salary from \$35,000 to \$50,000. Moran was concerned that Respondent could afford to pay Complainant that much, but authorized a pay increase for her to \$40,000 on July 14, 2006. Complainant was unhappy with the small increase and the fact that she did not receive commissions.

24. At the time of the raise, Moran discussed with Complainant the possibility of devising some type of commission structure for her, despite the fact that she did not book sales in her own name.

25. On July 31, 2006, Moran prepared a commission plan unique to Complainant, whereby in any month the Respondent met its projected break-even point of \$1.1 million, Complainant would receive a commission. For each \$100,000 sales increase, she would receive a \$100 increase in commission. For example, if sales were equally to or greater than \$1.1 million, Complainant would receive a commission of \$500; If sales were equal

to or greater than \$1.2 million, Complainant would receive a commission of \$600; If sales were equal to \$1.3 million, Complainant would receive a commission of \$700, and so on. The plan was retroactive to June 2006. (R-1) Moran testified that he placed a copy of the plan in Complainant's work mailbox. I credit his testimony. Complainant testified that she did not receive the plan in her mailbox, but I do not credit this testimony.

26. The Respondent achieved net sales of \$1.296 million in June 2006 and paid Complainant a commission of \$600.

27. On August 2, 2006, Complainant hand wrote a note to Moran stating that the commission was smaller than she expected, that she was dissatisfied with the plan, and asked to discuss the matter with Moran. (Ex.R-2) In response to Complainant's note of August 2, Moran wrote: "Refer to 7/31/06 Summary Commission Plan...If sales goals are not met (ie less than \$1,100,000/month) then no commission check is due..." (Ex. R-3)

28. On August 14, 2006, Jeff Loyd (d/o/b 3/28/58) was hired as an outside sales representative at a salary of \$50,000 plus commissions. After training for about a month by shadowing the insides sales staff, Loyd went out on the road, focusing on visiting large contractors to obtain commercial work, an area where Respondent wished to expand. As was required of all outside sales representatives, Loyd also worked in the showroom assisting customers three or four times per month.

29. In August 2006, Respondent hired a consulting group called IPA to perform a business review and develop a sales and marketing plan for the business. IPA Project leader David Jones testified that IPA's goal was to improve Respondent's sales volume and

profitability by increasing customers and improving job performance and to examine all of Respondent's processes to make sure they supported these goals. IPA remained on the project for approximately six weeks and provided Respondent with a written report in about November 2006.

30. David Jones testified he was an expert in operations and finance and another consultant, Mohammed Irfan, was an expert in sales and marketing. Jones prepared a weekly report and met with Respondent's owner Jim Gerrity and Kevin Moran every Thursday or Friday.

31. To increase sales, IPA identified a list of potential contacts and provided the list to Respondent. Jones testified that Irfan posed as a customer and visited five major competitors of Respondent to compare their pricing with Respondent's. IPA made no personnel recommendations to Respondent, other than to create the position of sales and marketing manager.

32. On August 16, 2006, IPA also held a focus group with all employees, and then held one-on-one interviews with several individual employees. Irfan interviewed sales/marketing employees and Jones interviewed the operations employees. Jones testified that the purpose of the interviews was to learn how the employees viewed themselves and to determine whether they performed any duties that "did not add value" to the company.

33. On August 16, 2006, Irfan interviewed Complainant. She testified that Irfan asked her why a woman like her would do better in the business than anyone else. Complainant responded that she believed women had a better sense of color than men. Irfan asked her about her experience and she responded that she had a lot of experience.



Complainant testified that Irfan then remarked that anyone could do her job; however, she never complained about Irfan's remarks to anyone in Respondent's management.

34. Irfan also met individually with Mark Valli on August 16. Valli testified that Irfan told him that someone out of college with sales experience could do his job at a lower salary. Valli testified that he immediately expressed his concerns about Irfan's comments to Moran. I do not credit Valli's testimony that he told Moran about such comments. Moran denied that Valli ever came to him about Irfan, and I credit Moran's testimony. Complainant testified that two years later, in 2008, Valli told her that the IPA consultant told him it would be cheaper to replace her with someone younger. I do not credit that Complainant's testimony that Valli said this to her, and even if he did, I find that this double level hearsay concerning an alleged remark made two years earlier is unreliable and I give it no weight.

35. On August 16, 2006, Complainant submitted a handwritten letter of resignation to Moran stating that her last day at Respondent would be September 1<sup>st</sup>. (R-4)

36. Moran met with Complainant within days of receiving her resignation to discuss Complainant's dissatisfaction with her compensation. Moran told Complainant that he believed she could earn close to \$50,000 under the plan, if the company met its sales target, although there was no guarantee that this would happen. At the end of the meeting, Complainant decided to remain working for Respondent.

37. At the time IPA began its analysis, the inside sales staff and the outside sales staff of Gerrity Stone and Black Bear, all reported to Donahue, who reported to Moran. IPA determined that Respondent needed a sales and marketing director and developed a job

description for Respondent to follow in its search for a qualified candidate. Moran recommended Jack Donahue for that position; however, after working with IPA for two to three weeks, Donahue was not able to fulfill the role and did not want the position.

38. Once it became clear that Donahue was unsuited for in the position, Moran began a search for a new sales and marketing director, which he believed was a key position that would oversee outside sales representatives who were targeting repeat business through Respondent's databases. Moran believed the new position would cost Respondent between \$75,000 and \$135,000 and he sought to eliminate positions from the payroll in order to fund the new position. I credit his testimony.

39. Complainant testified that in September 2006, one month after being hired as an outside sales representative, Loyd told her he had become an inside sales representative. She stated that she observed Loyd working with clients, but she did not see what he was doing. I do not credit Complainant's testimony in this regard. It contradicts the credible testimony of Loyd and Moran that Loyd remained an outside sales representative until the spring or summer of 2007.

40. On September 13, 2006, outside sales representative Kristin Capizzo sent an email to Kevin Moran, Jim Gerrity and Jack Donahue concerning an unpleasant interaction with Complainant. Capizzo wrote that after receiving a customer complaint about Complainant, she told Complainant to call her if she could not address customers in a courteous manner. According to Capizzo's email, Complainant responded to her, in the presence of customers, "I don't give a shit, Kristin." (Ex R-30)

41. After receiving the email, Moran testified that he and Donahue met with Complainant to discuss the incident with Capizzo and advised her that conflicts with co-

workers must be resolved in a professional and respectful manner. I credit this testimony, which is not disputed.

42. On October 10, 2006, Complainant wrote to Moran “I still have not received a commission check for August. This is a real problem, we made an agreement and I have never received a check on time. I would appreciate your attention to this matter.” (R-7) On October 12, she wrote, “I would appreciate my commission check for Aug.” (R-8) Moran responded on October 12 by hand writing on a copy of her Summary Commission Plan; “Francina, Sorry to inform that Gerrity Stone did not meet its sales targets as outlined above and there is no commission due for August or September of 2006.” (R-5)

43. On October 20, 2006, Moran called Complainant into his office. She refused to go to his office, so they met in Respondent’s parking lot. There, Moran told her that her employment was terminated because she was “burned out,” and that the company was undergoing a re-organization and was cutting back on salaries. I credit her testimony.

44. Moran testified that the primary reason for eliminating Complainant’s position was a downturn in business, a drop in sales, and company losses. Moran testified that eliminating Complainant’s position saved Respondent more money than eliminating McNulty’s part-time position because Complainant made more money than McNulty and received benefits. I credit his testimony.

45. Moran stated Complainant’s poor attitude toward work and dissatisfaction with her compensation was a secondary reason for terminating her employment. Her negative attitude was evidenced by her repeated complaints to Moran about her pay, her earlier decision to submit her resignation and her poor relationships with co-workers. (R-29) I credit his testimony.

46. Moran acknowledged that Complainant was a good performer and that her termination was for not for poor performance. He acknowledged that she was not given a warning, as stated in Respondent's position statement. I credit his testimony.

47. On October 20, Moran also terminated Mary Ruiz (d/o/b 7/23/58) who performed scheduling duties in Woburn. Ruiz's duties were then assigned to Vicki Morin (d/o/b11/1982), who had been performing the same tasks in Respondent's Salem office. Morin relocated to Woburn and received a raise for taking on the extra work.

48. Also on October 20, Respondent terminated Una Breen (d/o/b10/15/52), who performed a full-time administrative position, and replaced her with a newly hired part-time employee, Maria Galvez (d/o/b 4/27/79). Moran testified that Breen was not offered the part-time position because of data entry errors and conflicts with her supervisor, office manager Nancy Borges.

49. According to Valli, Moran's stated reasons for Complainant's termination included her outspokenness, her difficulties with co-workers and her difficulty getting around in the yard and warehouse during winters and that his new inside contact, Jeff Loyd would be able to get around more easily than Complainant because he was younger than she. I do not credit Valli's testimony that Moran told him Complainant had trouble getting around or that Loyd was his new inside contact and would get around better than Complainant would.

50. I do not find credible the testimony of Valli and Complainant that Loyd had moved to inside sales or had replaced Complainant, when the credible evidence shows that Loyd was hired as an outside sales representative in accordance with Respondent's plan to increase its outside sales force.

51. Moran denied telling Valli that Loyd was replacing Complainant and never told Valli that Complainant had trouble getting around in the warehouse in the winters. Moran became company president in March 2006 and never worked with Complainant during the winter months. According to Moran, the day he laid off Complainant, he told Valli to call him or Oscar Rodriguez or anyone else in the showroom with problems. I credit Moran's testimony.

52. Loyd credibly denied that he ever replaced Complainant. By all accounts, Loyd did not perform well in sales. According to Moran, Weiner decided to move Loyd to a new position of estimator in the spring or summer 2007. In the new position, Loyd prepared estimates for all Gerrity outside sales representatives, using Respondent's new computer-based estimator. He also did commercial "take-offs."<sup>1</sup> This enabled Weiner to keep the outside sales force on the road. As an estimator, Loyd's salary did not change but he was no longer entitled to commissions. The inside sales representatives continued to prepare their own estimates.

53. On October 23, 2006, Moran hired Alan Weiner (DOB 1/22/50) for the position of Sales and Marketing Manager at an annual salary of approximately \$130,000 to \$135,000. Moran testified that the money saved by eliminating Complainant's position, replacing Breen with a part-time employee and eliminating Ruiz's position and consolidating her duties with Morin's, helped fund Weiner's position. I credit his testimony.

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<sup>1</sup> Take-offs occur when an estimator or sales representatives reviews the plans of a general contractor's large project, such as a condominium complex, and selects from the plans anything that pertains to stone countertops, determines the square footage and prices the job. Loyd was laid off on October 31, 2008. Since his lay-off, Loyd has continued to do occasional take offs for Respondent as an independent contractor.

54. On October 23, 2006, Moran hired Ken Swift (DOB 3/9/56) for the position of Gerrity outside sales representative.

55. On February 5, 2007, Respondent hired Dawn Carroll (DOB 3/6/63) as a Gerrity outside sales representative.

### III. CONCLUSIONS OF LAW

M.G.L. c.151B §§4(1) and (1B) prohibit employers from discriminating against an employee on the basis of age and gender. In order to establish a prima facie case of age discrimination, Complainant must produce evidence that she is a member of a class protected by G. L. c. 151B; she performed her job at an acceptable level; she was subjected to adverse action; and that similarly situated persons not of her protected class were treated differently or that her termination occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34 (2005); Knight v. Avon Products, Inc., 438 Mass. 413 (2003); Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000).

An employer that seeks to reorganize its workforce is not free to make its employment decisions on impermissible grounds: "even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons. [citations omitted]." Sullivan, supra.

Complainant has satisfied the first two prongs of a prima facie case in that she is a woman over the age of 40 and her employment was terminated. Complainant asserts that she was treated differently than similarly situated inside sales staff at Respondent's Woburn location. Complainant contends that the decision to terminate her instead of Ely

Merino, Adam Graber or Denise McNulty amounts to age discrimination because they were all part of “sales,” were younger than she and were similarly situated to her.

I conclude that Denise McNulty was similarly situated to Complainant. They both performed the same duties, assisting the sales representatives by waiting on customers who entered the Woburn showroom, whether they were “walk-ins” or customers of outside sales representatives. Neither Complainant nor McNulty had her own customers or received commissions. They were distinguished only by the number of hours they worked and the fact that McNulty received no benefits. Complainant was terminated, while McNulty, who was six years younger was retained.

I also conclude that Merino and Graber were not similarly situated to Complainant. While a comparator’s circumstances need only be substantially similar to those of Complainant ‘in all relevant aspects’ to be considered similarly situated, Complainant has not persuaded me that Merino and Graber’s jobs were substantially similar to hers. Trustees of Health and Hospitals of City of Boston, Inc. v. MCAD, 449 Mass. 675 (2007). The evidence demonstrates that, unlike Complainant and McNulty, Merino and Graber had their own customers, quoted their own sales, oversaw the scheduling of their customers’ orders, responded to their customers’ complaints or job problems, were responsible for collecting account receivables and received commissions for each sale.<sup>2</sup>

In addition to the fact that Complainant was laid off and McNulty retained, other circumstances surrounding Complainant’s termination could raise a reasonable inference of discrimination. On the same day Complainant was terminated, a full-time clerical

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<sup>2</sup> Even if Graber and Merino could be considered comparators to Complainant, there was evidence that they were very high earners for Respondent, as evidenced by their sales; Graber had net sales of \$1.5 million and Merino had net sales of nearly \$1million for the fiscal year ending November 30, 2006.

worker Una Breen, age 53, was terminated and replaced by a new, part-time hire, Maria Galvez, age 27 and the clerical position of Mary Ruiz, age 48, was eliminated and her duties were assigned to Vicki Morin, age 34. Abramian, supra, 432. The simultaneous firings of Complainant, Breen and Galvez raise a reasonable inference of age discrimination.

Complainant also argues that she was replaced by a younger man, Jeff Loyd. However, the credible evidence does not support Complainant's contention that Loyd replaced her. I conclude that Loyd was hired as an outside sales representative and ultimately became an estimator long after Complainant's employment was terminated. Complainant also offers as evidence of age animus the alleged remarks of Mohamed Irfan, a consultant, asking Complainant why a woman like her could do the job better than anyone else. Given these facts, I conclude that Complainant has established a prima facie case of discrimination based on her age. Complainant was 58 years of age and was performing her job at an acceptable level, when she was terminated as the result of a company reorganization, a similarly situated younger woman was retained, and two other women in clerical positions were let go in favor of substantially younger women.<sup>3</sup>

Once Complainant establishes a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for her termination. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). As part of its burden of production, Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

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<sup>3</sup> There was no evidence of gender discrimination. All of the lay-offs involved women.



Respondent's articulated reasons for Complainant's termination were that the company's drop in sales and financial losses made a reorganization necessary and Respondent had to reduce its payroll in order to support the creation of the sales and marketing manager position. In addition Respondent cited Complainant's poor attitude caused by her dissatisfaction with her salary and commission structure.

The credible evidence supported Respondent's position that it was experiencing financial difficulties. In order to become more profitable, Respondent closed several locations, hired a consulting firm to create a plan for the company's future, eliminated and consolidated positions, hired a marketing and sales manager and expanded its outside sales force in order to seek out more new customers and secure repeat business from its existing customers. Respondent demonstrated that it was able to fund the marketing and sales manager position by eliminating Complainant's position, replacing a full-time clerical worker with a part-time worker and eliminating another clerical position.

In addition, there was ample support for Respondent's position that Complainant had become dissatisfied with her compensation, as evidenced by her correspondence with Moran about commissions and her resignation. Her blow-up with Capizzo in front of customers was an indicator that her dissatisfaction with the job was causing her relationships with co-workers to deteriorate.

Respondent also asserted legitimate, non-discriminatory reasons for terminating the full-time position of Una Breen and replacing her with a part-time employee; that is that Breen made data entry errors and did not get along with her supervisor, the office manager, and that transferring her duties to a part time employee helped Respondent to fund the cost of the sales and marketing position. Respondent also stated that Ruiz's

position was eliminated and her duties absorbed by Morin, a good performer. These layoffs helped fund the position of marketing and sales manager. Respondent was putting more money into outside sales in hopes of generating more profit. With respect to the remarks Complainant alleged were made by Irfan, Respondent denied that Irfan relayed any such thoughts or suggestions to the employer and IPA ultimately did not recommend that jobs be eliminated. IPA's only personnel recommendation was the creation of the marketing and sales manager position. I conclude that Respondent has articulated and produced credible evidence to support a legitimate, nondiscriminatory reason for its action.

Once Respondent meets its 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 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 Lipchitz at 504.; Abramian, 432 Mass. at 117.

As evidence of pretext, Complainant asserts that some of the reasons for terminating Complainant's employment that Respondent set forth in its position

statement were untrue. In its position statement, Respondent stated that it sought to reduce “personnel headcount” in sales. However, the evidence showed that between October 2006 and February 2007, the only person who was terminated in sales was Complainant and Respondent hired three people in sales; a sales manager, Weiner, and two outside sales people, Swift and Carroll. The sales division actually grew from seven to ten from August 2006 to February 2007. Respondent also asserted in its position statement that Complainant’s performance was “marginal,” unsatisfactory, and that her discharge was prompted, in part, by her failure to meet minimum expectations for her position during the months preceding the final days of employment. At the public hearing, Moran acknowledged that this was untrue and that Complainant was a good employee whose performance was never an issue. Respondent also stated in its position statement that Complainant was given a written warning, which Moran also acknowledged was untrue.

Evidence that the employer's reasons are untrue gives rise to an inference that the plaintiff was a victim of unlawful discrimination. “The employer may counter the effect of this evidence by showing that, even if his articulated reason for the adverse action is untrue, he had no discriminatory intent, or that his action was based on a different, nondiscriminatory reason.” Abramian, supra.

The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, but need only show that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

Here, the Complainant proved that some of the reasons set forth in Respondent's position statement were not true. However, I conclude that she has not proven that discriminatory animus was material factor in the decision to terminate her. She has not persuaded me that Respondent's legitimate, non-discriminatory reasons articulated at the public hearing were a pretext for discrimination or were not the real reasons for her termination. Complainant did not present evidence to counter the fact that eliminating her position partially funded the position of marketing and sales manager. I believe that Complainant's job dissatisfaction and the fact that she continued to be vocal about it, was a primary factor in Respondent's decision to terminate her employment. Complainant also did not establish that Respondent's reasons for terminating Breen and Ruiz were a pretext for age discrimination.

Finally, when Complainant first asked for a raise, Moran increased her salary and created a commission plan that was unique to her; and when Complainant tendered her resignation two months prior to her termination, Moran made efforts to convince her to stay with the company. Had Moran been seeking to terminate Complainant on account of her age, her voluntary resignation would have created the opportunity to accomplish that. I am persuaded that Moran's actions evidence a lack of discriminatory animus. Ultimately, Complainant has not proven that Respondent's reasons for terminating her position were a pretext for unlawful age discrimination.

#### 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 20th day of September, 2011

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JUDITH E. KAPLAN  
Hearing Officer