



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 09/01/2006

STATE OF ILLINOIS

HUMAN RIGHTS COMISSION

IN THE MATTER OF:)	
)	
DAMON HONAKER, SR.,)	
)	
Complainant,)	CHARGE NO. 2002CA1370
)	EEOC NO. 21BA20636
AND)	ALS NO. 12089
)	
RHOPAC FABRICATORS, INC.,)	
)	
Respondent.)	

RECOMMENDED ORDER AND DECISION

This matter is before this tribunal on Respondent Rhopac Fabricators, Inc.'s (Rhopac) motion for summary decision. Complainant Honaker has filed a response to that motion and Respondent has filed a reply. The matter is now ready for decision.

CONTENTIONS OF THE PARTIES

Complainant, Damon Honaker Sr., filed Charge No. 2002CA1370 with the Illinois Department of Human Rights on December 13, 2001. The Department of Human Rights filed a Complaint of Civil Rights Violation with the Illinois Human Rights Commission on June 9, 2003 alleging that Respondent discriminated against Complainant based on his age, 53, when Respondent terminated him from employment as a shipping manager.

Complainant alleges that Respondent withheld training that would have allowed him to fulfill the additional job duties of the position of "Manger of Receiving and Shipping" which was later filled by a younger employee, age 27.

Complainant further alleges that in the year he was terminated, eight of ten employees laid off were over the age of 40, substantiating an age discrimination claim.

Respondent claims that dire financial conditions forced Rhopac to institute company wide layoffs. Respondent argues that Complainant was laid off, his position eliminated, and his former job duties assumed by employees who could perform more tasks than Complainant.

FINDINGS OF FACT

1. Complainant, Damon Honaker Sr., filed Charge No. 2002CA1370 with the Illinois Department of Human Rights on December 13, 2001.
2. A Complaint of Civil Rights Violation (the complaint) was filed with the Commission on June 9, 2003.
3. Respondent hired Complainant in 1966.
4. Complainant worked for Respondent for 35 years without complaint as to his job performance.
5. Complainant was 53 years old when he was terminated on June 27, 2001.
6. In 2001, the year of Complainant's termination, Rhopac lost \$204,656 resulting in dire financial conditions.
7. Rhopac executives met with an independent accounting group and were advised to reduce business expenses in order to avoid bankruptcy.

8. In 2001, Rhopac instituted budget cuts in all departments including employee layoffs. On June 27, 2001, Respondent terminated Complainant during Rhopac's attempt to avoid bankruptcy.
9. Complainant performed two tasks at the time of his termination, while Rhopac decided to retain employees who performed up to four tasks to maximize operational efficiency.
10. Younger coworkers assumed complainant's job duties.
11. Respondent did not consider Complainant's age when it made the decision to terminate him.

CONCLUSIONS OF LAW

1. Complainant is an "employee" as that term is defined under the Illinois Human Rights Act. 775 ILCS 5/2-101(A).
2. Respondent is an "employer" as that term is defined under the Illinois Human Rights Act. 775 ILCS 52/101(B).
3. Complainant has established a *prima facie* case of age discrimination.
4. Respondent has articulated a legitimate, nondiscriminatory reason for its adverse action against the Complainant.
5. Respondent has established that there is no genuine issue of material fact with regard to its articulated, nondiscriminatory reason for terminating Complainant from its employ.
6. Respondent is entitled to a summary decision in its favor as a matter of law.

DISCUSSION

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v. Village of Dolton*, 250 Ill.App.3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993). A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. *Strunin and Marshall Field & Co.*, 8 Ill. HRC Rep. 199 (1983). The movant's affidavits should be strictly construed, while those of the opponent should be liberally construed. *Kolakowski v. Voris*, 76 Ill.App.3d 453, 456, 395 N.E.2d 6, 9 (1st Dist. 1979). The movant's right to summary decision must be clear and free from doubt. *Bennett v. Ragg*, 103 Ill.App.3d 321, 325, 431 N.E.2d 48, 51 (2nd Dist. 1982).

In its motion, Respondent argues that Complainant's position was eliminated and therefore a person less than 40 years of age could not have *replaced* Complainant. (Mot. for Summ. Decision ¶ 14.) Additionally, Respondent contends that multiple individuals, including an employee 41 years of age and in Complainant's protected class, performed Complainant's job duties after Complainant's termination. (Mot. for Summ. Decision ¶ 14.) Consequently, Respondent argues that Complainant cannot establish a *prima facie* case of age discrimination.

Respondent further argues that even if a *prima facie* case of age discrimination is established, Respondent has produced unrebutted evidence of a legitimate, nondiscriminatory reason for Complainant's termination, namely the

dire financial condition of the company. Respondent produced business records reflecting deteriorating sales. Through sworn affidavit, Rhopac showed growth of 12.5% in 1999, growth of 4.7% in 2000, and a 16.2% decrease in growth in 2001, resulting in loss of \$204,656 in the year of Complainant's termination. (Mot. for Summ. Decision ¶ 11, Respondent's Ex. 1.) Respondent's affidavits attest to the eventual demise of the company in January 2005. (Respondent's Reply in Support of Summ. Decision, Aff. of Barbara Dettman.)

In response, Complainant argues that Complainant's position was not eliminated but merged into a new position that was filled by an employee 27 years of age. (Response to Mot. for Summ. Decision ¶ 6.) Complainant argues that he satisfactorily performed his job duties and that Respondent withheld the training required for this merged position. (Response to Mot. for Summ. Decision ¶ 5.) Complainant further argues that during the year that he was terminated, eight of ten employees that were laid off were over the age of 40, substantiating his claim of age discrimination. (Response to Mot. for Summ. Decision ¶ 11.)

There is no evidence of direct discrimination on the record and Complainant concedes he was told that he was laid off because "not enough product was going out the door." (Complainant's Answers to Interrogs. page 3.) Therefore, Complainant must prove age discrimination through indirect means. The method of doing so is well established under *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802 (1973). Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate (not prove)

a legitimate, non-discriminatory reason for its action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is mere pretext for unlawful discrimination. *Id.* The Commission and the Illinois Supreme Court have adopted this method of proof. *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill.2d 172, 178, 545 N.E.2d 684, 687 (1989).

As to the Complainant's use of indirect evidence to establish a *prima facie* case of age discrimination, the courts and the Commission have required that a complainant show that: (1) he was in a protected age classification, here those over the age of 40; (2) he was performing his job well enough to meet the employer's legitimate expectations; (3) he experienced an adverse act and (4) younger co-workers who were similarly situated to the complainant were treated more favorably. *Clyde v. Human Rights Commission*, 206 Ill.App.3d 283, 292, 564 N.E.2d 265, 270 (4th Dist. 1990). The parties are not at odds with respect to the first and third elements.

As to the second element of the *prima facie* case, Respondent denies that Complainant satisfactorily performed all job duties made necessary by reason of existing business conditions. Respondent contends that in its legitimate business judgment and facing declining sales, Respondent retained employees who were able to perform as many as four tasks while Complainant performed only two tasks. Complainant responds that Respondent "covertly withheld

training” that would have allowed him to fulfill additional tasks and duties. At one time, it was necessary for a complainant to show that he was literally performing at or above the employer’s standards at the time of the adverse action to establish this element of the *prima facie* case. However, the Appellate Court lowered this hurdle and it was decided that the performance issue “should not be an essential element of proving a *prima facie* Illinois Human Rights Act case.” *ISS International Service System, Inc. v. Human Rights Comm’n*, 272 Ill.App.3d 969, 978, 651 N.E.2d 592, 597 (1st Dist 1995). Consequently, Complainant’s 35 years of employment for Respondent with no complaints as to his performance in the record are demonstrative of meeting this low burden of adequate job performance.

As to the fourth element of the *prima facie* case, the Complainant must prove that younger co-workers who were similarly situated to the complainant were treated more favorably. Complainant claims that a 27-year-old employee replaced him. Respondent counters that Complainant’s position was eliminated and not *replaced*. However, in cases involving reductions in work force the complainant does not have to show that a member outside the protected class replaced him in order to establish a *prima facie* age discrimination case, but only that younger coworkers were treated more favorably. *Clyde*, *supra*.

In this case, Respondent concedes that after Complainant’s termination other younger employees performed Complainant’s job duties. Respondent’s affidavit lists four employees that assumed Honaker’s job duties, one employee aged 24, two employees aged 26, and one employee aged 41. (Mot. for Summ.

Decision Ex. 5.) Respondent argues that one of these employees was 41 years of age and inside the protected class, thereby negating Complainant's ability to satisfy the *McDonnell* requirements. (Mot. for Summ. Decision ¶ 14.) However, even though an employee within the protected group assumed Complainant's job duties, age disparity can still give rise to the possibility of age discrimination, at least to establish a *prima facie* case. *Anderson v. Cook County's Oak Forest Hospital*, 314 Ill.App.3d 35, 50, 731 N.E.2d 371, 383 (1st Dist. 2000). Further, Complainant contends that in the year that he was terminated, eight of the ten employees laid off were over 40 years of age. This is verified by Respondent's affidavit. (Mot. for Summ. Decision Ex. 4.) Thus, Complainant has established a *prima facie* case of age discrimination and has therefore raised a rebuttable presumption of discrimination.

Once a complainant has established a *prima facie* case, the respondent has a burden of production to articulate (not prove) a legitimate business reason for the adverse act against the complainant. Here, Respondent has shown through sworn affidavits the dire financial conditions that Respondent faced in light of Complainant's termination. Respondent lost \$205,261 in the year 2000 and \$204,656 in 2001, the year of Complainant's termination. (Mot. for Summ. Decision ¶ 11, Respondent's Ex. 1.) Respondent was advised by an independent accountant to reduce expenses in the operation of the business so as to avoid bankruptcy. (Mot. for Summ. Decision Ex. F.) As of June 27, 2001, the date of Complainant's termination, Respondent employed 48 people. By September 2004, only 24 employees remained. (Mot. for Summ. Decision Ex.

4.) Respondent has shown that financial conditions worsened until Respondent was no longer in business and the company's assets were sold. (Respondent's Reply in Support of Summ. Decision, Aff. of Barbara Dettman.) Respondent argues that cutbacks in the workforce were a result of financial losses and impending bankruptcy. Respondent has therefore articulated a nondiscriminatory reason for Complainant's termination.

Next, the Complainant at a hearing would be required to prove by a preponderance of the evidence that this articulated reason is mere pretext for discrimination. A complainant may establish pretext by showing either that (1) the proffered reason has no basis in fact; (2) the proffered explanation did not actually motivate the decision; or (3) the proffered explanation was insufficient to motivate the decision. *Robert M. Sola v. Illinois Human Rights Comm'n*, 316 Ill.App3d 528, 537, 736 N.E.2d 1150, 1158 (1st Dist. 2000).

Complainant has failed to rebut any of Respondent's affidavits attesting to the nondiscriminatory reasons for company-wide layoffs. In the absence of any evidence from Complainant, Respondent's evidence stands unrebutted and must be accepted. *Koukoulomatis v. Disco Wheels*, 127 Ill.App.3d 95, 101, 468 N.E.2d 477 (4th Dist. 1984). Complainant has not shown that there is a genuine issue with regard to Respondent's articulated, nondiscriminatory reason for termination. Complainant's response to Respondent's motion for summary decision only reiterates his *prima facie* case that a younger worker replaced Complainant and that Complainant was satisfactorily completing his job duties. Complainant has not proven that Respondent's impending (and ultimate)

bankruptcy was somehow insufficient to motivate the decision to terminate Complainant. Further, Respondent has shown that the reduction in workforce over a three-year time frame following Complainant's termination left the ratio of employees over 40 years of age at the same level as prior to Complainant's termination. As of January 26, 2005, all of Respondent's employees were terminated.

Respondent has presented overwhelming evidence of dire financial conditions resulting in the exercise of Rhopac's legitimate business decision to institute company-wide layoffs. In the absence of any evidence that the business considerations relied upon by a respondent employer are a pretext for discrimination, the Commission will not substitute its own judgment for the business judgment of the employer. *Jones et al. and Illinois Department of Revenue*, 43 Ill. HRC Rep. 95, 111 (1988). After review of the pleadings in the light most favorable to the Complainant, Complainant has presented no evidence that Respondent's explanation of impending bankruptcy was a pretext for age discrimination. Therefore, this tribunal is left with no genuine issue as to the reason for Mr. Honaker's termination.

RECOMMENDATION

Based upon the foregoing, there are no genuine issues of material fact and Respondent is entitled to a recommended order in its favor as a matter of law. Therefore, it is recommended that Respondent's Motion for Summary

Decision be granted and that the complaint and the underlying charge in this matter be dismissed with prejudice.

ENTERED: July 10th, 2006

HUMAN RIGHTS COMMISSION

**MARIETTE LINDT
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION**