



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 10/06/04.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
JERRY R. SCHULLER,)	
)	
Complainant,)	
)	
and)	CHARGE NO: 2001SA0491
)	EEOC NO: 21BA11490
CARTER BROTHERS LUMBER a/k/a)	ALS NO: S11758
CARTER BROS. LUMBER CO.,)	
)	
Respondents.)	

RECOMMENDED ORDER AND DECISION

This matter comes before me at the conclusion of a public hearing conducted on April 3, 2003. The parties filed closing briefs on April 7, 2003 and April 10, 2003. Accordingly, this matter is ready for decision.

Contentions of the Parties

Complainant contends Respondent discriminated against him by terminating his employment as a back-up boom truck operator because of his age. Conversely, Respondent maintains that Complainant was terminated due to absenteeism and a downturn in business that no longer required the retention of two boom truck operators.

Findings of Fact

I found the following facts were proved by a preponderance of the evidence. Unproven or immaterial assertions made in the record are not addressed in this decision.

1. On June 14, 2000, Respondent hired Complainant as a back-up boom truck operator. The back-up boom truck operator assisted the primary boom truck operator in making deliveries during peak delivery times or at times the primary boom truck operator was not scheduled to work.

2. A boom truck is used to deliver roofing shingles to a construction site and is also used to hoist them onto a roof.
3. Complainant was 55 years old in June of 2000 when Respondent hired him as a back-up boom truck operator.
4. In June of 2000, Respondent already employed a primary boom truck operator, Bill McDermand, who was 60 years old at the time of Complainant's hire.
5. During Complainant's employment he was allowed to leave early if business was slow and if there were no deliveries for him to make.
6. Complainant was also excused from work for an extended medical leave of absence in order to recover from vascular leg surgery.
7. Sometime between June 2000 and March of 2001, Respondent experienced a downturn in business due to competition from a new roofing company that had located in the Springfield area. The competition almost extinguished Respondent's roofing business.
8. The requests from contractors for delivery and placement of roofing shingles diminished with the downturn of business and Respondent determined it could no longer afford both a primary and a back-up boom truck operator.
9. Complainant was terminated from his position of back-up boom truck operator in March, 2001 because Respondent no longer had the economic need for two boom truck operators.
10. On April 3, 2001, Complainant filed a charge of discrimination against Respondent on the basis of his age, 55, and a perceived handicap, vascular leg surgery.
11. The Department of Human Rights dismissed Complainant's charge of discrimination based on a perceived handicap, but on April 11, 2002, filed a complaint of age discrimination against Respondent pursuant to section 2-102(A) of the Illinois Human Rights Act. **775 ILCS 5/2-102(A).**

12. A public hearing was held in Springfield, Illinois on March 12, 2003 to accept evidence for the allegations in the complaint.

Conclusions of Law

1. Complainant Jerry Schuller is an "employee" as defined by Section 2-101(A)(1)(a) of the Illinois Human Rights Act. **775 ILCS 5/2-101(A)(1)(a).**

2. Respondent Carter Brothers Company is an "employer" as defined by Section 2-101(B)(1)(a) of the Illinois Human Rights Act and is subject to the provisions of the Act. **775 ILCS 5/2-101(B)(1)(a).**

3. Complainant Jerry Schuller failed to prove by a preponderance of the evidence a *prima facie* case of age discrimination under the Act.

4. Respondent articulated a legitimate non-discriminatory reason for terminating Complainant.

5. Because Respondent articulated a legitimate, non-discriminatory reason for its adverse action, Complainant is no longer required to establish a *prima facie* case of discrimination. Instead, the focus shifts to whether Complainant proved by a preponderance of the evidence that the articulated reason was a pretext for age discrimination.

6. Complainant has failed to prove by a preponderance of the evidence that the reason given by Respondent for terminating Complainant is a pretext for age discrimination.

Discussion

The Illinois Human Rights Act makes it unlawful for employers to discriminate against employees because of their age, which is defined as the "chronological age of a person who is at least 40 years old." See, **775 ILCS 5/1-103(A); 775 ILCS 5/2-102.** Accordingly, a complainant may establish an age discrimination claim under the Act by presenting either direct or indirect evidence of discrimination. See, **Warren Achievement Center, Inc. v. Human Rights Commission**, 216 Ill.App.3d 604, 607,

575 N.E.2d 929, 931 (3d Dist. 1991). In this case, Complainant first attempted to establish direct evidence of discrimination by testifying that Respondent's owner told him that due to Complainant's age and leg surgery he would be unable to handle his job during the summer months. The fact that Complainant had surgery on his leg, which may or may not have affected Respondent's perception of his ability to perform his job, is not at issue here because the Department dismissed the allegation before filing its complaint. Therefore, for purposes of this case, the only issue remaining is whether or not Respondent believed Complainant could not perform his job because of his age.

At first glance Complainant appears to successfully establish his case through direct evidence of age discrimination because Respondent does not specifically deny making the statement to Complainant that he was too old to handle his job. However, a close review of the record reveals that Respondent certainly denied terminating any employee because of age, and presented other evidence to further dilute Complainant's case. Specifically, it contended that age was not a factor in Complainant's termination because Complainant was 55 years of age when Respondent hired him for the position of back-up boom truck operator, and because it retained a 60 year old operator to drive the truck. It is hard to believe that if Respondent harbored age animus against Complainant, it would have hired him at the age of 55 or even retained an employee older than Complainant to drive the boom truck. Both of these facts taken separately or together negate Complainant's claim that his supervisor told him that age was a factor in his termination.

Additionally, I also find that Complainant cannot establish discrimination through the indirect method of proving discrimination. To understand why this is so, I must examine what is required of Complainant to prevail under the Act. He is first required to prove, by a preponderance of the evidence, a *prima facie* case of age discrimination. If he does so, the burden of production then shifts to Respondent to articulate a legitimate,

non-discriminatory reason for its action. If Respondent articulates a non-discriminatory reason, then the presumption of discrimination falls and Complaint is then required to prove the reason is merely a pretext for unlawful discrimination. **McDonnell Douglas v. Green**, 411 U.S. 792 (1983); **Zaderka v. Illinois Human Rights Commission**, 131 Ill. App. 2d 172, 545 N.E. 2d 684, 137 Ill. Dec. 31, 34 (Ill. 1989). The burden of proof remains at all times with Complainant.

Initially though, to prove a *prima facie* case of age discrimination, Complainant must establish that: 1) he was within a protected class; 2) he was performing his job according to his employer's expectations; 3) he suffered an adverse act; and 4) others outside the protected class were treated more favorably. See, **Clyde v. Illinois Human Rights Commission**, 206 Ill. App. 3d 283, 564 N.E. 2d 265, 151 Ill. Dec. 288, 293 (4th Dist 1990). In examining the evidence presented at hearing, there is no question that Complainant meets the first element of his *prima facie* case because it is uncontested that he was 55 years of age during the time period in question, which is obviously over the age 40 threshold required for protection under the Act. However, the other elements are not so patent. Specifically, the second element, i.e., whether or not Complainant's job performance passed muster.

Respondent would argue that Complainant's absenteeism, excused or not, affected his job performance; but on the other hand, it also maintains that it did not have enough work to support Complainant's position. Curiously, there was no evidence that Respondent was particularly dissatisfied with quality of Complainant's work. The only dissatisfaction appeared to be with Complainant's frequent absenteeism. However, the credible evidence presented at hearing revealed that Complainant was given permission to leave his shift early on numerous occasions for lack of available work, so Respondent would be hard pressed to now link Complainant's absenteeism with poor job performance.

Moreover, even if Complainant's job performance was less than desirable, it would not be fatal to his *prima facie* case. The Illinois Appellate Court and the Commission have previously held that the element of job performance is not determinative of a complainant's *prima facie* case of discrimination because there could always be other, less pure, motives behind an employee's termination. See, **ISS International Service Systems, Inc. v. Illinois Human Rights Comm'n**, 272 Ill. App. 3d 969, 651 N.E.2d 592 (1995); **Battieste and C.E. Niehoff & Co.**, ___ Ill. HRC. Rep.__(1989CF4075, November 14, 1995). Therefore, I find that Complainant meets the second element of his *prima facie* case.

Next, I find that Complainant unequivocally meets the third element of his *prima facie* case because the record revealed that he was terminated from his position as a back-up boom truck operator. There is no question that a termination is severe and pervasive enough to qualify as an adverse act for purposes of establishing a *prima facie* case of discrimination. (See, **Campion v. Blue Cross and Blue Shield Assoc.**, ___ Ill. HRC Rep.__(1988CF0062, June 27, 1997), holding that the adverse action must be sufficiently severe or pervasive enough to constitute a term or condition of employment.)

Complainant's case, though, fails with the fourth element of his *prima facie* case because no evidence was presented of a younger employee who was treated more favorably than he. True enough, Complainant speculated that a younger boom truck driver was hired to replace him. However, Respondent's owner, Joe Carter, credibly testified that his business could not support a back-up boom truck operator, so no one had been hired to replace Complainant. Respondent readily admitted that it hired other general delivery truck drivers, both under and over the age of 40, but they did not drive the boom-truck and the back-up boom truck driver position was never filled. Thus, Complainant's *prima facie* case must fail here.

Even though Complainant cannot establish a *prima facie* of age discrimination, his claim still survives at this juncture because Respondent has articulated a legitimate business reason for its actions. Namely, that it no longer needed two boom truck operators to deliver roofing shingles due to a decline in business from increased competition in the area. Accordingly, Complainant's duty to establish a *prima facie* case is now absolved and the only remaining issue is whether or not Respondent's reasons were a pretext for age discrimination. See, **Clyde v. Human Rights Commission**, 206 Ill. App 3d 283, 564 N.E.2d 265 (4th Dist.1990). To prevail here, Complainant must prove pretext by one of two methods: first, by indirectly proving Respondent's reason is unworthy of belief, or second, by directly showing that Respondent was motivated by discriminatory animus to take action against Complainant. **Vidal v. Human Rights Commission, et al**, 223 Ill. App. 3d at 470; 585 N.E.2d at 135 (5th Dist 1991).

The record does not reveal that Complainant attempted to prove pretext by either method. In explaining its articulation of terminating Complainant due to economic necessity, Respondent further maintained that because Complainant's position was that of a back-up or secondary boom truck operator, he was terminated and the primary boom truck operator, who was 60 years of age and a 30 year veteran of the company, was retained. As previously discussed herein, it is not logical to believe that Respondent would retain an employee older than Complainant to operate the boom truck if Respondent's motivation for terminating him was truly based on age. While Complainant did testify that he was hired as a general truck driver who also drove a boom truck, there was nothing in the record to corroborate his testimony. In fact to the contrary, Complainant also testified that when he was terminated Respondent's owner told Complainant that he just didn't have enough work for him. (Tr. p. 17) This testimony supports rather than challenges Respondent's articulated reason of an economic need to terminate Complainant. While it is unfortunate that Complainant lost his job for any

reason, there simply was not enough evidence presented at hearing to establish any discriminatory motivation for his termination.

Recommendation

Based on the above conclusions of law and findings of fact, I recommend that the Illinois Human Rights Commission dismiss with prejudice the complaint of JERRY SCHULLER and CARTER BROTHERS LUMBER, together with the underlying charge.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THE 13TH DAY OF AUGUST, 2003