



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 2/14/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)		
)		
KENNETH SHOWALTER,)		
)		
Complainant,)		
)		
and)	CHARGE NO:	1999SA0066
)	EEOC NO:	21B983025
B-LINE SYSTEMS,)	ALS NO:	S-10825
)		
Respondent.)		

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On June 25 and 26, 2001, a public hearing was held before me in Collinsville, Illinois. The parties completed the filing of their initial and reply briefs on November 6, 2001.

Contentions of the Parties

Complainant contends that he was the victim of age discrimination when, at the age of 41, he was demoted from his tool room machinist position even though a 39 year-old co-worker who performed comparable work was permitted to remain in a similar position. Respondent, however, maintains that Complainant was demoted for reasons unrelated to his age, that the twenty month difference in ages between Complainant and his comparative is too insignificant to support a claim of age discrimination, and that Complainant's purported comparative had a better job performance than Complainant. Respondent additionally submits that a settlement reached with Complainant regarding his internal grievances covering his demotion and subsequent termination precludes this Human Rights Act claim.

Findings of Fact

Based upon the record in this matter, I make the following findings of fact:

1. Complainant, born on April 4, 1957, began his employment with Respondent on August 15, 1979. At that time Complainant was hired as a production worker at Respondent's Highland, Illinois plant which manufactures bolted framing and steel fasteners. From August of 1979 to July of 1995, Complainant continued to work in various positions on the production line, with the last position being Machine Operator II.

2. On July 31, 1995, Complainant was awarded a Tool Room Machinist position pursuant a bid made through the collective bargaining process. Prior to receiving this bid, Complainant had taken and passed a written test for the position, and Complainant received the bid because he had the highest seniority among those individuals who has passed the written test. At the time Complainant received his bid, Respondent already employed four Tool Room Machinists (between the ages of 40 and 45) who were older than Complainant and one Tool Room Machinist (Harry Murphy) who was 20 months younger than Complainant.

3. At all times pertinent to this Complaint, the Tool Room Machinist position required individuals to maintain, sharpen and troubleshoot more than 700 dies and fixtures used in the presses, roll formers and other machinery at approximately twenty-five work centers in the Highland plant. The 700 dies varied in sophistication, with some dies being very simple to others weighing approximately 1,200 pounds and having fifteen different progressions used to form the metal part. The troubleshooting aspect of the Tool Room Machinist position was the most difficult aspect of the job, since it required that the individual diagnose the problem that the operator was experiencing with the die on the production floor and fix the problem on the spot.

4. After Complainant obtained the bid, he received on-the-job training for the Tool Room Machinist position while working the first shift. The training session lasted

proximately ninety days, with Complainant working along side Don Buettikoffer, an experienced Tool Room Machinist. Ken Haas was Complainant's supervisor throughout this period.

5. After Complainant finished his training period, he was transferred to the second shift where he worked with J.D. Carpenter, an older individual who received a bid to the Tool Room Machinist position at approximately the same time as Complainant. At the time of Complainant's transfer to the second shift, Haas believed that while Complainant did not know all of the aspects of the Tool Room Machinist position, Complainant could learn how to perform the job.

6. While Complainant worked the second shift, he spoke on a daily basis with Haas regarding current projects in the tool room. During these conversation Complainant responded that he did not need any help and could perform the tasks. Although Haas was still Complainant's supervisor during this time, Haas did not stay and work with Complainant on the second shift, such that Complainant and Carpenter generally worked in the tool room unsupervised during their shift.

7. During Complainant's 35-month tenure in the tool room, Complainant never received a formal written job review of his performance. However, during this time, Haas noted that Complainant generally accepted the simple sharpening assignments and spent longer on these jobs than it should have taken an experienced Tool Room Machinist.

8. From some point in 1996 to January of 1998, Ed Caperton served as Respondent's second shift plant superintendent. Periodically during this time frame, production supervisors reported to Caperton that they were unable to run production at a particular work center as scheduled because Complainant could not provide the necessary assistance to troubleshoot and repair dies. Eventually, because of the frequency of the reports, Caperton issued a standing order to the production supervisors

to either pull the bad die or let it sit, rather than wait for someone in the tool room to fix the problem. At some point during this time frame, Caperton went to Complainant to fix a BGA12 die, but Complainant refused, saying that he did not know how to fix it.

9. At some point after Complainant had received his training, Buettikoffer experienced problems with some of the parts Complainant had worked on during the second shift. Periodically, Buettikoffer noticed that some of the dies had been left unsharpened, some of the punches had been improperly installed, and some of the shim stock had been improperly measured and marked. Buettikoffer also spoke to Complainant about the use of a micrometer as opposed to the less accurate calipers to measure shims and the need to keep tolerance deviations to within one thousandth of an inch. Whenever Buettikoffer discovered problems in Complainant's work, he would stay over to the next shift to discuss the problem with Complainant and offer his assistance.

10. On September 11, 1996, Complainant received a written warning from Caperton for loafing on the job.

11. On October 21, 1996, Complainant received a written warning from Haas after he was observed standing at his tool bench for approximately 45 minutes not performing any work.

12. On November 25, 1996, Complainant was suspended for three days because he had failed to report a work injury to his finger. Complainant filed a grievance over the suspension. The union eventually settled the grievance on behalf of Complainant by having the suspension voided in exchange for Complainant's agreement not to be paid for the three days.

13. In January of 1998, Jeff Higgins was promoted to the position of plant superintendent on second shift, replacing Caperton. At that time Caperton informed Higgins that he had been having long-standing problems with Complainant's job

performance, and that Higgins needed to either improve Complainant's job performance or to discipline him.

14. Upon assuming the duties of the second shift plant superintendent, Higgins noticed that the shift was having problems getting support from Complainant in the tool room. At times, certain machines sat idle for a whole shift waiting for a tool room machinist to come and fix the problem, and Higgins received a report from Kevin King, a production supervisor, that Complainant was unable to troubleshoot and repair dies that were not functioning properly.

15. At some point between January and April 1998, Higgins observed that a die had not been shimmed correctly, and that Complainant had used calipers, as opposed to the more precise micrometer to shim the die. Complainant told Higgins that the two thousandths of an inch disparity between the measurements taken by the calipers and the micrometer would not make much difference. Higgins, however, believed that this disparity would make a difference in the manufactured part.

16. On February 10, 1998, Complainant received a three-day suspension for hitting the plant's cafeteria window with his car. Complainant claimed during the day following the accident that his brakes had failed. Complainant also told management that he was driving too fast as he pulled into the parking space and was unable to stop the car before it hit the building. Steve Ferguson, the first shift plant superintendent who was investigating the accident, observed skid marks on the pavement leading up to the building. Complainant did not file any grievance related to this three-day suspension.

17. On February 16, 1998, Higgins informed Complainant about a report he had received from Kevin King and Darrin McFerron, who were supervisors on the second shift, that Complainant had been loafing on the job for about 45 minutes. Complainant asserted that during this time he was talking to Carpenter about a procedure concerning the spot welder. Haas, however, told Higgins that it was not

necessary for Complainant to work with the spot welder, and that the procedure with the spot welder would have taken less than 45 minutes to perform. Higgins additionally informed Complainant that he had problems with Complainant's productivity and instructed Complainant that if he had questions at work he was to contact a supervisor. Higgins also told Complainant that if he felt he needed additional training in his job classification, he needed to contact management. Both Carpenter and Complainant received an informal "summary of conversation" with respect to this incident.

18. In March of 1998, Buettikoffer requested to temporarily work the second shift to accommodate his wife's illness. In granting Buettikoffer's request, Higgins and Ferguson saw the temporary transfer as an opportunity to assess the problems in the tool room on second shift. Carpenter worked on the first shift during this time period.

19. During the two-week period that Buettikoffer worked the second shift in March of 1998, Buettikoffer discovered that Complainant had trouble sharpening drill bits, shimming the sign plate, shimming for angles, and using the Tangimatic. Buettikoffer also gave Complainant a job of making a set of rails and instructed Complainant on two occasions on how to make the rails. During the shift Complainant did not correctly make the rails, and Buettikoffer eventually had to make the rails himself.

20. Following his two-week stint on the second shift in March of 1998, Buettikoffer reported to Higgins and Fergesen about the difficulties he experienced with Complainant. Specifically, he showed Ferguson a drill bit that Complainant had sharpened backwards and bluntly told Fergesen and Higgins that, when it came to working in the tool room, Complainant did not know the essentials of his job and that Complainant was an accident waiting to happen.

21. Fergesen and Higgins discussed Buettikoffer's observations about Complainant's job performance with Steve Drummond, Respondent's Vice-President of Human Resources, as well as the continued production problems on second shift that

were traced back to Complainant's performance in the tool room. During this discussion, the three men decided to disqualify Complainant from his Tool Room Machinist position.

22. On March 27, 1998, Complainant met with Fergesen, Higgins, Kevin King and two union stewards. During this meeting, Higgins told Complainant that the reasons for the disqualification included his inability to correctly sharpen a drill bit or polish roll forming units, his incorrect use of shims, as well as the impact that these deficiencies had on production. At the end of the meeting Complainant told Higgins that his disqualification was a "load off his shoulders [because] he was in over his head". After this meeting, Complainant began to taunt Buettikoffer by accusing him of being the individual who was responsible for disqualifying him.

23. Following his disqualification, Complainant began working on the second shift in his former position as Machine Operator II. On April 1, 1998, Higgins observed Complainant in the cafeteria, which was outside his work area. After Higgins learned from Complainant's supervisor that he did not have permission to be in the cafeteria, Higgins discussed the matter with Fergesen and Drummond. After examining Complainant's disciplinary record, the three men decided to terminate Complainant inasmuch as termination was the next step on Respondent's progressive disciplinary system. Complainant filed three grievances stemming from his disqualification and termination.

24. On April 8, 1998, Complainant, Respondent's management and the union held a meeting to resolve Complainant's grievances. During the meeting Respondent and Complainant settled the grievances, with the Respondent agreeing to reinstate Complainant to the Machine Operator II position and Complainant agreeing to accept his disqualification from the Tool Room Machinist position.

25. After Complainant's disqualification from the tool room, Harry Murphy, who was approximately 20 months younger than Complainant, transferred from his first

shift position in the tool room to the second shift while Complainant's replacement, Randy Grater was being trained. Once Murphy began working on second shift, the production problems associated with Complainant's job performance improved.

26. Grater, who was born on December 28, 1960, was awarded Complainant's position as the next senior person on the list of individuals who had passed the pre-certification test. Grater left the Tool Room Machinist position within 90 days after having received the position pursuant to Grater's request to "self-disqualify" himself from the position. Mark Petrie, who was born on June 25, 1955, took over Grater's position as the next senior person on the pre-certification list.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Once a respondent articulates a legitimate, nondiscriminatory reason for its action, the absence of a *prima facie* case of discrimination is no longer important. Rather the focus shifts to whether the complainant has proved by a preponderance of the evidence that the articulated reasons were a pretext for age discrimination.

4. Respondent has articulated a legitimate, non-discriminatory reason for its decision to demote Complainant.

5. Complainant failed to prove by a preponderance of the evidence that the reason given by Respondent for its decision to demote Complainant was a pretext for age discrimination.

Determination

Complainant has failed to prove by a preponderance of the evidence that Respondent violated section 2-102(A) of the Human Rights Act (775 ILCS 5/2-102(A)) when it demoted Complainant from his Tool Room Machinist position.

Discussion

Preliminary matter.

Respondent initially contends that Complainant's case should be dismissed because he signed a compromise and settlement agreement concerning his grievance that covered his disqualification from the tool room. Specifically, the April 9, 1998 settlement provided that Respondent agreed to void Complainant's discharge with the understanding that Complainant would be disqualified from the Tool Room Machinist classification and returned to his prior classification as a Machine Operator II position and paid for two days of lost wages. Complainant further agreed to withdraw his union grievances concerning his disqualification and termination. The agreement, however, made no mention of Complainant providing any release of any potential claims under state law relating to his disqualification and subsequent demotion.

Respondent argues that Complainant waived his age discrimination claim before the Commission since he voluntarily agreed to withdraw his grievance contesting his disqualification in exchange for continued employment at the Highland, Illinois plant. Moreover, it submits that Complainant was represented by the union in his negotiations with Respondent and had an opportunity to consider the terms of the agreement before he signed it. Respondent additionally maintains that even though the terms of the settlement agreement did not mention the release of any potential Human Rights Act claim, such a failure should not defeat any claim of waiver where the Commission in **Serra and Coca-Cola Bottling Co. of Chicago**, ___ Ill. HRC Rep. ___ (1988CF3836, September 20, 1996) similarly found that a complainant had waived his Human Rights

Act claim even though the terms of the grievance settlement did not specifically mention his charge of disability discrimination.

Respondent's reliance on **Serra**, though, is misplaced since the facts in **Serra** indicated that the parties had specifically agreed to release any claim "arising under state law", while the agreement in this case makes no mention of a release of any state law action. Additionally, as Respondent notes, Complainant did not have any pending age discrimination claim at the time of his grievance, and thus I am hard-pressed to find that the parties actually intended that this settlement agreement release potential claims under the Human Rights Act. Indeed, because there could have been many reasons related to the language of the applicable collective bargaining agreement as to why Respondent would agree to reinstate Complainant to a different job and why Complainant would have withdrawn his grievances, I find that Complainant's agreement to withdraw his grievance concerning his disqualification for the Tool Room Machinist position was limited to claims arising out of the collective bargaining agreement.

The merits.

In a case alleging discrimination based on age, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, **Clyde v. Human Rights Commission**, 206 Ill.App.3d 283, 546 N.E.2d 265, 151 Ill.Dec. 288 (4th Dist. 1991), and **Orlet and Jefferson Smurfit Corporation, d/b/a Alton Packaging Corporation**, 40 Ill. HRC Rep. 363 (1988).) 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 a legitimate, non-discriminatory reason for its adverse action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101

S.Ct. 1089, 67 L.Ed. 2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant.

As with any case of alleged unequal treatment based on age, the elements of a *prima facie* case will vary according to the specific claim. Traditionally, a complainant, in establishing a *prima facie* case of age discrimination, has been required to show that: (1) he was within the protected age classification; (2) he was performing according to his employer's legitimate expectations; (3) he suffered an adverse employment decision; and (4) others younger than the complainant were treated more favorably. (See, for example, **Oxman v. WLS-TV**, 846 F.2d 448, 455 (7th Cir. 1988).) Here, Respondent, in citing to **O'Connor v. Consolidated Coin Caterers Corp.**, 517 U.S. 308, 313 (1996), focuses on the fourth element in arguing that Complainant failed to show that a substantially younger individual received more favorable treatment. Indeed, the Seventh Circuit, in attempting to define the phrase "significantly younger", has applied a presumptive "ten-year rule" pertaining to the difference between the ages of an employee and his or her comparative in order to create a "reasonable inference" of age discrimination. See, for example, **Scott v. Parkview Memorial Hosp.**, 175 F.3d 523, 525 (7th Cir. 1999), and **Pitasi v. Gartner Group, Inc.**, 184 F.3d 709 (7th Cir. 1999), where the court found that comparatives who were four months and eight years younger than the employee were not "substantially younger" for purposes of establishing a *prima facie* case of age discrimination.

According to the Complaint, Harry Murphy, who was 20 months younger than Complainant, was the appropriate comparative co-worker who received more favorable treatment. Even if Complainant is correct that Murphy received more favorable

treatment, Complainant offers no explanation as to why, at age 41, he was the victim of age discrimination where Respondent apparently afforded older individuals in the tool room the same favorable treatment. Additionally, any inference of age discrimination in this case is not measurably enhanced when Complainant compares himself to Randy Grater, who eventually received the next bid for the Tool Room Machinist position and who was only 44 months younger than Complainant. However, Complainant, in citing to **Anderson v. Human Rights Commission**, 314 Ill.App.3d 35, 715 N.E.2d 371, 246 Ill.Dec. 843 (1st Dist., 1st Div. 2000), contends that replacement by an individual outside the protected classification is not an essential element of a *prima facie* case of age discrimination. While I do not dispute Complainant's contention in this regard, the facts in **Anderson** do not help Complainant's case since the replacement employee in **Anderson** was 13 years younger than the complainant. Thus, under these facts, I find that if Complainant established a *prima facie* case of age discrimination based on his replacement by either Murphy or Grater, the *prima facie* case was weak at best.

In any event, Respondent articulated during the public hearing that Complainant was disqualified due to his poor work performance. Thus, the only real issue remaining in this case is whether Complainant has shown by a preponderance of the evidence that the articulated reason was a pretext for age discrimination. (See, for example, **Clyde and Caterpillar Inc.**, 52 Ill. HRC Rep. 8 (1989).) To that end, a complainant may establish pretext for unlawful discrimination either directly, by offering evidence that a discriminatory reason more likely motivated the employer's actions, or indirectly, by showing that the employer's explanations were not worthy of belief. (See, for example, **Burnham City Hospital v. Illinois Human Rights Commission**, 126 Ill.App.3d 999. 467 N.E.2d 635, 81 Ill.Dec. 764 (1984).) Moreover, a complainant may discredit an employer's justification for its actions by demonstrating either that: (1) the proffered reason had no basis in fact; (2) the proffered reason did not actually motivate the

decision; or (3) the proffered reason was insufficient to motivate the decision. See, for example, **Grohs v. Gold Bond Products**, 859 F.2d 1283 (7th Cir. 1988).

Complainant submits that Respondent's explanation for his removal, i.e., his poor job performance, is a pretext for age discrimination because: (1) the evidence showed that he was qualified for the position after having taken the certification test and worked in the tool room for approximately 34 months; (2) he never received any negative feedback or written documentation from his supervisors about his job performance; and (3) co-workers on the second shift did not experience problems with his job performance. Complainant additionally submits that, beginning in September of 1996, he was hassled by Respondent's management by disciplining him for loafing on the job, for not reporting a splinter of metal in his thumb, for having a work related conversation with Carpenter, and for having a car accident at the plant in February of 1998. Finally, Complainant submits that Respondent's age animosity towards him was evidenced by its attempt to terminate him in April of 1998 for being away from his work station when in fact he had permission to be away from his work station.

At first blush, I agree with Complainant that it seems somewhat inconsistent for Respondent to claim that Complainant could not accomplish basic tasks of a Tool Room Machinist where Respondent's management permitted Complainant to remain in the position for almost three years. However, Respondent explained that Complainant's 34-month tenure in the tool room was a result of Ed Caperton's desire to give Complainant an opportunity to learn the job and to succeed in that position, as well as Caperton's practice of avoiding the issue of Complainant's incompetence by shifting jobs from dies that Complainant could not repair. Indeed, the reason for Complainant's relative longevity in the tool room points more towards an example of poor management skills rather than age discrimination given Caperton's candid admission that he dropped the

ball as a supervisor by permitting Complainant to remain in the tool room for such a long time in spite of his job performance problems.

However, Complainant's job performance became more relevant once Jeff Higgins took over Caperton's job in January of 1998 and learned about Complainant's job performance problems, including reports of work stoppages attributed to Complainant by supervisors in the plant. Specifically, Higgins raised some of his concerns about Complainant's job performance when Higgins spoke to Complainant about his productivity in February of 1998, and eventually decided to use Buettikoffer's temporary transfer request as an opportunity to evaluate Complainant's job skills in the tool room. Thus, contrary to Complainant's contention, Complainant was aware of management's concern about his job performance near the time of his disqualification.

Complainant, though, submits that his job performance could not have been the true reason for his disqualification since there was no written documentation expressing management's concern over the claimed work stoppages or, for that matter, his job performance. However, Complainant cites to no case law mandating that employers document inadequacies of their employees before they can disqualify them. Moreover, this failure has significance only if Complainant can show that the supervisors in the tool room had a practice of generating documentation with respect to poor job performance of their subordinates. In this regard, there was no evidence that Complainant's supervisors ever documented incidents of poor job performance or that other employees in Complainant's job classification ever received written job evaluations that reflected observations concerning job performance or work stoppages.

More important, the record shows that Buettikoffer's frank and negative comments to Higgins about Complainant's job skills in the tool room was the actual catalyst for Complainant's disqualification from his Tool Room Machinist position. In this regard, Higgins testified that after he learned from Buettikoffer about Complainant's

problems in the tool room, he discussed Complainant's job performance shortcomings with others in management before deciding to disqualify Complainant from the Tool Room Machinist position. Indeed, where at the time of his disqualification Complainant attributed his disqualification to the efforts of Buettikoffer, Complainant's current contention that age discrimination on the part of management was the true reason for his disqualification rings hollow in the absence of any evidence disputing the fact that Buettikoffer had given Higgins a negative report of Complainant's job skills, or that Buettikoffer had told management that Complainant could not make certain rails, use a Tangimatic, or properly sharpen a drill bit. Thus, while it might have been a better management practice for Complainant's supervisors to document his job deficiencies, the record demonstrates that management's concern over Complainant's job performance was the real reason for his disqualification. This is especially true in the absence of any evidence showing that others (younger or older) in the tool room shared similar job deficiencies and were allowed to remain in Complainant's job classification.

Complainant, though, submits that any deficiency he may have demonstrated in the tool room was the result of poor training and management's unwillingness to properly train him in spite of his repeated requests for more training. The record, though, does not support Complainant's claim, at least with respect to the deficiencies noted by Buettikoffer, since Buettikoffer credibly testified that he showed Complainant on two occasions how to manufacture the rails and that Complainant had been previously trained on the basic skills including the use of the Tangimatic and the mechanics of sharpening drill bits. Moreover, even if I could agree with Complainant that management did a poor job of training Complainant in the Tool Room Machinist position, Complainant still loses on his age discrimination claim since any alleged decision to deny Complainant training opportunities with respect to the basic skills of the position had to have occurred in 1995, when Complainant first took the job and when Complainant was

under the age of 40. Similarly, Complainant's contention, that he endured a pattern of harassment with respect to various disciplinary actions taken by management beginning in September of 1996 and ending in April of 1998 also misses the mark since any alleged pattern of harassment began before Complainant turned 40 years old.

In summary, Complainant loses his age discrimination claim because he failed to present any evidence that similarly situated individuals in the tool room performed at a similar level and were permitted to retain his job. Moreover, even though Complainant may have been competent in some aspects of the Tool Room Machinist position, such evidence does not require a finding that his disqualification was related to his age where Complainant could not deny that he was unable to perform other tasks deemed important by management. Here, where Complainant was only 20 months older than his initial replacement, where Respondent had several individuals in the tool room older than Complainant, and where Complainant could not establish that anyone in the tool room had difficulty in the job skills that he could not perform, I find that job performance, as opposed to age discrimination, was the real reason for Complainant's disqualification.

Recommendation

For all of the above reasons, I recommend that the Complaint and the underlying Charge of Discrimination of Kenneth Showalter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 21ST DAY OF AUGUST, 2002