

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

**IN THE MATTER OF:** )  
 )  
**WILLIAM KOSMIEJA,** )  
 )  
Complainant, )  
 )  
and )  
 )  
**CORPORATE BUSINESS CARDS, LTD.,** )  
 )  
Respondent. )

Charge No.: 2003CA2063  
EEOC No.: 21BA31030  
ALS No.: 04-121

**ORDER**

This matter coming before the Commission pursuant to a Supplemental Recommended Order and Decision, the Respondent's Exceptions filed thereto, and the Complainant's Response to the Respondent's Exceptions.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of this matter.

**IT IS HEREBY ORDERED:**

1. Pursuant to 775 ILCS 5/8A-103(E)(1) & (3), the Commission has **DECLINED** further review in the above-captioned matter. The parties are hereby notified that the Administrative Law Judge's Supplemental Recommended Order and Decision, entered on **December 7, 2010**, has become the Order of the Commission.

**STATE OF ILLINOIS** )  
 )  
**HUMAN RIGHTS COMMISSION** )

Entered this 8<sup>th</sup> day of June 2011

Commissioner Munir Muhammad

Commissioner Rozanne Ronen

Commissioner Nabi Fakroddin

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>WILLIAM KOSMIEJA,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>and</b>	)	<b>Charge No.: 2003CA2063</b>
	)	<b>EEOC No.: 21BA3103</b>
<b>CORPORATE BUSINESS CARDS,</b>	)	<b>ALS No.: 04-121</b>
	)	
	)	
<b>Respondent.</b>	)	

**SUPPLEMENTAL RECOMMENDED ORDER AND DECISION**

This matter comes before me to finalize disposition of the instant matter.

History of Case

This case has a varied history. A review of the recent history is necessary for a full and complete understanding of the *Supplemental Recommended Order and Decision* (SROD).

On April 2009, a *Supplemental Recommended Liability Determination (SRLD)* was issued, *inter alia*, ordering Complainant to file a petition for fees and costs incurred subsequent to the filing of the *Recommended Order and Determination (ROD)* filed on September 19, 2006.

On May 6, 2009, Respondent filed *Exceptions to the SRLD*.

On June 6, 2009, Complainant filed its *Response to the Exceptions to the SRLD*.

No further pleadings have been filed in the instant case.

The matter is, therefore, ripe for a final decision.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter. It is, therefore, named herein as an additional party of record.

Findings of Fact

Complainant has not filed a petition for attorney's fees subsequent to the *Supplemental Recommended Liability Determination* issued May 6, 2009.

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter.
2. A prevailing complainant is entitled to reasonable attorney's fees and costs.
3. Complainant waives his/her right to reasonable attorney's fees if he/she fails to timely file a petition for fees.

Discussion

In my SRLD issued on April 20, 2009, I recommended that

*"Respondent pay to Complainant the reasonable attorneys fees and costs incurred subsequent to the filing of the ROD issued on September 19, 2006, that amount to be determined after review of a motion and detailed affidavit meeting the standards of Clark and Champaign National Bank, 41 Ill. HRC Rep. 193 (1983), said motion and affidavit to be filed by Complainant within 21 days after service of the Supplemental Recommended Liability Determination.; failure to submit such a motion will be seen as a waiver of attorneys fees."* (emphasis added.)

As Complainant has not filed any subsequent fee petition in accordance with the above, he has waived his right to such fees. As a result, no fees or costs should be awarded to Complainant other than those set forth in the ROD of September 19, 2006.

RECOMMENDATION

1. That the Complaint in this matter be sustained.
2. That Complainant receive all relief recommended in the RLD entered on April 20, 2009.

3. That Complainant not be awarded any additional fees and costs subsequent to the filing of the ROD on September 19, 2006.

HUMAN RIGHTS COMMISSION

**BY:** \_\_\_\_\_

GERTRUDE L. MCCARTHY  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

ENTERED: December 7, 2010

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>WILLIAM KOSMIEJA,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>and</b>	)	<b>Charge No.: 2003CA2063</b>
	)	<b>EEOC No.: 21BA3103</b>
<b>CORPORATE BUSINESS CARDS,</b>	)	<b>ALS No.: 04-121</b>
	)	
	)	
<b>Respondent.</b>	)	

**SUPPLEMENTAL RECOMMENDED LIABILITY DETERMINATION**

On April 5-7, 2006, a public hearing was held on Complainant's complaint alleging age discrimination. The public hearing resulted in the issuance of a *Recommended Liability Determination (RLD)* and subsequent *Recommended Order and Decision (ROD)*. In addition to an award of damages set forth in the RLD, the ROD recommended an award of attorney's fees and costs. A copy of the RLD and ROD are incorporated herein by reference.

On October 16, 2006, Respondent filed exceptions to the recommendation and Complainant filed a response.

On August 28, 2007, the Commission issued a Remand Order (Order). The Order seeks clarification of whether Respondent's decision to reduce Complainant's hours and compensation was "motivated by a legitimate business reason or discriminatory animus."

The sole issue before me, therefore, is whether Respondent's actions were a pretext for a violation of the Illinois Human Rights Act (Act) based on age discrimination.

## DISCUSSION

The issue of whether an employer's articulated reason for an employment decision is pretextual in nature is a question of fact. See **Sola v. Illinois Human Rights Commission**, 316 Ill.App.3d 528 (1<sup>st</sup> Dist. 2000). Further, Complainant may establish pretext in the following manner: (1) that the employer's explanation was not worthy of belief; (2) the proffered explanation has no basis in fact; (3) the proffered explanation did not actually motivate the decision; or (4) the proffered explanation was insufficient to motivate the decision. **Sola, supra**.

### *Employer's Explanation Is Pretextual and Not Worthy of Belief*

Complainant was hired to work in Respondent's typesetting department. (Tr. 23). Complainant had worked for Respondent full-time for over seven years prior to his refusal to accept part-time employment. (Tr. 224). Complainant testified that on or about August 15, 2002, he had a meeting with Richard LeTarte, (Richard), Respondent's owner. (Tr. 74). Richard testified that Complainant was asked to take part-time work from one to twenty hours per week with no hourly guarantee. (Tr. 223-24). Complainant testified that the part-time offer would also result in the loss of his benefits. (Tr. 78). Complainant testified that Richard made him the offer because there was not enough full-time work in the typesetting department. (Tr. 78). Justin Sharp (Sharp) was hired part-time in the bindery department while in high school. (Tr. 240). Sharp worked primarily in the bindery department, but also worked in the typesetting department on an "as needed" basis. (Tr. 225). There was no way to determine the amount of time Sharp spent in either the bindery or typesetting departments. (Tr. 226). Robert Micatka (Micatka), Respondent's accountant, testified that the business had dropped off during the years 2000-2003. (Tr. 372-373). Micatka recommended that overtime be eliminated and to have people work only 40 hours per week. (Tr. 227, 375). Payroll records show that from August 26, 2002 through December 8, 2002, Sharp received overtime on a

weekly basis. (Tr. 227). Richard testified at the hearing that Sharp was only a typist. (Tr. 231). Complainant knew how to use the PENTA system; Sharp was never trained on PENTA. (Tr. 231, 240). PENTA is a highly sophisticated typesetting system. (Tr. 233).

#### Analysis

Respondent's reasons for offering Complainant part-time employment with no benefits was based on the drop in Respondent's business from 2000-2003 and that there was not enough full-time work in the typesetting department. That drop in business resulted in Micatka's recommendation that overtime be eliminated and employees work 40 hours per week. The uncontroverted testimony, however, clearly shows that: (1) Sharp was a much younger employee with less experience than Complainant; (2) Complainant was over forty and, therefore, a member of a protected class under the Act; (3) Sharp worked overtime on a consistent basis after Complainant refused the offer of a part-time position; (4) Sharp was not trained on sophisticated machinery (PENTA) used in the typesetting department; and (5) Complainant was highly trained on PENTA. That testimony clearly suggests Respondent's explanation for its actions were not worthy of belief. It stretches logic for a company, in financial distress, to remove a seasoned employee from its work force while retaining a less skilled employee, untrained on sophisticated equipment. This less skilled, much younger employee, worked overtime on a consistent basis, thus defeating Micatka's recommendation to eliminate overtime. I, therefore, find that Respondent's decision to offer Complainant part-time employment with no benefits was a pretext for age discrimination and a violation of the Act. .

#### FINDINGS OF FACT

The following facts are based upon a review of the evidence pursuant to the Commission's remand order.

1. Respondent's articulated reason for its decision to offer Complainant part-time employment with no benefits was discrimination based on Complainant's age and, therefore, a violation of the Act.

RECOMMENDATION

Based upon the foregoing, it is recommended that an order be entered awarding the following relief:

A. Complainant receive all relief recommended in the RLD entered in this matter on June 28, 2006.

B. Respondent pay to Complainant the reasonable attorney's fees and costs incurred subsequent to the filing of the ROD issued on September 19, 2006, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1983), said motion and affidavit to be filed by Complainant within 21 days after the service of the Supplemental Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees.

C. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
GERTRUDE L. MCCARTHY  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

ENTERED: April 20, 2009

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
WILLIAM KOSMIEJA,	)		
	)	Charge No.	2003CA2063
COMPLAINANT,	)	EEOC No.	21BA31030
	)	ALS No.	04-121
AND	)		
	)		
CORPORATE BUSINESS CARDS, LTD.	)		
	)		
RESPONDENT.	)		

REMAND

August 28, 2007

The Commission by a panel of three:

Commissioners Munir Muhammad, Gregory G. Simoncini and Diane Viverito.

On review of the recommended order of Gertrude McCarthy, Administrative Law Judge.

For Complainant: Michael J. Fleck, Law Office of Michael J. Fleck, P.C.

For Respondent: Michael R. Lied, Howard & Howard Attorneys, P.C.

Illinois Human Rights Commission: Matthew Z. Hammoudeh, Acting General Counsel  
Matthew Brockmeier, Coles Fellow

This matter comes before the Commission pursuant to a Recommended Order and Decision issued by Administrative Law Judge Gertrude McCarthy, exceptions and a response filed thereto.

The Illinois Department of Human Rights is an additional statutory party that has conducted state action in this matter. They are named herein as an additional party of record. The Illinois Department of Human Rights did not participate in the Commission's consideration of exceptions.

On review of Judge McCarthy's recommendations and the exceptions and response filed hereto, this matter is remanded to the Chief Administrative Law Judge for further proceedings. This is not a final order of the Illinois Human Rights Commission.

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

Page 2 of 4 – August 28, 2007 Remand  
*William Kosmieja v. Corporate Business Cards, LTD.*

I. Nature of the Case

William Kosmieja, Complainant, was hired by Corporate Business Cards, Ltd., Respondent, on June 6, 1994 as a typesetting assistant. Throughout his employment Complainant performed his duties in a manner consistent with Respondent's standards. On or about August 23, 2002 Complainant was notified that he would no longer be able to work full time and was offered a severe reduction in hours and compensation. Being unable to accept such a reduction, Complainant refused and was laid off.

Complainant filed Charge No. 2003 CA 2063 on January 13, 2003 alleging to have been aggrieved by age discrimination in violation of Section 2-102(A) of the Illinois Human Rights Act ("Act"). 775 ILCS 5/1-101 *et seq.* At the time of the alleged incidents, Complainant was 43 years old. Complainant also alleges that though he was qualified for the position, he was replaced by a younger employee who was not a member of the protected class.

The Illinois Department of Human Rights ("IDHR") drafted the instant Complaint. It was filed with the Commission on behalf of the Complainant on April 5, 2004.

II. Proceedings

A public hearing was held on April 5-7, 2006. Administrative Law Judge McCarthy found that the Complainant established a prima facie case of age discrimination. Judge McCarthy further found that Respondent's articulated non-discriminatory reason for discharging the Complainant was not credible.

Judge McCarthy recommends that the Commission find that the Respondent discriminated against the Complainant on the basis of his age and award \$90,029.00 in back pay, \$23,529.04 attorney's fees and \$271.29 in costs

Respondent filed exceptions and Complainant filed a response thereto.

III. Findings

In reviewing an Administrative Law Judge's findings of fact, the Commission will adopt the Judge's findings unless they are contrary to the manifest weight of the evidence presented at the hearing, 775 ILCS 5/8A-103(E)(2). The Commission reviews a question of law *de novo* and is empowered to modify, reverse, or sustain the Judge's recommendations, in whole or in part, 775 ILCS 5/8A-103(E).

The Human Rights Act prohibits discrimination in employment because of a person's age and forbids covered employers to discriminate based on age "with respect to recruitment, hiring, promotion, renewal of employment, selection for training or

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

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*William Kosmieja v. Corporate Business Cards, LTD.*

apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment,” 775 ILCS 5/2-102(A) (1996).

The age discrimination provisions of federal and Illinois law are substantially identical. In cases where discrimination in employment is charged, the Appellate Court of Illinois has drawn an analogy to the procedures used in cases under the Federal Civil Rights Act. 42 U.S.C. sec. 2000e (1982); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973);

The method of proving a charge of discrimination is well established. See *Clyde v. Human Rights Commission*, 206 Ill.App.3d 283, 292, 564 N.E.2d 265, 270 (4th Dist. 1990). The complainant must show (1) he was within the protected class; (2) he was performing according to his employer's legitimate expectations; (3) he was terminated or demoted; and (4) others not in the protected class were treated more favorably. *Id.*

The recommended order suggests that the Respondent may have articulated a non-discriminatory reason for its actions: that the company's financial situation had declined to the point that it had no choice but to reduce the Complainant's hours. If the Respondent "has articulated a reason for its actions, the agency or court need not decide whether the plaintiff stated a prima facie case. The sole question is whether the plaintiff can show that the given reason is a pretext for unlawful discrimination". *Clyde v. Human Rights Comm'n*, 206 Ill. App. 3d 283, 293, 564 N.E.2d 265, 151 Ill. Dec. 288 (1990), *Johnson v. Human Rights Comm'n*, 318 Ill. App. 3d 582, 252 Ill. Dec. 255 (2000), *Bonita Welch and Supreme Court of Illinois, et al*, Illinois Human Rights Commission en banc, ALS No. S-10644, May 19, 2006.

Judge McCarthy did not make a specific finding of fact on the issue of pretext. Rather, she expressed that Respondent's arguments were not as credible as Complainant's, and that the articulated non-discriminatory motive was not reasonable or compelling.

Respondent argues that Complainant failed to satisfy his burden to prove by a preponderance of the evidence that Respondent's articulated reason for its decision was a mere pretext for discrimination. Complainant argues in response that Judge McCarthy properly found that there were no business reasons that could have motivated Respondent.

Whether an employer's articulated explanation for its employment decision is pretextual is a question of fact. A Complainant may establish pretext by showing either that (1) the employer's explanations are not worthy of belief; (2) the proffered explanation had no basis in fact; (3) the proffered explanation did not actually motivate the decision; or (4) the proffered explanation was insufficient to motivate the decision, *Sola v. Illinois Human Rights Comm'n*, 316 Ill.App.3d 528 (1st Dist. 2000).

Uncontradicted evidence proffered by the Respondent shows continuing financial loss leading up to its decision to reduce Complainant's hours. (EX. J, K, L). Respondent has adduced evidence that it was forced to resort to reducing the hours of other employees, even relatives.

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

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*William Kosmieja v. Corporate Business Cards, LTD.*

Further, Respondent showed that by reducing Complainant's hours and replacing him with a lower paid worker, it lowered costs considerably (Ex. 11). An employer may take into account anticipated cost savings in making an employment decision. See *Hazen Paper Company v. Biggens*, 507 U.S. 604 (1993) (discharging an employee to prevent his pension benefits does not, without more, constitute age discrimination); See also *Baxter v. Anderson Healthcare Corp.*, 13 F. 3d 1120 (7th Cir. 1994) (employee could not prove age discrimination simply because employer discharged him to reduce its salary costs).

Employers may act for many reasons. Whether or not it is reasonable to discharge a seasoned employee and keep a younger, less proficient one is not a matter for the Court to review. *Baron v. City of Highland Park*, 195 F.3d 333, 341 (7th Cir. 1999). Overall correctness or desirability of the reasons proffered is not relevant to the determination of pretext, only if the employer engaged in unlawful discrimination. *Id.* The Commission does "not sit as a superpersonnel department that reexamines an entity's business decisions." See e.g., *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 300 (7th Cir. 1998).

It is incumbent to remember that the issue of pretext addresses not the wisdom of an employer's decision, but the genuineness of the employer's motives- whether the employer honestly believed in the nondiscriminatory reasons. *Lesch c. Crown & Cork Seal*, 282 F.3d 467, 473 (7th Cir. 2002); *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992).

Whether the Respondent's decision was motivated by a legitimate business reason or discriminatory animus requires further findings and clarification.

IT IS HEREBY ORDERED THAT:

1. The Recommended Liability Determination and Recommended Order and Decision in favor of Complainant is not adopted;
2. This matter is remanded to the Chief Administrative Law Judge for proceedings consistent with this Order.

Commissioner Munir Muhammad

Commissioner Gregory G. Simoncini

Commissioner Diane Viverito

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
WILLIAM KOSMIEJA,	)	
	)	
Complainant,	)	
	)	
and	)	Charge No.: 2003CA2063
	)	EEOC No.: 21BA31030
CORPORATE BUSINESS CARDS, LTD.,	)	ALS No.: 04-121
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me on Complainant's Petition for Attorneys Fees filed with the Commission on July 20, 2006. Respondent filed its objections to Complainant's fee petition with the Commission on August 8, 2006. Complainant filed no reply to Respondent's objections. On June 28, 2006, I entered a Recommended Liability Determination (RLD) finding that Respondent violated Section 5/1-102(A) of the Illinois Human Rights Act (Act) when it terminated Complainant from his position with Respondent as a typesetting assistant. This matter is now ready for resolution of Complainant's fee petition.

CONTENTIONS OF THE PARTIES

In the fee petition, Complainant seeks attorney's fees in the amount of \$28,165.00, and costs in the amount of \$271.29.

In its objections, Respondent does not dispute the hourly rate of Complainant's attorneys, but does object to the amount of time allocated to certain tasks, such as review of the file, which it alleges are multiple entries. Respondent further objects to the time spent by Thomas L. Schmid, (Schmid) an associate of Michael Fleck (Fleck), Complainant's primary attorney. Finally, Respondent objects to Complainant's charge of

\$180.49 for Westlaw research on Respondent President Richard LeTarte's real estate holdings as being irrelevant to the issues before the Commission.

#### FINDINGS OF FACT

1. Complainant is entitled to attorney's fees and costs in accordance with the RLD entered in this case on June 28, 2006.

2. Fleck was admitted to practice law in the State of Illinois in November, 1995.

3. Fleck's practice is a "diverse general practice, including employment related litigation matters."

4. Fleck has handled matters before the United States Department of Labor, Illinois Department of Human Rights, and the federal Equal Employment Opportunity Commission.

5. Schmid was admitted to practice law in the State of Illinois in November, 2004.

6. Schmid is an associate of Fleck.

7. A Contingency Fee Agreement (Agreement) was entered into between Complainant and Fleck on April 20, 2004.

8. Fleck's hourly rate, for both in and out of court services, is \$195.00.

9. Schmid's hourly rate, for both in and out of court services, is \$150.00.

10. Fleck's hourly rate is consistent with the rates of similarly qualified attorneys and is reasonable.

11. Schmid's hourly rate is consistent with the rates of similarly qualified attorneys and is reasonable.

12. Some of the hours worked are unreasonable and excessive and, therefore, a reduction in those hours is proper for a total reduction of fees equaling \$4,907.25

## CONCLUSIONS OF LAW

1. A prevailing complainant is entitled to reasonable attorney's fees and necessary costs incurred to litigate a matter.
2. It is appropriate to award attorney's fees at current rates to compensate for the delay in such fees.
3. The Commission may reduce a fee request if it finds the fees are excessive and/or unreasonable.

## DISCUSSION

### Standards for Attorney's Fee awards

After a finding of liability against a respondent, an attorney who represents the prevailing party is entitled to an award of fees. See Section 5/8A-104(G) of the Illinois Human Rights Act (Act). See also **Leffler and Board of Directors, Green Hills Country Club**, 24 Ill. HRC Rep. 2,12 (1986). The purpose of a fee award is to provide an effective means of access to the judicial process to victims of civil rights violations who might not otherwise have the means to retain counsel. Although the provisions of the Illinois Human Rights Act awarding attorney's fees should be accorded liberal construction, the purpose of such awards is not to provide a windfall to prevailing attorneys. See **Marie Johnson and City of Chicago Police Department**, \_\_\_\_ Ill. HRC Rep. \_\_\_\_ (1998CF2836, June 24, 2004). Accordingly, every fee petition must be scrutinized to ensure that the amount recovered is fair and reasonable. The concept of reasonableness, however, requires not only that excessive fees be cut but also that the fees awarded be adequate to ensure competent counsel. See **Bard and Cassidy Tire Company**, 34 Ill. HRC Rep. 206 (1987).

In **Clark and Champaign National Bank**, 4 Ill. HRC 193 (1982), the seminal decision on evaluating petitions for attorneys fees, the Commission set forth a step-by-

step approach to guide the Commission. In **Clark**, *supra*, the first step requires that the Commission determine the appropriate hourly rate for the attorney's work. The second step is for the Commission to determine the number of hours reasonably expended on the case. Finally, in the third step, the Commission must determine if any additional adjustment should be made to the fee award.

Appropriate Hourly Rate

Respondent has not disputed Complainant's attorneys' hourly rates as set forth in Complainant's fee petition. Accordingly, Complainant's attorneys' hourly rate are accepted as reasonable.

Number of Hours Reasonably Worked

Once the hourly rate has been decided, it is then necessary for the Commission to determine whether the hours claimed are justified. Complainant filed a detailed statement of fees/costs itemizing the hours billed for services performed and the cost involved for the services. The fee petition is in accordance with 56 Ill. Admin. Code Section 5300.765(a)(1) and is sufficient to enable scrutiny by Respondent and the Commission.

Respondent objects to the number of hours Complainant's attorneys devoted to various tasks such as file review. Respondent's objections set forth the period from June 9, 2004, through and including July 1, 2006. I have reviewed the fee petition to assess the time spent by Complainant's attorneys for review of the file. The difficulty in making such a determination comes from the multiple tasks listed for a specific day. I find that the costs for said services is \$7,688.00.

I have carefully evaluated the fee petition in accordance with the dates presented in Respondent's objections. (See Appendix A attached to this Recommended Order and Decision and made a part hereof.) It should be reiterated that there were several entries that included multiple tasks and Respondent provided no assistance to bolster its

objections to the multiple entries. Accordingly, in its evaluation of those entries, I had to approximate the amount of time utilized by Complainant's attorneys to review the file. In those instances, *e.g.*, *June 6, 2004*, I have reduced the time and cost by one-half. Therefore, a reduction in the fee petition of \$3,084.75 is appropriate.

Respondent also objects to the attendance of attorney Schmid at the public hearing on April 5, 2006 and April 7, 2006, as being unnecessary. Respondent asserts that attorney Fleck did not need the assistance of attorney Schmid. Respondent, however, does admit that it was "helpful to Mr. Fleck to have Mr. Schmid present..." Accordingly, even by Respondent's own admission, Schmid was a "helpful presence" to Fleck and, therefore, to Complainant. I do, however, acknowledge that Mr. Schmid's appearance on the designated public hearing dates was excessive. Thus, Mr. Schmid's billing should be reduced by one-half, or \$1,822.50. In support of this reduction, I note that on April 5, 2006, Mr. Schmid's billing indicates 16.30 hours of time spent, with two hours for travel. The public hearing generally started around 9:00 a.m. and adjourned at approximately 4:30 p.m. every day. Giving Mr. Schmid the benefit of travel time, I find that time excessive and, therefore, supportive of the reduction in Schmid's billing time.

Respondent finally objects to Complainant's charge of \$180.40 for Westlaw research on Richard LeTarte's real estate holdings in Wisconsin. Respondent contends that Mr. LeTarte's holdings played no role in the Recommended Liability Determination. The cost of computerized legal research should be allowed if it is reasonably related to the prosecution of the case. See **John Lynch and Cook County Hospital**, \_\_\_\_ Ill. HRC Rep. \_\_\_\_ (1993CA0598, June 30, 1999). I find the computerized legal research to be compensable in accordance with the fee petition. While acknowledging that the aforementioned real estate holdings played an insignificant part in the Recommended Liability Determination, I do not find the research excessive in light of the potential findings.

RECOMMENDATION

Based upon the foregoing, I recommend that:

1. Respondent pay to Complainant an adjusted amount of \$23,529.04 as reasonable and necessary attorney's fees in this matter.
2. Respondent pay to Complainant costs in the amount of \$271.29.
3. Complainant receive all other relief recommended in the RLD entered in this matter on June 28, 2006.

HUMAN RIGHTS COMMISSION

BY \_\_\_\_\_  
GERTRUDE L. MCCARTHY  
Administrative Law Judge  
Administrative Law Section

ENTERED: 9-19-06



- \* Fleck's billing rate is \$195.00/hr
- \*\* Does not indicated "review of file"
- \*\*\* Schmid's billing rate is \$150.00/hr

The Commission notes that several entries are compound, with review of file and other matters being handled on a single day.

The Commission notes that certain entries, specifically on 4/4/04, include review of file by both Fleck and Schmid.

STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

IN THE MATTER OF: )  
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WILLIAM KOSMIEJA, )  
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 Complainant, )  
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and ) Charge No.: 2003CA2063  
 ) EEOC No.: 21BA31030  
CORPORATE BUSINESS CARDS, LTD., ) ALS No.: 04-121  
 )  
 Respondent. )

RECOMMENDED LIABILITY DETERMINATION

This matter comes before me after a public hearing held in Chicago, Illinois, on April 5-7, 2006, pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101, *et seq.*). No closing briefs were filed. This matter is now ripe for a decision.

CONTENTION OF THE PARTIES

On April 5, 2004, the Illinois Department of Human Rights (Department) filed a complaint on behalf of Complainant, William Kosmieja (Complainant). That complaint alleged that Respondent, Corporate Business Cards, Ltd. (Respondent), discriminated against Complainant on the basis of his age when it discharged him. The Respondent filed an answer generally denying the substantive allegations of the complaint and setting forth certain affirmative defenses.

FINDINGS OF FACT

Facts numbered one through three are facts that were stipulated by the parties or admitted in the answer to the complaint. The remaining facts were determined to have been proven by a preponderance of the evidence at the public hearing in this matter. Assertions made at the public hearing that are not addressed were determined to be unproven or were determined to be immaterial to this decision.

1. Complainant's was born November 7, 1958.

2. Complainant was hired by Respondent on or about June 6, 1994, as a typesetting assistant where he performed his duties in a manner consistent with Respondent's standards.

3. On August 23, 2002, Complainant left Respondent's employ rather than accept part-time employment offered by Respondent.

4. Respondent produces business cards, letterheads, envelopes, labels and similar products.

5. Richard LeTarte is Respondent's president.

6. Complainant's starting salary was \$11.00 per hour with an ending salary of \$14.80 per hour.

7. Complainant knew Richard LeTarte from working with him at Vail Printing (Vail) where Complainant had worked for eighteen years.

8. Complainant was familiar with the PENTA equipment, a dedicated software typesetting system which included data entry and computer coding, used in Respondent's business, as he had used similar equipment while employed at Vail.

9. Respondent used a PENTA system designed for its own use.

10. Complainant's immediate supervisor was Pamela Taglia (Taglia).

11. Complainant received no formal training but obtained from Taglia a PENTA completion certificate form.

12. Complainant had a good relationship with Taglia.

13. Respondent had approximately 20 employees when Complainant was employed by Respondent.

14. Justin Sharp (Sharp), born November 13, 1980, was hired by Respondent in 2000.

15. On August 23, 2002, Complainant attended a meeting where Richard LeTarte, Patricia LeTarte and Pamela Taglia were present.

16. In the August 23, 2002, meeting, Complainant was told that he was being laid off but was given the option of working 1-20 hours per week with no hourly guarantee and no benefits; he was subject to being recalled by Respondent at a later time.

17. Complainant got his belongings and left Respondent's facility immediately after the April 23, 2002, meeting.

18. Complainant received a letter of recommendation from Respondent indicating that he was laid off.

19. A document submitted to the Department as part of a discovery request, admitted into evidence as Exhibit 9, indicated that, prior to the August 23, 2002, meeting, Complainant and Sharp were performing the same duties.

20. After Complainant left Respondent's employ, Sharp consistently worked overtime.

21. Richard LeTarte did not offer to reduce the hours of Sharp or eighteen other employees.

22. The LeTartes are owners of 36 acres of property in Wisconsin.

23. Robert Miatka (Miatka) is a self-employed accountant who serves as Respondent's CPA.

24. Complainant's W-2 form for 2000 showed an income of \$32,519.38.

25. Complainant's W-2 form for 2001 showed an income of \$31,914.97.

26. Complainant's W-2 form for 2002 (through August) showed an income of \$21,453.65.

27. Complainant received approximately \$18,850.00 in unemployment compensation.

28. After leaving Respondent, Complainant obtained temporary employment

with the U.S. Bureau of Census (Census) as a clerk making \$9.00 per hour and a field operations supervisor making \$14.00 per hour. Complainant's total income from the Census was \$1,825.00.

29. Complainant has lost wages and back pay as a result of Respondent's actions in the amount of \$110,704.00

30. Complainant had interim earnings due to his receipt of unemployment compensation and temporary work in the amount of \$20,675.00.

31. On December 6, 2002, Complainant paid a visit to Dr. Hirsch, complaining of high blood pressure and depression.

#### CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined under Section 5/1-1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/101 *et seq.* (Act).

2. Respondent is an "employer" as defined by Section 5/2-101(B)(1)(a) of the Act and is subject to the provisions of the Act.

3. The Commission has jurisdiction over the parties and the subject matter of this action.

4. Complainant has established a *prima facie* case of age discrimination against Respondent.

5. Complainant is entitled to prejudgment interest in accordance with the Act and the Commission's procedural rules.

6. Complainant is entitled to compensation for lost health care benefits in the amount of \$6,384.00.

7. Complainant has not demonstrated emotional suffering resulting from Respondent's actions to such a degree that he is entitled to an award of emotional distress damages.

## DETERMINATION

Complainant has proven by a preponderance of the evidence that Respondent violated Section 5/1-102(A) of the Act when it terminated Complainant from his position as typesetting assistant.

## DISCUSSION

### Age Discrimination Claim

On June 6, 1994, Respondent hired Complainant, who was then 35 years of age, as a typesetting assistant. On August 23, 2002, Complainant, then 43 years of age, had a meeting with a group of people, including Complainant's immediate supervisor, Taglia and Richard LeTarte, who advised Complainant that there was not enough typesetting work for him to be maintained full-time. Complainant was advised that he could accept part-time work of 1-20 hours per week with no guarantee of hours and no benefits. Complainant did not accept the part-time arrangement. Complainant alleges that the offer amounted to a discharge and that Sharp, who was much younger, performed his duties after his employment with Respondent ended.

Respondent claims that Complainant was not discharged, but laid off, and that Richard LeTarte did not expect Complainant to leave.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Respondent discharged Complainant because of his age. Complainant was 43 at the time of the alleged discharge.

The method of proving a charge of discrimination is well established. Complainant must first establish a *prima facie* case of discrimination. Once Complainant has met that burden, it is incumbent upon Respondent to articulate a legitimate, non-discriminatory reason for its actions. If Respondent is successful, in order for Complainant to prevail he must then prove that Respondent's articulated reason is pretextual. **Zaderaka v. Human Rights Commission**, 131 Ill.2d 172, 545 N.E.2d 684

(1989). See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 251 (1981).

To establish a *prima facie* case of age discrimination Complainant must prove 1) that he is a member of a protected age class, 2) that he was meeting Respondent's reasonable performance expectations, 3) that he was discharged, and 4) that similarly situated younger employees were treated more favorably. **Southern Illinois Clinic, Ltd. v. Human Rights Commission**, 274 Ill.App.3d 840, 654 N.E.2d 655 (5<sup>th</sup> Dist. 1995).

Complainant has clearly established the first and second elements of his *prima facie* case. Clearly he was in the protected class for age. See Section 5/1-103 (A) of the Act which defines "Age" as "*the chronological age of a person who is at least 40 years old. . . .*" Further, Respondent's answer to the complaint admits Complainant's satisfactory job performance during his employment with Respondent.

The dispute arises over elements 3 and 4 of the establishment of a *prima facie* case of age discrimination. Complainant alleges that the part-time offer, which was undisputed to be 1-20 hours per week with no benefits and no guarantee of hours amounted to him being discharged. Respondent, however, states that Complainant was not discharged but was laid off subject to being recalled. In resolving this issue the undisputed facts brought forth in the public hearing assist the Commission. Firstly, Complainant at the relevant time period lived in Huntley, Illinois, a 40 mile trip by car to Respondent's Franklin Park, Illinois location. It would seem untenable to expect Complainant to travel a distance of 80 miles to perform what may have turned out to be one hour of work. Secondly, Respondent did not guarantee Complainant a certain amount of part-time hours so Complainant was in the position of "waiting around" to be called. Thirdly, Complainant's benefits, such as medical coverage and vacation time, as part of full-time employment, was not provided as a part-time employee. In resolving the

layoff/discharge issue, I find the matter to be merely one of semantics. We need look no further than the undisputed facts 1) Complainant did not know if he would be called to work, 2) Complainant did not know, if called to work, how many hours he would work, 3) the distance he would have to travel (for possibly one hour of work) was extensive and 4) being placed on part-time employment meant that Complainant lost his medical, vacation and other benefits. A reasonable person when confronted with that option, would look for another source of income. Complainant did not quit with a refusal to work for Respondent. Rather, Respondent's offer was untenable to Complainant. Complainant subsequently applied for unemployment compensation benefits, which was justified under the circumstances. I believe that an "employee" is no longer an "employee" of the "employer" when the "employee" 1) is not provided with a salary, 2) does not provide a service to the "employer", and 3) receives no benefits. Under those circumstances, Respondent discharged Complainant as its employee. See **Davis and Raintree Health Care Center, Inc.**, \_\_\_\_ Ill. HRC Rep. \_\_\_\_, (1988CN2190, April 15, 1994); *aff'd* 173 Ill.2d 469, 672 N.E.2d 1136, 220 Ill.Dec. 124 (1996).

Respondent's witnesses testified that Sharp worked mainly in the bindery, performing typesetting work when necessary, and was not as proficient on the PENTA machine as was Complainant. Exhibit 9, however, admitted into evidence, belies those assertions by Respondent. That Exhibit, a letter to the Department from Patricia LeTarte, states that Sharp and Complainant were performing the same duties. Sharp, however, testified that he received most of his skills through a high school course and on-the-job training. Complainant, in contrast, testified that he worked as a typesetter for over 20 years (through his employment at Vail and later with Respondent). Based upon the uncontroverted evidence that: 1) Complainant was clearly more experienced than Sharp, 2) Complainant was 43 at the time of the discharge, 3) Sharp, still employed by Respondent, was 21 at the time of Complainant's discharge, and 4) Sharp

consistently worked overtime after Complainant was no longer employed by Respondent, I find that Complainant has met the fourth element of a *prima facie* case of age discrimination.

*Respondent's Legitimate, Non-Discriminatory Articulation*

Respondent argues that there is a legitimate, non-discriminatory reason for discharging Complainant. Its argument relies upon proving that Respondent's business was much less profitable in 2000 and later years. Richard LeTarte testified that business declined due to new digital technology in the industry which eliminated the need for typesetting or proofreading. I do not find Respondent's arguments credible. Respondent relies solely on the testimony of Richard LeTarte and Micatka for Respondent's downward financial trend. Micatka testified that in discussions with the LeTartes he recommended that Respondent cut overtime and employee's work hours to 40 hours per week. I do not find his testimony as compelling as other evidence presented, as set forth below, which supports Complainant's argument that the discharge was age related. It just does not seem reasonable to discharge a "seasoned" employee, who is performing satisfactorily and who just happens to be over the age of 40, and keep a 21 year old who is much less proficient and have him work overtime to cover the slack left by Complainant. Throughout the extensive testimony, none of Respondent's witnesses provided an iota of evidence to justify maintaining Sharp and discharging Complainant.

*Damages*

*Back Pay*

The first element of damages to be considered is back pay. Often, a calculation in back pay can be speculative in nature. Any ambiguity is resolved in favor of the prevailing Complainant, and against the discriminating employer, since the employer's

wrongful act gave rise to the uncertainty. See **Clark v. Human Rights Commission**, 141 Ill.App.3d 178, 490 N.E.2d 29, 95 Ill. Dec. 556 (1st Dist 1986).

I find no ambiguity in the testimony presented by the witnesses. I find that Complainant's testimony, together with his tendered W-2 forms for the years 2000-2002 to be sufficient for back pay to be calculated. Respondent did not rebut Complainant's evidence.

On the last day of Complainant's employment with Respondent, August 23, 2002, Complainant was working full-time, forty hours per week, with benefits. When he was discharged from Respondent's employ, he was making \$14.80 per hour.

I calculate Complainant's back pay as follows:

\$14.80 per hour for a 40 hour week equals \$592.00 per week.

\$592.00 per week for 187 weeks (August 23, 2002, through and including April 7, 2006) amounts to \$110,704.00.

Therefore, I find that Complainant's lost wages for the period from August 23, 2002 through and including April 7, 2006, the last date of the public hearing, equals \$110,704.00.

Complainant testified that he received approximately \$18,850.00 in unemployment compensation and \$1,825.00 from his employment with the Census.

Deducting the amount of \$18,850.00 and \$1,850.00 from the back pay figure, Complainant has proven a back pay award in the amount of \$90,029.00. Complainant's full back pay is justified.

#### *Pre-Judgment Interest*

Respondent should also be ordered to pay Complainant interest on the back pay as contemplated by Section 5/8A104(J) of the Act, and calculated as provided in Section 5300.1145 of the Commission's procedural rules.

### *Emotional Distress*

It is not apparent to what degree Complainant suffered emotional distress. In **Harris and Vinylgrain**, \_\_\_\_ HRC Rep. \_\_\_\_, (1996CA1087, August 1, 2001), it was determined that emotional distress must be over and above that which would be expected from "the mere fact of a civil rights violation" and is therefore compensable under the Act. Complainant's sole evidence of emotional distress is an alleged visit to his doctor complaining of depression. It is certainly understandable that Complainant would suffer from the loss of a job which he had for several years and whose employer he had a friendly relationship with for a significant period of time. But, I find nothing in the testimony to justify an award of emotional distress using the standard set forth in **Harris, supra**.

### *Lost Benefits*

Complainant seeks reimbursement for health care benefits paid from the period of November, 2002 through December, 2005, in the amount of \$6,384.00. Complainant testified that he paid \$6,384.00 in health care benefits in addition to what his wife was paying to have him placed on her health care program. Respondent provided no rebuttal to Complainant's testimony. As there was no evidence provided by Complainant regarding the added cost to his wife to have him placed on her health care plan, I am unable to compute any reimbursable amount. I, however, find that Complainant is entitled to reimbursement for the \$6,384.00 which he paid in health care benefits for the period from November, 2002, through December, 2005.

### *Other Relief*

Complainant also seeks to recover approximately \$25,000.00 which he testified he borrowed from his mother. As Complainant provided no proof of the loan his request for recovery is denied.

Although reinstatement is presumptively the relief sought and given in discrimination cases under the Act, Complainant provided no testimony of his desire to be reinstated. Accordingly, no such relief is recommended.

In his complaint, Complainant also sought an award of attorney's fees.

It is recommended that Complainant's attorney file a fee petition within 21 days of entry of this order. It is further recommended that Respondent have 21 days from the filing of the fee petition to file any response.

#### RECOMMENDATION

Based upon the foregoing, Complainant proved that Respondent discriminated against him on the basis of age when it discharged him. Complainant further proved, by a preponderance of the evidence, that Respondent's articulated reason for its actions was a pretext for unlawful discrimination. Accordingly, it is recommended that the complaint in this matter be sustained and that the Commission award Complainant the following relief:

1. Award back pay in the amount of \$90,029.00.
2. Award prejudgment interest on the back pay award in accordance with the Act's and the Commission's Procedural Rules;
3. Award compensation for lost health care benefits in the amount of \$6,384.00.
4. Complainant's request for emotional distress be denied.
5. Complainant's request for recovery of a loan in the amount of \$25,000.00 be denied.
6. Respondent pay to Complainant the reasonable attorney's fees and costs incurred herein, that amount to be determined after review of a motion and detailed affidavit meeting the standards set forth in **Clark and Champaign National Bank**, 4 Ill. HRC Rep. 193 (1982), said motion and affidavit to be filed by Complainant

within 21 days after the service of the Recommended Liability Determination; failure to submit such a motion will be seen as a waiver of attorney's fees.

7. If Respondent contests the amount of requested attorney's fees, it must file a written response to Complainant's motion within 21 days of the service of said motion; failure to do so will be taken as evidence that Respondent does not contest the amount of such fees.

8. The recommended relief in paragraphs 1 through 3 is stayed pending issuance of a Recommended Order and Decision with the issue of attorney's fees resolved.

HUMAN RIGHTS COMMISSION

BY \_\_\_\_\_  
GERTRUDE L. MCCARTHY  
Administrative Law Judge  
Administrative Law Section

ENTERED: 6-28-06