



STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
DANNY L. CONN,)	
)	
Complainant,)	
)	
and)	CHARGE NO: 1998CA2628
)	EEOC NO: 21B981987
CATERPILLAR, INC.,)	ALS NO: S-10996
)	
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.). A public hearing was held before me on February 20 and 21, 2002 in Springfield, Illinois. The parties were given an opportunity to file post-hearing briefs. However, only Respondent filed a post-hearing brief.

Contentions of the Parties

In the Complaint, Complainant contends that he was the victim of age discrimination when Respondent demoted him from his skilled trades, 6B20 position, while permitting younger co-workers with similar work histories to remain in their 6B20 positions. Respondent, however, maintains that Complainant cannot establish a *prima facie* case of age discrimination since all of his co-workers were within the protected age classification. It additionally asserts that Complainant was demoted for reasons unrelated to his age.

Findings of Fact

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

1. In 1966, Respondent hired Complainant for a position at its Mossville, Illinois plant. Complainant, who was born on November 18, 1941, worked at various assembly line jobs until 1975, when he became a 3B10 millwright.

2. Complainant worked as a 3B10 millwright from 1975 until 1992, when his 3B10 millwright position was combined with the 2B10 pipefitter and 8T21 machine repairman positions to form a higher-paid 6B20 machine mechanic position.

3. From 1992 to October 24, 1997, Complainant took a series of twelve classes that covered training in pipefitter, millwright or machine repair duties. Throughout this time all 6B20s, including Complainant, were expected to repair any of the thousands of different kinds of machines located within any particular building at the Mossville, Illinois facility even if they did not have any prior experience repairing the machine.

4. In 1994, Complainant received an evaluation from John Dunker, one of Complainant's supervisors in Building B at the Mossville facility. In the evaluation, Dunker observed in part that:

"Danny performs his job duties in an average manner. His quality is slightly above average, but Dan requires a lot of reinforcement when assigned to a job by himself. He has performed some work in the other two fields that make up the 6B20 class, but he prefers millwright type assignments. With all the upcoming machine moves, Danny will be required to utilize all of the skills of a 6B20. [H]e does not exhibit good initiative [or] very good self confidence."

5. At some point in 1995, Dunker left Building B while Complainant continued to work in Building B until June 2, 1997. During much of 1996 and through June 2, 1997, Building B stopped its production function, and Complainant and other 6B20s assigned to Building B were required to remove all the machines and empty the building.

6. On June 2, 1997, Complainant transferred into Building DD. At the time of this transfer, John Dunker again became Complainant's supervisor. However, unlike

Building B, Building DD had active production taking place such that Complainant was expected to take safety-related repair tickets, as well as tickets that responded to complaints that a machine in active production was down and needed prompt attention.

7. At all times between June 2, 1997 and March of 1998, Dunker typically gave Complainant and other 6B20 repairmen assignments at the start of their shift. After the first assignment was done, Complainant and other 6B20s were permitted to select projects that they wanted to work on unless Dunker had given them another assignment. Throughout this time frame, Respondent's management expected that, when making a selection for the next job, the 6B20 repairmen would take safety-related projects first, then projects that concerned machines on the assembly line, and then projects that concerned machines which were not involved in production.

8. On June 27, 1997, Dunker gave Complainant his first evaluation while Complainant worked in Building DD. In the evaluation, Dunker rated Complainant an overall rating of "effective", with Complainant receiving average ratings in 10 of 11 individual areas and below average in the area of initiative. In the remarks section Dunker observed that: "[Complainant's] lack of experience in this area tends to limit his initiative. As he gains experience and becomes familiar with the many different machines, his initiative will improve."

9. Between June and October of 1997, Complainant was involved in three incidents, which Dunker believed constituted poor job performance on the part of Complainant. The first incident, which occurred shortly after Complainant's transfer, was Dunker's observation that Complainant had to be re-instructed on the use of the ERS screen, which Dunker believed was something that all 6B20 repairmen should have known.

10. The second incident occurred on October 21, 1997, when Complainant undertook a repair job in which he did not fix the problem without the help of another

6B20 repairman. Dunker believed that Complainant had wasted four to five hours before the job was completed.

11. The third incident also occurred on October 21, 1997, when Complainant signed off on a repair job that Complainant had claimed was completed. Another supervisor subsequently informed Dunker that Complainant did not make the proper repair, and that another 6B20 repairman had to correctly repair the problem.

12. At some point between June 2, 1997 and October 27, 1997, Complainant worked overtime on the second shift when the second shift supervisor, Wayne Theobald, instructed Complainant to replace a heat exchanger. Complainant eventually indicated to Theobald that he could not do the job. Theobald showed Complainant how to do the job and eventually assigned another 6B20 to assist Complainant after determining that Complainant was taking too long to complete the job. At some point thereafter Theobald observed Complainant merely assisting other 6B20s in completing a complicated repair job without attempting the more difficult aspects of the repair job.

13. At some point between June 2, 1997 and October 27, 1997, Theobald gave Dunker feedback about Complainant's inability to replace the heat exchanger and to perform the complicated repair mentioned in Finding of Fact No. 12. Theobald additionally told Dunker that in the future when it was Complainant's turn to work on Theobald's shift, Dunker should also assign another 6B20 repairman to assist Complainant. Theobald did not ask Dunker to assign another 6B20 repairman for any other 6B20 repairman scheduled to work on his shift.

14. On October 27, 1997, Dunker decided to demote Complainant to his previous 1Q14 position that Complainant had held prior to becoming a 6B20 repairman. The basis for this demotion was Dunker's belief that Complainant lacked troubleshooting skills and initiative to perform the duties of the 6B20 position.

15. Complainant thereafter filed a union grievance challenging his demotion. On January 5, 1998, Respondent agreed to reinstate Complainant to his 6B20 position for an approximate six-week trial period. In exchange for management's action, Complainant's union stated that if Complainant did not improve during his trial period, it would not accept another grievance from Complainant relating to his demotion.

16. For approximately seven weeks, Dunker monitored Complainant's job performance as a 6B20 repairman. During this time period, Dunker cited six instances in which Dunker believed that Complainant either did not know how to do a job or wasted time while processing a repair ticket. Dunker also noted one instance where Complainant took a ticket requiring him to do a relatively minor task of hanging corkboard while there were other more difficult tasks to be done.

17. On March 2, 1998, Dunker again demoted Complainant to the 1Q14 position based on his lack of troubleshooting skills and initiative. At that time Complainant was returned to the 1Q14 position. The other existing 6B20 repairmen on his shift absorbed Complainant's 6B20 job duties. Moreover, no one was hired or transferred to replace Complainant after his second demotion.

18. From March 1, 1997 to March 30, 1998, fifteen individuals including Complainant reported to Dunker as 6B20s. Of those employees, one employee was older and thirteen employees were younger, ranging from age 56 down to age 44.

19. Of the job performance evaluations contained in the record, no 6B20 had received as low of a rating as Complainant, and no 6B20 had received a less than average rating in the "initiative" category.

20. In his approximately 20-year experience as a supervisor, Dunker never demoted any 6B20 repairman other than Complainant. In his approximately 21 year experience as a supervisor, Theobald demoted only one 6B20 who was either 30 or 31 years old.

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. Respondent articulated a legitimate, non-discriminatory reason for its decision to demote Complainant to a 1Q14 position.
4. 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 of the Human Rights Act (775 ILCS 5/2-102) when it demoted him from his 6B20 repairman position to an 1Q14 position.

Discussion

In a case alleging 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 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 was a pretext for age discrimination.

Respondent initially argues that Complainant cannot establish a *prima facie* case of age discrimination since all of the other 6B20s employed by Respondent were over 40 years of age and in the protected age classification. However, the Commission in **Ray and Cima Electrical & Mine Services**, ___ Ill. HRC Rep. ___ (1992SA0130, September 11, 1995) rejected a similar argument made by the employer. There, the Commission recognized the theoretical possibility of establishing an age discrimination claim where both the complainant and the similarly situated employee were over 40 years old, but where the similarly situated employees were younger than the complainant. Here, the record shows that Complainant was the second oldest of fifteen 6B20s supervised by Dunker, and that younger 6B20s were allowed to remain in their positions. Accordingly, I find that Complainant's age discrimination claim cannot be rejected on this basis alone.

Moreover, the issue of whether Complainant established a *prima facie* case of age discrimination is really beside the point where, as here, Respondent has articulated a reason for its decision to demote him to a 1Q14 position. (See, **Phillips et al. and Walsh Construction Co.** 41 Ill. HRC Rep. 206, 210 and **U.S. Postal Service Board of Governors v. Aikens**, 103 S.Ct. 1478 (1983).) In this regard, Respondent contended at the public hearing that Complainant was demoted because, according to Dunker, Complainant lacked troubleshooting skills and initiative to adequately perform the 6B20 position. Inasmuch as this articulation provides me with a neutral, non-discriminatory reason for its treatment of Complainant, Complainant is only required to show by a preponderance of the evidence that the reason proffered by Respondent was not the

true reason underlying its decision to demote him to the 1Q14 position, and that Respondent's articulation was merely a pretext for age discrimination.

Typically, complainants attempt to establish pretext for unlawful discrimination either directly, by offering evidence that a discriminatory reason more likely motivated the respondent's actions, or indirectly, by showing that the respondent's explanations were not worthy of belief. (See, for example, **Vidal and St. Mary's Hospital of East St. Louis, Inc.**, ___ Ill. HRC Rep. ___, (1985SF0343, August 1, 1995).) In this regard, a complainant may discredit the respondent's justification for its adverse actions by demonstrating either that: (1) the proffered reasons had no basis in fact; (2) the proffered reasons did not actually motivate the decision; or (3) the proffered reasons were insufficient to motivate the decision. See, for example, **Grohs v. Gold Bond Products**, 859 F.2d 1283 (7th Cir. 1988).

Admittedly, Complainant's task in establishing pretext in this case has been rendered more difficult since his counsel has failed to file a brief on the issue. In examining Complainant's testimony, though, it appears that Complainant is arguing that his demotion was discriminatory because: (1) in his opinion, he was doing as much as any other 6B20 repairman; and (2) some unspecified 6B20 repairmen were "probably" not performing satisfactorily. (Vol. 1 Tr. at p. 51.) Under certain circumstances, disparities in job performance can provide evidence of pretext where the employer articulates poor job performance as the reason why the complainant suffered an adverse act. However, Complainant gives me no specific names of co-workers whom he believes performed at or below his level, and thus I cannot make the exacting comparison of work records seemingly required by the Commission in **Vidal** to establish pretext for age discrimination.

In any event, a review of the job performance evaluations of Complainant's co-workers contained in the record does not support his contention that he was performing

at a level equal to or superior than his 6B20 co-workers. Specifically, none of the other 6B20 repairmen had received as low of a ranking as Complainant in the areas of troubleshooting skills and initiative. Moreover, Complainant did not offer any objective evidence with respect to his productivity to support his claim that he was doing as much as the other 6B20 repairmen. Indeed, Complainant did not directly refute Dunker's testimony that Complainant took easier job assignments when given an opportunity to demonstrate his 6B20 job skills.

Finally, Complainant's counsel argued during the public hearing that Complainant was the victim of some sort of program created by Respondent to rid the workplace of individuals who, like Complainant, had attained 30 years of service with the company and was therefore able to retire with full benefits. Complainant, though, does not provide any documentary support for this contention, and I would note that Complainant's demotion constituted the only time in Dunker's 20 years of experience as a supervisor where he demoted an employee from his 6B20 position. As such, I reject Complainant's suggestion that he was the victim a vast "conspiracy" based on ageism to rid the workplace of older workers. In short, Complainant loses because he could not provide any objective evidence indicating that specific younger co-workers performing at or below his level were permitted to retain their 6B20 jobs.

Recommendation

For all of the above reasons, it is recommended that the Complaint and the underlying Charge of Discrimination of Danny L. Conn be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

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

ENTERED THE 13TH DAY OF FEBRUARY, 2003

