Maine Human Rights Commission

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INVESTIGATOR'S REPORT
E17-0267-A, -B
May 10, 2019

Ernest Michael Ballesteros (Glenburn)

v.

ALCOM, LLC (Winslow)
&
Hudson Ferry Capital, LLC (New York, NY)[1]

Summary of Case:

Complainant, who was plant manager for Respondent, a trailer manufacturer, alleged that he was subjected to unlawful discrimination based on age when he was discharged. Respondent denied discrimination and stated that Complainant was discharged due to poor performance. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties and holding a Fact Finding Conference. Based upon this information, the Investigator recommends a finding that there are reasonable grounds to believe Complainant was discriminated against on the basis of age.

Jurisdictional Data:

1) Dates of alleged discrimination: 1/26/2017.
2) Date complaint filed with the Maine Human Rights Commission ("Commission"): 6/14/2017.

[1] Complainant alleged that both Respondents were his employer because they were an integrated enterprise. Although the Law Court has not yet decided whether to adopt it, the "integrated enterprise" test has often been adopted or employed by federal courts to determine whether multiple entities operate as a single employer for purposes of liability under federal anti-discrimination laws. *See Batchelder v. Realty Res. Hospitality, LLC*, 2007 ME 17, ¶¶ 8, 11 (collecting cases). Pursuant to the "integrated enterprise" test, two entities may be treated as one employer after examining four factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *See Romano v. U-Haul International*, 233 F.3d 655, 662 (1st Cir. 2000). The test should be applied flexibly, with a focus on control of labor relations, and it is not necessary that all four factors be present to establish an "integrated enterprise." *Torres-Negron v. Merck & Company, Inc.*, 488 F.3d 34, 42 (1st Cir. 2007). The focus is "on employment decisions, but only to the extent that [a respondent] exerts an amount of participation that is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions." *Romano*, 233 F.3d at 666. In this case, the record suggests that the two named Respondents should be considered an "integrated enterprise" for purposes of liability here. However, since resolution of the integrated enterprise issue is not necessary to the underlying claim of discrimination, it will not be analyzed further in this report. For ease of reference, both listed Respondents will be referred to collectively as "Respondent" throughout this report.

3) Respondents are subject to the Maine Human Rights Act ("MHRA"), Age Discrimination in Employment Act ("ADEA"), and state and federal employment regulations.

4) Complainant is represented by Frank T. McGuire, Esq. Respondent is represented by Robert W. Kline, Esq.

IV. Development of Facts:

1) Complainant provided the following in support of his claims:

Complainant, who was 52 years of age, received only positive feedback during his 14 months as plant manager. He received no discipline or warnings and never received a negative performance review. He received a bonus just a few months before he was discharged without warning or explanation. Another older employee[2] at that plant was discharged the same day.[3] Complainant was offered a severance agreement and given three weeks to consider the offer. The agreement advised him to consult an attorney, who contacted Respondent to request a copy of Complainant's personnel file and reasons for his discharge. Complainant was also concerned that the agreement required him to waive his end of year performance bonus that had not yet been determined. In response to Complainant's attorney's request, Respondent's attorney revoked almost all of the time that Complainant had to consider the agreement and demanded an answer by the following day. This forced Complainant to choose between either abandoning rights guaranteed to him under the ADEA or refuse to sign and give up severance pay. The offer was withdrawn when he did not accept by the deadline. Complainant and the older CEO who was discharged were both replaced in their positions by individuals who were in their mid-30s. The explanations Respondent provided by for why Complainant was discharged are untrue and inconsistent.

2) Respondent provided the following in support of its position:

Complainant's age complaint is groundless. It springs from his remorse in engaging legal counsel to negotiate a severance package beyond the graciously extended offer. The offer was withdrawn due to the belligerent approach of Complainant's counsel. Complainant was discharged only a year after he hired so his age could not have been a factor. The "same actor inference"[4] applies in this case because he was hired and fired by the same individual, the Chief Operating Officer ("COO"). There is also a higher standard of proof for age discrimination case.[5] Complainant received weekly reports from the company's Chief Financial Officer ("CFO") that contained key metrics of the plant's performance, in addition to full monthly financial reports. These reports reflected that output per hour had gone down by nearly a third during Complainant's tenure as plant manager. He also abandoned a "supervisor's scorecard"[6] without authorization, a communication tool designed to help him (as plant manager) guide his supervisors and gauge their performance. The month preceding Complainant's discharge, he missed his production budget

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[2] The Chief Executive Officer ("CEO"), who was in his mid-60s.

[3] Complainant also alleged that two older human resources managers, one in his mid-60s, the other age 50, were discharged within two months of Complainant's discharge.

[4] The same actor legal inference provides that if the hirer and the firer are the same individual, and the termination of employment occurs over a relatively short period of time, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.

[5] While federal case law has provided that cases under the ADEA must establish that age was a "but for" cause, as opposed to simply being a "motivating factor," the higher standard is not required under the MHRA age cases.

[6] Complainant claimed that the scorecard card was eliminated with the full knowledge and authorization from his direct supervisors, CEO and CFO.

by almost one million dollars.[7] After Complainant was replaced, the output per hour was restored to restored to its expected range, showing that goal was attainable. Warranty expense as it pertains to production quality was also three times higher than budget. Complainant also failed to control the cost of production, overhead, production to meet demand, employee turnover,[8] and product quality. Management[9] concluded that Complainant did not have the skill set to meet expectations in the position, which led to his discharge.

3) The Investigator made the following findings of fact:

a) Respondent manufactures several lines and many models of aluminum trailers for various vehicles. It has plants in Winslow Maine, Sioux Falls (South Dakota) and Bonner (Montana). The Maine plant was responsible for approximately 50% of Respondent's overall production, the Montana plant for approximately 35%, and the South Dakota plant for 15%.

b) Complainant had no prior experience managing a manufacturing plant, but he had held the position of dean at a community college, as well as working as trainer to help businesses improve and streamline production. Neither of those positions required him to review production metrics as were used in his position as plant manager for Respondent.

c) Respondent ALCOM was founded by an individual and his son. In 2012, a majority interest in that company was acquired by Respondent Hudson Ferry Capital, a private equity firm, two members of which serve on Respondent ALCOM'S Board of Directors. The original owner and his son maintained a minority interest in ALCOM. Three other members of ALCOM management also maintained small equity ownership positions, including COO and CFO.

d) Complainant was hired by COO in October 2015. In 2016, the former CEO was replaced by the older CEO who was later discharged the same day as Complainant. Complainant was supervised by and reported to both COO and CEO.

e) Complainant received no discipline of formal performance evaluations while employed. Respondent claimed that Complainant should nevertheless have been aware that his performance was not meeting expectations based upon the weekly reports from CFO that highlighted the key performance metrics for each of the company's three plants. Respondent claimed that Complainant should have been aware he was underperforming based upon the full monthly financial reports that were provided to him.

f) On or about 10/5/2018, Complainant was allegedly taken to lunch by COO to celebrate Complainant's one year anniversary with the company. Complainant's yearly salary was increased by $10,000, and his bonus potential for that year was increased from $10,000 to $20,000. On 10/4/2016, COO emailed Complainant and wrote, "Congrats on the anniversary! You have been a great addition to the team! Keep up the great work Mike. We appreciate you." Respondent disputed that the pay raise was performance based and claimed that the increase was simply to bring Complainant's yearly salary in line with other plant managers.

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[7] Respondent claimed that missing that month's production budget by $995,000 indicated that the Maine plant was operating at only 72% to budget. Respondent additionally claimed that labor costs were 26% off when compared to budget, which resulted in lost earnings of 4.69%, when compared to budget.

[8] Complainant claimed that worker turnover was higher before he took over as plant manager at that location.

[9] Respondent provided that the decision to discharge Complainant was made by the Respondent ALCOM'S Board of Directors, and then carried out and communicated by COO.

g) On or about 12/22/2016, Complainant, COO, and CFO, went to lunch together. Complainant claimed that the event was to celebrate the improvements and successes at the Maine plant that year. CFO disputed this at the FFC, claiming that he expressly told Complainant when they went out that he did not wish to discuss work while they were out.

h) On 12/26/2016, CFO telephoned Complainant to inform him that his employment had been terminated. Complainant allegedly asked CFO if he knew the reasons for the discharge decision. CFO stated at the FFC that he had been notified (by a member of the Board of Directors) earlier that day that Complainant and CEO were being discharged, but that no reason was provided. CFO also stated at the FFC that he was not involved in the discharge decision and was only notified of it after it had been made. CFO further provided at the FFC that, while no explanation for Complainant's (and CEO's) discharge was provided to him (CFO), it should have been apparent based upon the financial "trends" that were reflected in the weekly and monthly reports that CFO provided to Complainant and CEO.

i) On or about 1/6/2017, Complainant received a Separation Agreement and General Release from Respondent. The document specifically advised Complainant to consult with an attorney before signing the agreement, and that he would have at least 21 days from its receipt to consider the proposal.[10] That deadline meant that Complainant had until January 27, 2017 to accept or decline Respondent's offer

j) On 1/18/2017, Complainant's attorney wrote a letter ("Exhibit A") to Respondent to request a copy of Complainant's personnel file, and to request the specific reasons for his termination from employment. In response, on the following day, 1/19/2017, Respondent's attorney wrote to Complainant's attorney to inform him that the time to consider the severance offer had been shortened from January 27th, 2019, to 5:00 P.M. the following day, 1/20/2017. Respondent's attorney further wrote that if the offer was declined, they would use the severance money to "vigorously defend any claim that may be brought."

k) Complainant declined to accept Respondent's offer by the truncated deadline. On 1/23/2017, Complainant's attorney was notified that Complainant had earned a bonus of $4,200 for 2016, based upon him achieving goals in two specifically measured areas.

l) Respondent provided no explanation to Complainant for his discharge when he was informed of the decision. In response to Complainant's attorney's written request for the reason(s) behind the decision, Respondent's attorney wrote that the information contained in ALCOM'S weekly internal reports, "...provides adequate rational for [Complainant's] termination." In a subsequent letter from Respondent's current attorney, additional reasons cited included, "failing to meet the metrics for which he was responsible as plant manager beginning October 2015. He was separated for failure to control cost of production, output per hour, overhead, production to meet demand, employee turnover and product quality." In Respondent's answer to Complainant's Commission complaint. Respondent also asserted that the discharge decision was also based upon Complainant not managing the flow of three lines of production through his supervisors, and that Complainant had abandoned a supervisor scorecard that had been developed as a tool to gauge production and communicate with supervisors.

m) Complainant asserted that the plant metrics submitted by Respondent were, "cherry picked negative information, and omitted all positive information, including all comparative information for the three plants." Complainant also noted that plants comparisons are relevant because the other two, younger, plant managers were not discharged despite their plants performing more poorly than Complainant's.

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[10] The federal Older Workers' Benefit Protection Act requires a 21-day consideration period and a seven-day revocation period in order for a release of age discrimination claims under the ADEA to be effective.

Complainant claimed that, from the January through November 2016, the Maine plant was budgeted to produce 50% of the company's gross profit, it actually produced 53.42%. Complainant claimed that during the same period, the South Dakota produced only 10.38% out of the 15% gross profit that had been targeted, yet its plant manager (mid-30s) was not discharged. Complainant also claimed that the Maine plant also had the highest output per production worker of the three plants during that time frame. Complainant further alleged that a three-plant comparison reflects that Maine was the highest performer of the three in total manufacturing overhead, total delivery expense, total cost of goods sold, gross profit (year to date), and that Maine was the second of three in the following categories: total direct material; total direct labor; selling, general and administrative expense (administrative costs for sales); and earnings before interest, taxes, depreciation, and amortization.

V. Analysis:

1) The MHRA provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 Maine Revised Statutes ("M.R.S.") § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

2) The MHRA provides, in part, as follows: "It is unlawful employment discrimination, in violation of this Act . . . for any employer to . . . because of . . . age. . . discriminate with respect to . . . hire, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment. . . ." 5 M.R.S. § 4572(1) (A).

3) Complainant alleged that he was discharged because of his age, including that he and other older employees were discharged on or around the same time. Respondent denied discrimination and stated that Complainant's employment was terminated due to his poor performance.

4) Because there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).

5) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) he performed her job satisfactorily, (2) his employer took an adverse employment decision against her, (3) his employer continued to have his duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).

6) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. *See Doyle v. Dept. of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus,

Complainant can meet his overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

7) In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.

8) In this case, Complainant has established a prima-facie case in that: (1) he belonged to a protected class (age); (2) he performed her job satisfactorily in that he was qualified for the position and was not counseled or reprimanded during his employment; (3) Respondent took an adverse employment decision against him by terminating his employment; and 4) the individual who took over Complainant's job duties, was a substantially different age than Complainant.

9) The Respondent articulated legitimate nondiscriminatory reasons for its employment action, specifically that his performance was unsatisfactory, including that he was not meeting targeted goals in key performance metrics such as production against budget, production efficiency, output per manhour, crew size, and warranty percentage.

10) Complainant has established that it is at least as likely as not -- the Commission's "reasonable grounds" standard -- that his employment was terminated because of his age, with reasoning as follows:

a) The record supports Complainant's claim that he received very little direct feedback from his supervisors that his job might be in in jeopardy prior to his discharge. Respondent did not dispute this but claimed that the data contained on the weekly and monthly reports should have made Complainant aware that he was not meeting targeted goals in a number of metrics.
b) However, both parties have submitted objective evidence (presumed to be accurate) demonstrating that while Complainant failed to meet budgeted objectives in certain measured areas, he met or exceeded the performance of the other two plants in others. Complainant's personnel file is devoid of any type of warning, discipline, or evaluation regarding his alleged underperformance. This casts doubt upon whether these were genuine concerns or after the fact justifications for the discharge after Complainant's legal counsel formally requested the reasons for his discharge. Respondent has also been unwilling or unable to produce *any* written documentation (letters, emails, notes, memos to the file, etc.) that any performance concerns about Complainant were ever discussed by upper management. The fact that Complainant received a yearly salary raise of $10, 000 just a few months prior to his discharge, as well as end-of-the-year bonus for meeting certain performance goals also belies the claim that he was performing poorly in his position.
c) There was also additional evidence of discrimination in this case that suggests Complainant's age may have been a factor in his discharge. There is no dispute that the CEO of the company, who was in his 60s, was discharged the same day as Complainant, purportedly for the same reason, failing to meet budgetary goals. It is also undisputed that both individuals were replaced in their position by men in their mid-30s. Circumstantial evidence also includes that two older employees who worked in Human Resources were also discharged in or around the time that Complainant and CEO were discharged.
d) Respondent's credibility is also questioned in this case. Although Respondent's answer to the Commission complaint alleged that Complainant's abandonment of the "supervisor scorecard" was a factor in his discharge, at the FFC, CFO denied that this could have been a factor since the Board of Directors would not have been aware of the use of the scorecard or its abandonment. In fact, at the FFC Respondent's attorney asserted that he had been the one who decided to include that reason as a factor in Complainant's discharge.

e) Lastly, although not necessarily determinative that age discrimination took place in this case, Respondent's attorney's decision to shorten Complainant's time to consider the severance offer from 10 days to 24 hours certainly suggests that Respondent was highly concerned with Complainant's attorney's attempt to gather information additional information about the basis for the discharge. Despite Respondent's characterization of the letter as "belligerent," and an attempt to, "…negotiate a severance package beyond the graciously extended offer," is disproven by the letter itself. It contains no language that can reasonably be characterized in any way as "belligerent," and no attempt to renegotiate the terms of the severance amount is contained in the letter. In this case, it appears that Complainant was given the option of either accepting the severance offer without full information regarding the reasons for his discharge or receiving that information and forgoing the severance. If Respondent was confident that its basis for Complainant's discharged was justified, it would seeming have little reason to withhold the rationale for that decision, nor be motivated to drastically shorten the time Complainant had to consider the time to consider the offer mandated by the ADEA from 21 days to 24 hours.

11) Age discrimination is found in this case.

VI. Recommendations

Based upon the information contained herein, the following recommendation is made to the Maine Human Rights Commission:

There are **REASONABLE GROUNDS** to believe that ALCOM, LLC and Hudson Ferry Capital, LLC , discriminated against Ernest Michael Ballesteros on the basis of age, and conciliation of the complaint should be attempted in keeping with 5 M.R.S. § 4612(3).

Robert D. Beauchesne
MHRC Investigator