



Maine Human Rights Commission
51 State House Station | Augusta ME 04333-0051

Physical location: 19 Union Street, Augusta ME 04330
Phone (207) 624-6290 ■ Fax (207) 624-8729 ■ TTY: 1-888-557-6690
www.maine.gov/mhrc

Amy M. Sneirson
Executive Director

John P. Gause
Commission Counsel

INVESTIGATOR'S REPORT
E11-0700

January 28, 2013

██████████ (Lewiston)

v.

██████████ (Auburn)

I. Complainant's Charge:

Complainant ██████████ (hereinafter, "Complainant" or "██████████" alleged that Respondent ██████████ (hereinafter "Respondent" or "██████████" discriminated against him on the basis of age by making an unlawful inquiry about his date of birth on its application form and failing to hire him for any position because of his age (59 years old).

II. Respondent's Answer:

Respondent stated that it had to slow down hiring due to financial conditions; the positions available when Complainant applied have not been filled.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: September 26, 2011; mid-October 2011.
- 2) Date complaint filed with the Maine Human Rights Commission: November 29, 2011.
- 3) Respondent is subject to the Maine Human Rights Act and the Age Discrimination in Employment Act as well as state and federal employment regulations.
- 4) The parties are not represented by counsel.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties, interview with Complainant. Based on this review, this complaint has been identified for a brief Investigator's Report, which summarizes the allegations and denials in relationship to the applicable law but does not fully explore the factual issues presented. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of reasonable grounds or no reasonable grounds in this case.

IV. Development of Facts:

- 1) The parties and issues in this case are as follows:

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- a) Complainant [REDACTED] was born on October 22, 1952. He was 58 or 59 years old at the time of these events.
 - b) Respondent [REDACTED] is a brick manufacturer with facilities in Auburn and Brewer, Maine.
 - c) Complainant alleged that Respondent discriminated against him on the basis of age by making an unlawful inquiry about his date of birth on its application form and by failing to hire him for any position because of his age (59 years old). Respondent stated that it had to slow down hiring due to financial conditions; the positions available when Complainant applied have not been filled.
- 2) Documents provided by Respondent include:
- a) Advertisement (start date June 29, 2011, end date July 12, 2011):
“ [REDACTED] is accepting applications for the following positions:
Laborers – First shift
Industrial Maintenance Mechanic – Second shift
Pre-employment drug testing required.
Benefits Available
Apply at Office...
EOE”
 - b) [REDACTED] application for employment dated September 26, 2011:
...
Position applied for: Any.
...
Date of Birth: Oct. 22, 1952.
...
Desired Salary/Hourly Rate: Going rate.
...Type of employment desired: Full-time Part-time (specify hours) Days.
...
- 3) Complainant provides the following:
- a) He was interviewed on October 11, 2011. He was given the impression that he was selected for employment on the day shift. The employer indicated that they would call him later to finalize the starting date and pay rate.
 - b) [REDACTED] called to check on the status of his application but was put off and not really given any answer.
 - c) He believes he was not hired because Respondent asked for his date of birth on the application and because he was qualified but not hired.
- 4) The Plant Manager for [REDACTED] provided the following:

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- a) [REDACTED] application was reviewed and he was considered as a possible candidate for a night maintenance position they were thinking about filling. A background check was completed and the results were acceptable.
 - b) [REDACTED] was interviewed by telephone, then invited to an in-person interview in mid-October 2011. [REDACTED] said he was looking for a job to supplement his retirement income. Plant Manger told [REDACTED] that they were considering filling two night maintenance positions. [REDACTED] said he would like to time discuss the position with his wife and would get back to Plant Manager.
 - c) Plant Manager spoke to [REDACTED] about a week later by telephone. [REDACTED] said he was interested in the position and he was asked to come in for a second interview. [REDACTED] said the proposed position and schedule were acceptable. He was interviewed by the Maintenance Supervisor and several plant supervisors and he did well in all areas. He was told he was one of the primary people they were considering and that they would get back to him.
 - d) After these interviews, [REDACTED] decided that a shutdown was required due to the size of their inventory of finished goods and slowing sales. They decided not to fill the positions at that time due to the pending shutdown.
 - e) [REDACTED] called, and Plant Manager told him that he was the primary candidate for the position but they could not fill the position at the present time. [REDACTED] was told he would be given a call when the position was going to be filled.
 - f) A roster submitted by [REDACTED] shows that 29 employees were laid off between December 29, 2011 and January 4, 2012. They ranged in age from 19 to 62 years old.
- 5) Respondent provided rosters of employees in the Auburn and Brewer facilities with names, dates of birth, and dates of hire. The rosters show:
- a) In 2010 and 2011, [REDACTED] employed eleven people who are as old as Complainant or older. The same eleven people were employed in 2011 as in 2010.
 - b) In 2010 and 2011, the same 86 people worked for the company. The average age of employees in 2010 was 35.27 years old and in 2011, the average age had risen to 36.27.
 - c) In the recent past, [REDACTED] has hired:
 - Driver, 54 years old (2010).
 - Laborer, 53 years old (2010).
 - Forklift Operator, 57 years old (2009).
 - Samples employee, 54 years old (2007).
 - Controller, 53 years old (2007).
 - Plant Manager, 55 years old (2006).

V. Analysis:

- 1) The Maine Human Rights Act ("MHRA") provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine

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whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 M.R.S.A. § 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 also provides that it is unlawful employment discrimination to fail or refuse to hire any applicant for employment because of age. 5 M.R.S.A. § 4572(1)(A).
- 3) The MHRA further provides that it is unlawful for any employer, prior to employment, to use any form of application for employment containing questions or entries directly or indirectly pertaining to age. 5 M.R.S.A. § 4572(1)(D)(3).
- 4) Here, Complainant alleged that Respondent discriminated against him on the basis of age by making an unlawful inquiry about his date of birth on its application form and failing to hire him for any position because of his age (59 years old). Respondent stated that it had to slow down hiring due to financial conditions; the positions available when Complainant applied have not been filled.

Application Form

- 5) The investigation confirmed that [REDACTED] used an application form that violates the MHRA by asking applicants to report their date of birth, an unlawful inquiry that directly pertains to age.

Failure to Hire

- 6) Because there is no direct evidence of age 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).
- 7) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that (1) he applied for and (2) met the minimum objective qualifications for the job sought, (3) he was rejected, and (4) the person hired was of a substantially different age than him. *City of Auburn*, 408 A.2d at 1263; *Maine Human Rights Com. v. Kennebec Water Power Co.*, 468 A.2d 307, 309 (Me. 1983). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).
- 8) 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. Department 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.

- 9) 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.
- 10) Here, Complainant belongs to a protected class (age/59 years old) and it is undisputed that he was qualified for the position he sought.¹ It is also true that Complainant was "rejected" in that he was not hired or given a start date for employment.
- 11) However, Complainant did not establish that Respondent hired a person who was substantially younger than him for the position. The rosters submitted by Respondent show that as of January 1, 2011, no one was employed by the company who was not already employed by the company in January 2010.

Conclusions

- 12) Respondent used an application form that contains an unlawful inquiry based on age, which affected Complainant when he applied for employment with Respondent in September 2011.
- 13) There is insufficient evidence to establish that Respondent failed or refused to hire Complainant because of his age.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

1. There are **Reasonable Grounds** to believe that Respondent made an unlawful pre-employment inquiry about Complainant's age;
2. Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).
3. There are **No Reasonable Grounds** to believe that Respondent failed to hire Complainant because of his age;
4. That portion of the complaint should be dismissed in accordance with 5 M.R.S.A. § 4612(2).



Amy M. Sneirson, Executive Director



Barbara Lelli, Chief Investigator

¹ The parties disagree about the schedule [REDACTED] was going to work, but there was no dispute that he was qualified for a position that was available when he applied and was interviewed.