

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

ROBERT W. BAUM,

Complainant,

v.

MILLBROOK KITCHENS INC.,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10110166

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on January 8, 2009, by Edward Luban, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER").** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **MAY 04 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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**ROBERT W. BAUM,**

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**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10110166**

**SUMMARY**

Complainant alleged that Respondent unlawfully denied him sales leads and terminated his employment because of his age and his sex. Complainant failed to sustain his burden of proof. Therefore, the complaint should be dismissed.

**PROCEEDINGS IN THE CASE**

On February 9, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Christine Marbach Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on July 21-22, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Christopher W. Meyer, Esq.

Permission to file post-hearing briefs was granted. Respondent submitted a brief.

After the hearing and receipt of post-hearing submissions, the case was reassigned to Edward Luban, another ALJ of the Division.

#### **FINDINGS OF FACT**

1. Complainant is male and was born on October 5, 1929. Complainant was 76 years old when he last worked for Respondent. (Tr. 10, 41)

2. Respondent designs and sells custom kitchen cabinetry manufactured by Millbrook Millwork. Joseph Hochberg owns both Respondent and Millbrook Millwork. Cynthia Gallant, Hochberg’s daughter, is Respondent’s showroom and retail manager. Cynthia Gallant’s husband, Michael Gallant<sup>1</sup>, is employed by Millbrook Millwork and advises Respondent on financial issues. (Tr. 21, 23, 180-81, 231, 316)

3. Complainant has been a kitchen designer for approximately 40 years. He has been a Certified Kitchen Designer since 1972. (Tr. 13-14; Complainant’s Exh. 1,3)

4. Complainant was employed by Respondent as a designer from 1975 to December 2005. (Tr. 10)

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<sup>1</sup> To avoid confusion, Cynthia Gallant is referred to by her full name and Michael Gallant is referred to as “Gallant.”

5. Between 2003 and 2005, Respondent also employed Robyn Keeler, Bob Hochberg, Desiree Kelleher, Denise Fix, and Joe Thorne as designers. Keeler, Kelleher, and Fix are females who were 44, 36, and 31 years of age, respectively, in December 2005. Bob Hochberg and Thorne are males who were 37 and 65 years of age, respectively, in December 2005. Joe Hochberg and Mary Hochberg, his wife, also designed several kitchens a year for family and friends, but they did not take any money for design work. (Tr. 40-46, 283-92, 294-95, 300-02)

6. Complainant was paid on commission. (Tr. 33, 317) However, he took a regular weekly draw against his commission account. (Tr. 317-18)

7. Keeler also received a regular weekly payment. The other designers were on straight commission. (Tr. 42-43, 58-59, 153, 358-59)

8. Since 1993 or 1994, except while on maternity leave in 1995-96, Cynthia Gallant has been responsible for assigning sales leads ("leads") to Respondent's designers. (Tr. 237-38, 247-49)

9. Respondent distributes leads primarily by referrals, including previous customers and other requests for a specific designer. Respondent always assigns such leads to the designer who generates the lead, except for very rare occasions when the customer asks not to work with the designer. Designers are also expected to generate their own leads. (Tr. 47, 97, 238-40, 270, 271, 314-15, 342-44)

10. Respondent obtains substantial business from an annual home show in Albany. Respondent's designers staff its booth at the show. (Tr. 48-49, 52) Customers who meet a designer at the show are considered referral leads for that designer. (Tr. 95-97, 101, 253)

11. If there is no referral or no attachment to a particular designer, the lead is considered "open." (Tr. 241) Cynthia Gallant assigns open leads according to the type of job, the

customer's location, and whether the designer is full-time or part-time. Full-time designers get preference. (Tr. 241-44, 350)

12. Any designer can work any day of the week. If an open lead comes into the showroom, the designer who greets the customer is entitled to the lead. (Tr. 271-73, 296-98)

13. In or around 1996, Complainant cut back to working three days a week because he was receiving Social Security benefits. (Tr. 20, 92, 250)

14. Complainant worked the home show until approximately 1999, when he stopped for health reasons. (Tr. 51, 99-100) When he did so, he lost leads that came from the show except for specific referral leads. (Tr. 253)

15. Complainant knew that he could get more open leads by working additional time in the showroom. He declined to do so. (Tr. 296-98, 350)

16. Between 2003 and 2005, Complainant lost, on average, six leads a year because he was out of the office on vacation. (Tr. 304-05)

17. Respondent's sales declined from \$1,931,277 in 2004 to \$1,761,975 in 2005. (Tr. 308; Respondent's Exh. 6)

18. Complainant's own sales declined from \$140,902 in 2004 to \$72,636 in 2005. (Tr. 310-11; Respondent's Exh. 6, 7)

19. From 1996, when Cynthia Gallant returned from maternity leave, to 2001 or 2002, Complainant was a very good designer. He was diligent, thorough, and attentive to his customers. (Tr. 254)

20. However, beginning around 2001 or 2002, Respondent began getting complaints from Complainant's customers. Several customers complained that Complainant argued with them

about what they needed in their kitchens. Other customers said that Complainant did not return their phone calls. (Tr. 255-56, 274; Respondent's Exh. 5)

21. Between 2003 and 2005, Complainant had a significant number of errors in his work. His error rate was higher than those of Respondent's other designers. (Tr. 262-63)

22. In 2002 or 2003, Complainant worked on kitchens and bathrooms for 12-15 units in a resort in Lenox, Massachusetts. Because of Complainant's errors, the developer refused to consider Respondent for the project's next phase. (Tr. 37-38, 102-05, 263-70)

23. In 2004, Complainant's draw began to exceed the amount in his commission account. (Tr. 317) At the end of 2004, Complainant had a negative balance of \$1,742.22 in his commission account. (Respondent's Exh. 9)

24. In 2005, Complainant continued to take a draw every week. By December 2005, Complainant had a negative balance of \$10,107.97 in his commission account. (Tr. 330-31; Respondent's Exh. 9)

25. Keeler's commission account has never had a negative balance. (Tr. 358)

26. Cynthia Gallant spoke with Complainant several times about his account. Complainant always told her not to worry, that he was working on it. (Tr. 319-21)

27. Complainant was like a father to Cynthia Gallant. Because of their relationship, she was not comfortable discussing the problem with him. (Tr. 193-94, 266, 322) She asked her husband to speak with Complainant. (Tr. 193-94)

28. In October 2005, Gallant met with Complainant in Gallant's office. Gallant told Complainant his account was overdrawn, and he asked if Complainant had a plan to replenish the account. Complainant said he had some jobs in the pipeline. Gallant told Complainant he could continue to take a weekly draw. (Tr. 187-88, 323)

29. In early December 2005, Gallant met with Complainant again. Gallant said there had been problems with the jobs Complainant had mentioned in their October meeting and that Complainant was unlikely to get commissions on those jobs. Gallant told Complainant that because of these problems, Complainant would no longer be able to draw a weekly paycheck against his commission account. (Tr. 62, 189-90)

30. Complainant told Gallant that he could not sell jobs because he did not have leads. He asked if more leads were available. Gallant said that Respondent had no leads to give but that leads would be assigned as they became available. (Tr. 192-93)

31. Complainant felt Respondent had “in effect” terminated his employment because he believed he could not pay back his arrearage without new leads. (Tr. 63-64, 152)

32. Shortly after he met with Gallant, Complainant applied for unemployment insurance benefits (“UIB”). (Tr. 68, 140; Respondent’s Exh. 2) However, Complainant continued to come into his office. He still had active leads, and he was still working. (Tr. 196-97, 201-02, 326)

33. On December 19 or 20, 2005, Respondent received notice from the Department of Labor (“DOL”) of Complainant’s UIB claim. (Tr. 196; Respondent’s Exh. 2) Gallant asked Complainant to meet with him. Gallant told Complainant that he could not collect UIB and still work for Respondent. Complainant said, “Okay, if that’s the way you see it.” (Tr. 67, 201-03)

### OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee on the basis of age or sex. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that she is a member of a protected class, that he was qualified for his position, that he suffered an adverse employment

action, and that the adverse action occurred in circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 305, 786 N.Y.S. 2d 382, 390 (2004). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-discriminatory reason for its action. If Respondent does so, Complainant must show that the reasons Respondent has presented were merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Ferrante*, 90 N.Y. 2d at 630, 665 N.Y.S. 2d at 29.

Complainant alleged that Respondent discriminated against him because his leads declined after Cynthia Gallant became showroom manager and because his employment was effectively terminated. Cynthia Gallant became manager in 1993 or 1994, but Complainant did not file his complaint until February 9, 2006. A complaint under the Human Rights Law must be filed within one year after the alleged unlawful discriminatory practice. Human Rights Law §297 subd. 5. Therefore, to the extent Complainant alleges that his leads declined before February 9, 2005, his claim is time-barred.

Complainant is a member of a protected class, and he was qualified for his position, which he held for many years. Complainant failed to establish that he suffered an adverse employment action in circumstances giving rise to an inference of discrimination. Complainant did not prove that his leads declined because of his age or his sex. On the contrary, the proof shows that Respondent's business had declined, that Respondent did not have open leads to assign, that Complainant lost opportunities to receive open leads because he did not work the home show and spent only limited time in the showroom, and that Complainant's referral leads declined because of poor performance.

Complainant believed his employment was terminated when Gallant said that he could no longer continue to collect his weekly draw and that Respondent had no leads to assign him. However, Respondent did not terminate Complainant's employment until it learned that Complainant had applied for UIB. Complainant produced no evidence that Respondent's decision to discontinue his weekly draw was motivated by discrimination. Only one other designer, Keeler, received a weekly draw, and her account always had a positive balance. Moreover, it is undisputed that at the time Respondent stopped Complainant's draw, his commission account was more than \$10,000 in arrears. The arrears had increased substantially over the previous year, and Complainant had no prospects for sales to replenish his account.

Complainant did not sustain his burden of proof. Therefore, the complaint must be dismissed.

**ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint be and the same hereby is dismissed.

DATED: January 8, 2009  
Syracuse, New York



Edward Luban  
Administrative Law Judge