



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JOSEPH D. GANGEMI,

Complainant,

v.

NORTHERN AIR SYSTEMS, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10198741

Federal Charge No. 16GB901274

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 April 1, 2021, 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.


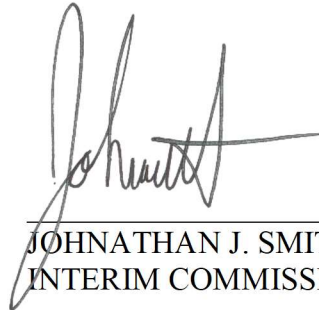
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE JOHNATHAN J. SMITH, INTERIM COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has 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: **June 3, 2021**
Bronx, New York



JOHNATHAN J. SMITH
INTERIM COMMISSIONER



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NORTHERN AIR SYSTEMS, INC.,

Respondent.

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

Case No. **10198741**

Federal Charge No. 16GB901274

SUMMARY

Complainant alleged that Respondent unlawfully terminated his employment because of his age. Because the evidence does not support Complainant's allegation, the complaint is dismissed.

PROCEEDINGS IN THE CASE

On December 27, 2018, 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 Edward Luban, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held virtually on November 9 and 10, 2020.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jeffrey Wicks, Esq. Respondent was represented by Kimberly K. Harding, Esq.

Permission to file post-hearing briefs was granted. Both parties timely filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant was born on September 24, 1948. (Tr. 109)
2. Respondent is a company in Rochester, New York that manufactures specialized air conditioning equipment for military, mobile medical, mobile broadcast, and aviation uses. (Tr. 109, 292)
3. Timothy Confer is Respondent’s president and “CEO.” (Tr. 257)
4. In April 2014, when Complainant was 65 years old, Confer hired him as Respondent’s sales manager. (Tr. 21-23, 109, 258)
5. At the time, Confer and Complainant had known each other for many years and were close friends. Confer was aware of Complainant’s age. (Tr. 20, 258)
6. Complainant was a member of Respondent’s executive team. (Tr. 24, 177)

7. In or around 2017, when Complainant was 68 or 69, Confer promoted him to vice-president of sales. Confer gave Complainant additional responsibilities and a \$10,000 annual salary increase. (Tr. 25-26, 57-58, 258-59)

8. Confer was aware of Complainant's age when he promoted him. (Tr. 258-59)

9. Complainant's sales performance during his employment was satisfactory. (Tr. 5)

10. Respondent contracts with "outside manufacturer's representatives," also called "outside sales representatives," to sell its products. These are not employees, but independent contractors. (Tr. 26-27, 109-110, 127)

11. Stanley Buczek has worked as an outside sales representative for Respondent since 2011 or 2012. (Tr. 194)

12. Buczek was approximately 65 to 67 years old when he began working for Respondent. He is now 75. (Tr. 194)

13. Buczek is Respondent's sales representative for Farber Specialties ("Farber"), a customer in Columbus, Ohio; Gerling Associates ("Gerling"), a customer near Columbus; and All Mobile Video ("All Mobile"), a customer in New York City and New Jersey.¹ (Tr. 44-46, 91-92, 103, 202, 204; Respondent's Exh. 1)

14. Robert Bates, who is 70 years old, worked as an outside manufacturer's representative for Respondent from 2012 to early 2020. Bates stopped working with Respondent because he felt Respondent's product was not priced competitively to sell. (Tr. 26, 127-29, 136)

15. It is not unusual for Respondent to reassign accounts between different sales representatives. Confer often asked Complainant to transfer accounts from some sales representatives, including Buczek, to others. (Tr. 201-02, 282-83)

¹ Farber is also identified as "Farber Associates" in the transcript. (Tr. 44)

16. At some point, Confer asked Complainant to shift two accounts from Buczek to Mike Hardesty, another sales representative.² (Tr. 163-64, 169, 288-89) I do not credit Complainant's testimony that Confer asked him to shift accounts from Buczek and Bates because of their age and "poor health." (Tr. 26-27) On cross-examination, Complainant acknowledged that he did not remember any details about those accounts, including which accounts Confer asked him to transfer, the sales representative(s) to whom he was to shift them, or how many accounts were involved. (Tr. 90) Buczek and Confer credibly testified that the reassignments had nothing to do with Buczek's age. (Tr. 198, 288-89)

17. On unspecified occasions when Complainant's wife was approximately 69 or 70 years old, Confer said that she was "a good-looking woman for someone of her age." (Tr. 28-29)

18. On another unspecified occasion, Confer made a statement to the effect that William Gutheim, Respondent's consulting engineer, was being more and more difficult because he was older. (Tr. 29, 182)

19. During a meeting in or around September 2018, Confer said Complainant was acting old. Confer then "lightheartedly" said, "I can't say that because my wife said that's discriminatory. But this is my company. And I can say what I want." (Tr. 29-30)

20. During Complainant's employment, employees were to make complaints about discrimination or harassment to Patricia Carr, Respondent's office manager. (Tr. 152)

21. Complainant never complained to Carr about age discrimination, inappropriate comments, or mistreatment. (Tr. 153)

22. In or around 2018, the relationship between Confer and Complainant deteriorated. Confer became angry when Complainant disagreed with him about a decision to do business

² Hardesty is also identified, incorrectly, as "Hardsey" in the transcript. (Tr. 288-89)

with a new customer and expressed his disagreement in a group email that included the new customer. Another new customer told Confer that Complainant had made sarcastic comments about him. (Tr. 165, 169-71, 259-60, 277, 279)

23. As their relationship deteriorated, Complainant and Confer spoke with each other much less often than they had before. (Tr. 165, 173, 178, 278)

24. Complainant had a company credit card (“company card”) during his employment with Respondent. The card was to be used for business, not personal expenses. (Tr. 32, 263)

25. In September 2018, James Groff began employment as Respondent’s chief financial officer. (Tr. 25, 214)

26. Groff noted deficiencies in Respondent’s controls, including records of employee credit card transactions. (Tr. 214-15, 235, 263)

27. Groff reviewed expenses reported for all employees who had company cards, including Complainant. (Tr. 215-16, 235-36, 253)

28. Groff found that Respondent was missing receipts and descriptions for credit card transactions from Complainant and other employees. He sent lists of transactions to those employees and requested the missing information. (Tr. 215-17, 236, 251-52, 263-64)

29. On November 1, 2018, Groff emailed Complainant a list of transactions for which Respondent had not received receipts. Groff asked Complainant to submit the requested receipts by November 9, 2018, with a description of the expense and business purpose and, for entertainment expenses, “the names and business relationship of the persons entertained” and the date, place, duration of and participants in “any business discussion that occurred directly before or after the entertainment.” (Respondent’s Exh. 2)

30. The following day, Complainant emailed Groff, “Any receipts I had I turned in . . . I do not have anything else.” (Tr. 217-18; Respondent’s Exh. 2)

31. Eventually, Groff asked Complainant to explain any charges over \$75. (Tr. 217-18)

32. Groff emailed Complainant a spreadsheet containing the date, description, and amount of each of Complainant’s credit card transactions from January 3, 2018, to October 11, 2018. The spreadsheet had two additional blank columns, one for the business purpose of the expense and the other for the names and business relationship of the persons entertained or with whom Complainant met. Groff asked Complainant to fill in those columns for all transactions over \$75. (Tr. 36, 49-51, 96, 223, 226, 237-38; Complainant’s Exh. 5)

33. On December 3, 2018, Complainant emailed Groff the completed spreadsheet. (Tr. 50-52, 97, 218-19, 221, 236-37; Complainant’s Exh. 5)

34. Groff reviewed the spreadsheet and found several charges he considered questionable, including charges of large amounts and charges incurred on weekends. (Tr. 226-29, 238, 247; Complainant’s Exh. 5)

February 16, 2018 Transaction

35. On February 16, 2018, the Friday before Presidents’ Day, Complainant charged a dinner at a restaurant in Columbus, Ohio to his company card in the amount of \$123.00. (Tr. 78; Complainant’s Exh. 5)

36. On the spreadsheet, Complainant entered “Gerling” and “Jennifer and Brandon,” referring to Jennifer Gerling and Brandon Robinson, in connection with the February 16, 2018, dinner. (Tr. 76)

37. Neither Jennifer Gerling nor Robinson was present at the dinner. (Tr. 76)

38. Jennifer Gerling and Robinson told Confer that they did not meet with Complainant that day and had never had dinner with him. (Tr. 269, 277, 289-91)

May 5-6, 2018 Transactions

39. Buczek learned that Complainant and his wife planned to be in New York City in May 2018. Buczek suggested that they all visit All Mobile's maintenance facility and field shop. (Tr. 195)

40. On May 5 and 6, 2018, a Saturday and Sunday, Complainant and his wife stayed at a hotel in Manhattan. Complainant paid for the hotel using his Hilton hotel points; he did not charge his company card. (Tr. 38, 70; Complainant's Exh. 3)

41. On May 5 and 6, 2018, Complainant charged dinner for himself and his wife to his company card in the amounts of \$157.83 and \$388.81, respectively. (Complainant's Exh. 5)

42. On the spreadsheet, Complainant entered "All Mobile Video" and "Stan and Lee," referring to Buczek and Lee Blanco, an All Mobile manager, in connection with both dinners. (Tr. 62, 66; Complainant's Exh. 5)

43. Neither Buczek nor Blanco attended either dinner. (Tr. 70, 196-97)

44. Groff found a post on Facebook with a photograph showing Complainant and his family in New York City that weekend. (Tr. 228, 243)

45. On Monday, May 7, 2018, Complainant, his wife, and Buczek visited two All Mobile facilities in New Jersey and had lunch with Blanco at a diner in Hackensack, New Jersey. Complainant charged the lunch to his company card. (Tr. 36-37, 67, 196, 200, 209-11); Complainant's Exh. 5)

August 4, 2018 Transaction

46. On August 4, 2018, a Saturday, Complainant and his wife had dinner at a restaurant in Manhattan. Complainant charged the dinner to his company card in the amount of \$406.97. (Tr. 34-35, 60; Complainant's Exh. 2)

47. On the spreadsheet, Complainant entered "All Mobile Video" and "Stan and Lee" in connection with the August 4, 2018, dinner. However, neither Buczek nor Blanco attended the dinner. Complainant did not meet with Buczek that weekend. (Tr. 61-62, 196)

48. Groff asked Complainant about the charge. Complainant said he had to meet with All Mobile that weekend because they could not meet during the week. Groff did not find this credible. (Tr. 230, 239-40)

49. Groff spoke with Buczek, Respondent's sales representative for All Mobile, who said that no meeting with All Mobile had occurred. (Tr. 241)

50. Complainant acknowledged at the public hearing that he did not inform Buczek of a visit to All Mobile that day. (Tr. 61, 94, 103-04; Complainant's Exh. 5)

51. I do not credit Complainant's testimony that he did not tell Buczek about his visit to All Mobile because Confer had directed him to develop his own relationship with All Mobile and other accounts "exclusive of" Buczek. (Tr. 28, 39, 93, 103) Earlier in the hearing, Complainant was unable to identify the accounts that were part of Confer's alleged directive. (Tr. 90) Buczek was Respondent's sales representative for All Mobile throughout Complainant's employment, and he remained so at the time of the hearing. (Tr. 93, 201)

52. The August 4, 2018, charge stood out to Confer, who knew Complainant was in New York with his family at that time. Confer also "had no idea why [Complainant] would be at All Mobile Video on a Saturday in New York City." Confer asked Buczek about that charge and

several others Complainant said related to All Mobile. Buczek said he did not have dinner with Complainant and Blanco in New York City. (Tr. 197, 264-65, 284-85, 287)

August 6, 2018 Transaction

53. On August 6, 2018, Complainant charged a stay at a Hampton Inn in Manhattan and an additional charge at the Hampton Inn to his company card in the amounts of \$253.14 and \$49.32, respectively.³ (Complainant's Exh. 5)

54. Groff noted that the Hampton Inn transactions did not match the description Complainant provided on the spreadsheet. Complainant indicated the transaction was related to a "US Chemical visit," but U.S. Chemical is located in North Carolina. (Tr. 64, 228-29, 248; Complainant's Exh. 5)

55. At the public hearing, Complainant acknowledged that U.S. Chemical had "no relationship" to the August 6, 2018, hotel stay. (Tr. 64, 66)

November 21, 2018 Transaction

56. Complainant's daughter, son-in-law, and grandchildren live in the Columbus area. On November 21, 2018, Complainant traveled to Ohio to visit his family for Thanksgiving. (Tr. 48; Respondent's Exh. 1, pp. 1-2)

57. That evening, Complainant charged a stay at a Hampton Inn in Columbus to his company card in the amount of \$145.92. (Tr. 42, 73; Complainant's Exh. 4)

58. On November 23, 2018, Complainant emailed the receipt for his stay to Jamie Brochu, Respondent's billing clerk, and wrote, "Log under sales visit to Farber." (Tr. 44, 118; Complainant's Exh. 4)

³ The Hampton Inn transactions also state "Ocean City, MD." Complainant was not in Ocean City at that time, and it is not clear why that location appears on the transactions. (Tr. 98-99; Complainant's Exh. 5)

59. Complainant did not meet with anyone from Farber or Gerling on November 21, 2018. (Tr. 46, 73)

60. I do not credit Complainant's testimony that on November 21, 2018, he visited the Farber parking lot, drove through the Gerling parking lot, and walked into and around the Gerling manufacturing facility unescorted. (T. 46-47, 79-81, 101-02) Confer credibly testified that Gerling's parking lot is fenced, with a gate, and that Complainant would have had no reason to drive around the lot. (Tr. 266-67) Buczek credibly testified that there would be no point to driving several hundred miles from Rochester to Ohio just to drive around either company's parking lot. (Tr. 208) I also find it implausible that Complainant could have walked into Gerling's building unannounced and walked through the building unescorted by Gerling personnel. (Tr. 209, 267)

61. On April 22, 2019, at a hearing on a claim for unemployment insurance benefits before an administrative law judge of the New York State Department of Labor, Complainant testified that he did not visit Farber on November 21, 2018. (Respondent's Exh. 1, p. 4)

62. Groff asked Patricia Carr, who was then Respondent's office manager, to prepare a record of Complainant's vacation requests from 2015 on and compare his vacation dates to the dates of his credit card transactions. (Tr. 144, 147-48, 157, 159; Respondent's Exh. 3)

63. Carr found that Complainant had incurred credit card charges on four days in 2017 and 2018 when he was on vacation, in violation of Respondent's standards of conduct. Carr reported her findings to Groff. (Tr. 150-51; Respondent's Exh. 3)

64. Groff asked Complainant if any of the expenses on his company card were personal. Complainant replied, "Absolutely not." (Tr. 108, 230, 250)

65. Nevertheless, Groff concluded that some of Complainant's charges were personal. Groff reported his findings to Confer. (Tr. 230, 254)

66. Groff did not conclude that any other employees had made unauthorized personal charges on their company cards or had been untruthful in their responses to his inquiries. (Tr. 252)

67. After reviewing Groff's findings and speaking with Buczek and Gerling personnel, Confer also concluded that Complainant had used his company credit card for personal use. Confer decided to terminate Complainant's employment. (Tr. 270)

68. On December 27, 2018, Respondent terminated Complainant's employment. (Tr. 154, 157; ALJ's Exhs. 1-2)

69. Complainant was 70 years old at the time. (Tr. 18)

70. Respondent's workforce averages around 100 employees. When Respondent terminated Complainant's employment, approximately 10-11 of these employees were over 60 years old, including one who was in his mid-70s. (Tr. 271)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discharge an employee because of his age. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he 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 under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997). 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 reason presented was merely a pretext for discrimination.

Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant, who was 70 years old when Respondent terminated his employment, is a member of a protected class based on his age. Complainant was qualified for his position as vice-president of sales, which he held for over one year and performed satisfactorily. Complainant suffered an adverse employment action on December 27, 2018, when Respondent terminated his employment. Around September 2018 and at several other unspecified times, Confer commented about Complainant's age and that of his wife and Gutheim. These circumstances give rise to an inference of unlawful discrimination, the burden of which has been described as "de minimis." *Schwaller v. Squire Sanders & Dempsey*, 249 A.D.2d 195, 196, 671 N.Y.S.2d 759, 761 (1st Dept. 1998). Therefore, Complainant has established a prima facie case of age discrimination.

However, Respondent has presented a legitimate, non-discriminatory reason for its decision to terminate Complainant's employment. After Groff reviewed the expenses for all employees who had company credit cards, he and Confer concluded that Complainant had charged personal expenses to his company card.

Complainant failed to show that Respondent's explanation was a pretext for unlawful discrimination. Groff did not single out Complainant for investigation of his credit card expenses. When Groff became chief financial officer, he found deficiencies in Respondent's controls, including records of employee credit card transactions. Groff reviewed expenses for all employees who had company cards, not just Complainant, and he asked all employees who were missing receipts and descriptions of their transactions to provide the missing receipts and information. When Complainant provided the requested information, Groff found several

charges that appeared questionable. After further investigation, Groff concluded that Complainant's explanations were not credible and that he had used his company card for personal expenses. After speaking with Buczek and several customers, Confer came to the same conclusion.

While Confer made several comments about age on unspecified occasions, Complainant has not shown that these stray remarks had any nexus to Respondent's decision to terminate his employment. *See Chiara v. Town of New Castle*, 126 A.D.3d 111, 124, 2 N.Y.S.3d 132, 142 (2d Dept. 2015). Moreover, "[a]s many courts have recognized, there is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes, Inc. v. State Div. of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). *See also Brennan v. Metropolitan Opera Assn.*, 284 A.D.2d 66, 71, 729 N.Y.S.2d 77, 83 (1st Dept. 2001). Confer hired Complainant in 2014, when Complainant was 65 years old. At the time, Confer had been friends with Complainant for many years, and he knew Complainant's age. Confer then promoted Complainant in 2017, when Complainant was 68 or 69. Having hired and promoted Complainant in those circumstances, it is implausible that in 2018, Confer would fire Complainant because of his age. Complainant has not shown that Respondent acted with discriminatory animus, treated other, similarly situated younger employees more favorably, or exhibited any other indicia of age-based discrimination.

The ultimate burden of persuasion lies at all times with Complainant to show that Respondent intentionally discriminated against him. *Bailey v. New York Westchester Square Med. Ctr.*, 38 A.D.3d 119, 123, 829 N.Y.S.2d 30, 34 (1st Dept. 2007). Complainant failed to meet this burden. Accordingly, 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: April 1, 2021
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge