



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JEFFREY L. HEATH,

Complainant,

v.

LIGHTING SERVICES INCORPORATED,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10136400

Federal Charge No. 16GA905986

PLEASE TAKE NOTICE that the attached is a true copy of the Amended Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 8, 2013, by Christine Marbach Kellett, 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.

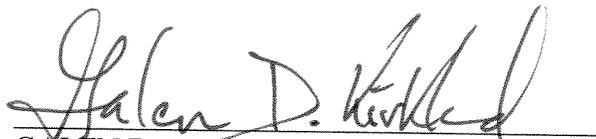
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: 2/22/2013
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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

Case No. **10136400**

SUMMARY

Complainant charged Respondent with illegal discrimination in employment on the basis of age in violation of the Human Rights Law when his employment was terminated. Complainant failed to meet his burden of proof and the complaint must be dismissed.

PROCEEDINGS IN THE CASE

On September 14, 2009, 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 B. Katherine Huang, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 3, 2011.

Complainant and Respondent appeared at the hearing. Complainant was represented by Bernard Weinreb, Esq. Respondent was represented by Mary A. Smith, Esq.

Permission to file post-hearing briefs was granted; briefs were timely received from counsel and have been duly considered.

On February 3, 2012, ALJ Huang issued a Recommended Order after Hearing. On March 13, 2012, the Commissioner by Matthew Menes, Adjudication Counsel, returned the recommended order to the Hearing Unit to issue an amended recommended order. (ALJ Exh.5)

The case was reassigned to Chief Administrative Law Judge Christine Marbach Kellett for issuance of the amended Recommended Order after Hearing.

FINDINGS OF FACT

1. Respondent Lighting Services Incorporated manufactures premium track fixtures and other lighting products. (Tr. 11, 17; Jt. Exh. 7)
2. Complainant was born on March 22, 1946. (Tr. 27; ALJ Exh.3)
3. From August 2007 through January 2008 Complainant served as a consultant with Ray Peterson and Associates (Peterson), a consulting firm, and worked as a “Manager of Advanced Manufacturing” for Respondent. (Tr. 103; Jt. Exh. 2) His duties included providing Respondent with services in safety techniques, and “lean manufacturing,” working with then plant manager Debbie Day, and subsequently when Day left in December 2007, serving as “interim production manager.” (Tr. 18-20, 104, 109, 114, 184Jt. Exhibits 1 and 2).

4. In the Fall of 2007, Respondent considered itself in trouble both financially and organizationally. By January 2008, Respondent ended its relationship with Ray Peterson, who had been collecting both a salary as Respondent's executive vice-president and consulting fees payable to his firm for services, including Complainant's consultant services. (Tr. 18, 21-23, 110-11, 178-80)

5. In January 2008, Respondent offered Complainant employment as its production manager, with a \$90,000 salary, an additional \$1000 per month "for expenses," and benefits such as health insurance. (Tr. 23-26, 56, 74-79, 83; Joint Exh. 5)

6. Complainant was then nearly 62 years of age. (Tr. 270)

7. Complainant's principal task was to continue the reorganization of the plant, implement lean manufacturing principles, find a replacement plant manager, improve production levels, and develop safety policies. (Tr. 11, 19-20, 27)

8. Respondent's Executive Vice-President Ken Kane (Kane) anticipated Complainant would provide continuity through what Kane viewed as a transition period of six to nine months while Respondent rebuilt its operations. (Tr. 189-190, 195-98)

9. Complainant accepted Respondent's offer, and acknowledged receipt of the employee handbook, which includes an equal employment opportunity statement. (Tr.123-24, Jt. Exh. 17)

10. Complainant was nearly 62 at the time of his employment with Respondent. (ALJ Exh. 4)

11. Consistent with Kane's expectations, Complainant continued with the reorganization of the plant, improving productivity, and assisted Respondent in its search for a new manufacturing manager. He interviewed applicants and provided feedback and recommendations regarding the candidates. (Tr. 40-43, 198; Jt. Exh. 6)

12. Complainant had functioned as the interim production manager position with Respondent while a consultant with Peterson and had continued in that position when he became a Respondent employee in January of 2008. (Tr. 113) He was fully aware that Respondent was looking for a production manager. (Tr. 113-114)

13. Complainant never applied for the production manager position. (Tr. 118) He did speak with Kane in April 2008 about possibly extending his own employment beyond its expected duration. (Tr. 32; Jt. Exh. 6) In April of 2008, Kane told him they were already making plans for his replacement. (Tr. 32-34; Jt. Exh. 6)

14. Complainant was looking for other work, and applying for other positions, including ones in Kentucky. (Jt. Exh. 6) Complainant's home was in Kentucky. (Tr. 89, 121; Jt. Exhibits 16 and 19) Even though he was looking for a permanent position, he never applied for the open production manager position at Respondent. (Tr. 118)

15. In May, 2008, Kane told Complainant he would possibly stay on for year, concentrating on reorganization of the plant and the implementation of the safety policies. (Tr. 37, 137-138; Jt. Exh. 6)

16. By August 2008 Complainant was very aware of Respondent's financial problems and even questioned how he could be kept on. (Tr. 134; Jt. Exh. 6) Creditors were not being paid. (Jt. Exh. 6)

17. Complainant was applying for positions elsewhere and in August interviewed in Louisville, Kentucky. (Jt. Exh. 6)

18. In August Respondent had offered the production manager position to a candidate recommended by Complainant, but who ultimately declined. (Joint Exh. 6) This candidate was

53 years of age. (Joint Exh. 5) Complainant was very aware of this offer and understood his own time with Respondent was limited. (Joint Exh. 6)

19. In September 2008, Respondent made an employment offer to Louis Gamboa (Gamboa) for its manufacturing manager position effective October 2, 2008, at a salary of \$82,000 annually plus insurance benefits. (Jt. Exh. 25)

20. Gamboa was 52 years of age at the time he was employed by Respondent. (Jt. Exh. 1)

21. Complainant however thought Gamboa was 45 based on his looks. (Tr. 44-45; ALJ Exh. 4) He viewed Gamboa as both much younger, with much less experience, and had not recommended him for the position. (Tr. 46, 48-49, 210; Jt. Exh. 6)

22. With Gamboa's employment, Kane expected Complainant to transition out of plant management duties, finalize the new safety program, and having met Kane's goals for Complainant's services, end employment with Respondent in two to three months. (Tr. 213-15)

23. In September, 2008, Complainant told Peterson he knew his employment was coming to an end and asked for his assistance in finding other consulting work. (Tr. 148; Jt. Exh. 6)

24. In October 2008 Respondent gave Complainant 90 days notice. (Jt. Exh. 6)

25. On December 5, 2008, Respondent advised Complainant his last day of work would be January 30, 2009. Tr. 149-150; Jt. Exh. 13) Complainant was then nearly 63 years of age. (Tr. 172)

26. In January 2009, Respondent also terminated four other employees, whose birthdates occurred in years ranging from 1953 through 1965 (ages 43 through 55). (Jt. Exh. 28)

27. Complainant admitted Respondent made no comments about his age or the age of anyone else to him. (Tr. 127, 171-72) Complainant never filed an internal complaint regarding discrimination with Respondent. (Tr. 126-127)

OPINION AND DECISION

New York State's Human Rights Law makes it an unlawful discriminatory practice for an employer to discharge an employee because of age. NYS Executive Law, §§296 (1)(a) and 296(3-a) The employment provision of §296(3-a) applies to individuals eighteen years of age or older. (NYS Executive Law §296(3-a))

Complainant charged Respondent with violating the Human Rights Law on the basis of his age when it terminated his employment, and replaced him with a person ten years younger than he was. Complainant failed to meet his burden of proof and the complaint should be dismissed.

To make out a prima facie case of unlawful discrimination under the N.Y. Exec. Law, art. 15 (Human Rights Law), a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 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 a complainant makes out a prima facie case of discrimination, the burden shifts to the respondent to present a legitimate, non-discriminatory reason for its action. If the respondent does so, the complainant must show that the reasons presented were merely a pretext for illegal discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Complainant met his burden of establishing a prima facie case of age discrimination. He is in the protected class of having an age greater than 18 as he was nearly 63 years of age at the

time of his termination. He was qualified for the position he held. He suffered an adverse employment action when his employment was terminated. Respondent's actions in hiring as his replacement an individual both having the age of 52 and being some ten years Complainant's junior give rise to an inference of age discrimination.

Respondent's position that it viewed Complainant's employment as a transitional phase between the consulting services he rendered under Peterson and the planned reorganization is not refuted by Complainant. Though he had now had an employee's salary, Complainant's tasks were identical to those he had performed as a consultant: he advised, he developed new policies and programs and he guided in the selection of staff. Complainant knew Respondent was seeking a production manager. Complainant failed to apply for the position for which he was conducting interviews. His own report indicates that he was seeking alternative work as early as April 2008, and certainly by August 2008, as Respondent was in terrible financial condition. His continued contact with Peterson, his former employer and owner of a consulting firm in Kentucky, supports Respondent's position that Complainant knew he had been hired to facilitate the transition.

Complainant fails to demonstrate his age was any factor in Respondent's decisions. Respondent offered him employment at nearly 62 years of age; his termination a year later at nearly 63 is not shown to be related to his age but rather to the completion of his duties. Complainant failed to show Respondent's explanation of its actions were a pretext for illegal discrimination.

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, 2013
Bronx, New York



Christine Marbach Kellett
Administrative Law Judge