



City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 3rd Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

James Glowacz
Complainant,
v.

Joseph Angelastri
Respondent.

Case No.: 06-E-70

Date of Ruling: December 16, 2009

Date Mailed: January 7, 2010

TO:

James J. Glowacz
5224 W. Patterson Ave.
Chicago, IL 60641

Joel David Malkin
Attorney at Law
2953 W. Birchwood Ave.
Chicago, IL 60645

FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on December 16, 2009,¹ the Chicago Commission on Human Relations issued a ruling in favor of Respondent in the above-captioned matter. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, this case is hereby DISMISSED.)

Pursuant to Commission Regulations 100(15) and 250.150, Complainant may seek a review of this Order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS
Dana V. Starks, Chair and Commissioner

¹ On December 21, 2009, the Commission received from Respondent a Motion for Leave to File Reply to Complainant's Response to the Recommended Ruling, with a proposed Reply to the objections filed by Complainant. Because the motion was received subsequent to the action of the Board of Commissioners, which ruled in favor of Respondent, the motion is denied as moot.



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FINAL RULING ON LIABILITY

I. INTRODUCTION AND PROCEDURAL HISTORY

Complainant, James Glowacz, alleges that on March 13, 2006, his former employer, Joseph Angelastri, the owner of City News, Incorporated, discriminated against him on the basis of his age (then 56) when he terminated his employment. Accordingly, Complainant asserts that his termination violated the Chicago Human Rights Ordinance, specifically §2-160-030, Chicago Municipal Code.

Complainant filed his Complaint with the Chicago Commission on Human Relations on September 7, 2006, alleging age and disability discrimination against Respondent. On December 15, 2006, Respondent filed his Verified Response denying the allegations of discrimination.

On February 11, 2009, the Commission issued its Order Finding Substantial Evidence of an ordinance violation with regard to Complainant's age discrimination claim, but the Commission found no substantial evidence of disability discrimination and dismissed the latter claim. On March 11, 2009, Complainant filed a Request for Review of the no substantial evidence finding, which was denied on May 7, 2009.

The parties participated in an administrative hearing on the age discrimination claim on August 4, 2009. The hearing officer issued her Recommended Ruling on October 16, 2009, after which Complainant filed objections on November 13, 2009.

As discussed more fully below, the Commission on Human Relations accepts and adopts the hearing officer's recommended ruling and finds that Complainant has failed to prove by a preponderance of the evidence that Respondent terminated his employment because of his age and in violation of the CHRO.

II. FINDINGS OF FACT

Background

1. Joseph Angelastri is the owner of City News, Incorporated, a retail store that sells newspapers and magazines. (Tr. 81-82) He started the business in 1978 as a newsstand on the corner of Irving Park and Cicero in Chicago, Illinois. (Tr. 82) As business grew, Angelastri opened a store at 4018 North Cicero in 1988 and then a second location in Evanston, Illinois in 2000. (Tr. 82-83)
2. Complainant started working at City News on June 22, 1996, as a part-time store clerk. (Tr. 85) In this role his sole responsibilities were to run the cash register and help

customers. *Id.* Prior to October of 2006, Complainant worked less than 40 hours per week.

Events in the Fall of 2005

3. Several relevant events happened in the fall of 2005. First, on September 21, 2005, Steve Cachura, who had been a store clerk at City News for nearly five years, quit. (See Resp. Ex. 1) Second, and shortly thereafter, Complainant informed Angelastri that he had a job offer from Osco to work 40 hours per week with health care benefits and would not show up for his next shift unless Angelastri matched the offer. (Tr. 25-26, 86, 103)^{1 2}
4. Complainant did not believe his request was all that significant because, from his perspective, he had already been working close to 40 hours per week and health care benefits had always been available to City News employees. (See Compl. Group Ex. 3, Tr. 42-43) However, no other City News employee had demanded to work a minimum of 40 hours per week.
5. In the wake of Cachura's resignation and given concerns about possibly having to train several new employees if Complainant quit, Angelastri made a "split second decision" and agreed to Complainant's ultimatum. (Tr. 103) Third, and finally, on October 17, 2005, Angelastri hired Danuta Kosiba as a part-time store clerk. (See Resp. Ex. 1) She was approximately 40 years old at the time and made \$9.20 per hour. (Tr. 24)

City News' Financial Decline and Complainant's Termination

6. Around the time that Angelastri made his commitment to Complainant and hired Kosiba, City News had begun to experience declining revenues. Several factors contributed to the decline, including a construction project next to City News that affected foot traffic, the overall ongoing decline in the publication business, and finally, the generally declining condition of the Six Corners business district where City News was located. (Tr. 22-23)
7. By the end of 2005, City News had an \$80,000 decrease in sales at the Cicero store where Complainant worked. (Tr. 88, Resp. Ex. 5) Between January 1, 2005, and December 31, 2006, sales at the Cicero store had declined approximately \$130,000. (*Id.* Tr. 89) In addition, as part of the construction project, in late 2005 or early 2006, Com Ed had separated the utilities for the new building and City News' building, which caused a significant increase in utility costs for Respondent. (Tr. 23-25)
8. In the midst of increasing costs and declining revenues, Angelastri had to make some tough decisions. As of March 2006, Angelastri knew he could no longer meet his commitment to give Complainant 40 hours of work per week. (Tr. 86) He also knew he would be unable to continue Complainant's health care benefits because City News could

¹ Complainant disputes that he told Angelastri he wouldn't show up for his shift, but the hearing officer found Angelastri's testimony more credible on this point. It is hard to believe that Angelastri would have agreed to Complainant's demands absent the threat to quit, especially when Angelastri had just lost another employee.

² In the transcript, Angelastri referred to an offer from "CVS." However, Complainant testified it was "Osco." Because Complainant is in a better position to know which entity made the job offer to him, the hearing officer credited Complainant's testimony on this point.

not afford the 67 percent premium increase. *Id.* Accordingly, Angelastri had planned to discontinue the group health insurance policy altogether. *Id.*

9. On March 13, 2006, Angelastri met with Complainant and told him he would be terminated because of City News' financial problems. (Tr. 21) Angelastri had made the decision to terminate Complainant's employment a week or two prior to the hearing. (Tr. 101)
10. While Complainant was 56 years old at the time of his termination, five of City News' seven remaining employees were over the age of 40 and two of those employees were older than Complainant. (Resp. Ex. 1) Specifically, Gregory Kubala was 58 and Donald Tanagi was 65. (See Resp. Ex. 1)
11. Angelastri testified that given City News' financial condition, he "felt more comfortable with people willing to work part time [who] didn't require health insurance" as a condition of employment. (Tr. 99, 103) Angelastri did not offer Complainant a part-time position or less pay rather than terminating him because, based on Complainant's prior demand for a 40-hour work week, he did not think Complainant would accept such a position. (Tr. 26-27)
12. Angelastri testified that he did not consider laying off Kosiba instead of Complainant because she was more flexible with her work hour requirements and job duties. (Tr. 30) In addition, Angelastri assumed that Complainant would be able to take a job at Osco, since he had previously been given an offer. (Tr. 26)
13. Finally, Angelastri knew that on a go-forward basis, the store clerks would be required to take on additional job duties, including among other things merchandizing, receiving, and shelving—job duties that Complainant did not typically handle. (Tr. 30, 85-87)³
14. Complainant's termination was not the only cost-cutting measure put in place by Angelastri. As mentioned above, Angelastri ended City News' group health care insurance. (Tr. 86) He also switched utility companies, changed scavenger services, disconnected certain phone lines, and stopped paying a maintenance person to clean the store. (Tr. 102)
15. In addition in 2006, Angelastri decreased employee work time by 150 hours overall to reduce costs. (Tr. 100-101) For example, Angelastri decreased hours for employee Donald Tanagi, who was nearly ten years older than Complainant at the time of Complainant's termination. (Tr. 9)
16. Tanagi had worked for City News since November 1996. (Tr. 8) He testified that the reduction in hours was not entirely unexpected because business had been slow and therefore he "had a feeling that something was going to happen." (Tr. 11). Angelastri

³ At the hearing, Angelastri and Michael Oelrich testified that Complainant was sometimes late in starting his shift. (Tr. 39, 69) Respondent put into evidence several Employee Self Appraisal reports in which Complainant admitted that he "should be a bit more punctual when starting [his] shift." (See Resp. Ex. 2 and 3) However, the hearing officer found that even if punctuality was a problem for Complainant, that fact is irrelevant to the analysis here because (1) In March 2006, Angelastri never identified work performance as the reason for Complainant's termination and (2) at the hearing, Angelastri testified that he thought Complainant was a good and loyal employee. (Tr. 103)

told him the reduction in hours was due to declining business. (Tr. 13-14). Ultimately, Tanagi retired from City News in January 2007. (Tr. 14)

17. Further, from March 2006 through the date of the hearing, City News had not hired any new employees—full time or part time. (Tr. 92) Indeed in 2007, Angelastri had to terminate another long-term employee—Charles Julian, who was 39 years old at the time. *Id.* Julian had worked at City News for approximately seven years before his termination. (See Resp. Ex. 1)

Post-Termination Events

18. Given Complainant's termination, Angelastri asked Michael Oelrich to take over some of Complainant's work hours temporarily and on a part-time basis.⁴ (Tr. 70) He took over those hours on March 13, 2006—the day of Complainant's termination. (Tr. 17) Oelrich was nearly 48 years old at the time. (See Resp. Ex. 1)
19. Oelrich had worked for City News since may 1993 in various capacities. Over the years, he was a buyer, had created a newsletter for City News and then a web page, helped customers, answered phones, worked as a cashier, and represented City News at conventions. (Tr. 19, 67, 74) Just prior to Complainant's termination, Oelrich worked for City News from home doing marketing and promotional work as well as working with the media. (Tr. 71,75) Oelrich was paid commissions and a flat fee for his work from home, but had an hourly wage upon returning to work at the store in March 2006. (Tr. 77-78)
20. About a month after returning to work at the store, Oelrich told Angelastri that he wanted to keep the position permanently, instead of on a temporary basis. (Tr. 71) Angelastri agreed but told Oelrich he would have to take a pay cut. *Id.*
21. Importantly, upon returning to the store, Oelrich did not work a full-time schedule. (Tr. 75) He knew that the work schedule at the store would be flexible, was willing to work as needed, and did not require a forty-hour workweek. (Tr. 27, 71) Oelrich also continued to do the website as well as marketing and promotions for City News. (Tr. 28, 71-72)
22. Complainant received unemployment benefits for approximately six months after his termination from City News. (Tr. 105) In March of 2007, Complainant accepted a job at a bookstore in the airport that paid \$8.00 per hour. *Id.*⁵
23. Regarding the end of his employment at City News, Complainant testified that he “can’t say for sure why [he] was terminated” but believed it “might have been” based on age because the explanation of financial hardship “[didn’t] seem to hold up.” (Tr. 49, 110)

⁴ Complainant also testified that he believed Kosiba took over some of his job duties. (Tr. 47) However, there was no definitive evidence presented by either party on this point.

⁵ Complainant did not identify the Chicago area airport where he worked.

III. APPLICABLE LEGAL STANDARDS AND CONCLUSIONS OF LAW

The Chicago Human Rights Ordinance provides in relevant part:

No person shall directly or indirectly discriminate against any individual in hiring...discharge...or other term or condition of employment because of the individual's...age.

§2-160-030, Chgo. Muni. Code. For purposes of the CHRO, "age" is defined as "chronological age of not less than 40 years." §2-160-020(a), Chgo. Muni. Code.

Complainant may establish a violation of this provision of the CHRO by either direct evidence of discriminatory intent, such as discriminatory statements made by Respondent, or through indirect evidence such as inferences drawn from events and circumstances surrounding his termination which show that his discharge was improperly based on age. See *Ingram v. Got Pizza*, CCHR No. 05-E-94 (Oct. 16, 2006).

Here, there is no direct evidence of age discrimination, and therefore Complainant has the burden of establishing a *prima facie* case through the indirect method of proof. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, Complainant must show that (1) he was over 40 at the time of termination and therefore in the protected age group, (2) he was meeting his employer's job expectations, (3) he was discharged, and (4) similarly-situated, younger employees were treated more favorably. See *Chimpoulis and Richardson v. J & C Corp. d/b/a Cove Lounge et al.*, CCHR No. 97-E-123/127 (Sept. 20, 2000); *Mahaffey v. University of Chicago Hospitals*, CCHR No. 93-E-221 (July 22, 1998).

If Complainant establishes a *prima facie* case, the burden then shifts to Respondent to articulate a legitimate, non-discriminatory reason for Complainant's termination. *Ingram, supra*. at p. 5, citing *Pruitt v. John O. Butler Co. et al.*, CCHR No. 97-E-42 (Dec. 6, 2000); and *Adams v. Chicago Fire Dept.*, CCHR No. 92-E-72 (Sept. 20, 1995). If Respondent articulates a legitimate, non-discriminatory reason for the discharge, Complainant can still prevail if he shows that the purported reason for termination was a pretext for discrimination. *Id.*

A. Complainant Failed to Establish a Prima Facie Case of Age Discrimination

Based on the evidence presented at the hearing, Complainant established the first three elements of proof for his *prima facie* case. He was 56 at the time of his termination and was therefore well within the protected class for age. Angelastri admitted that, overall, Complainant was a good, loyal employee, thereby establishing that Complainant was satisfactorily performing his job duties and meeting Respondent's expectations. Importantly, there is no credible evidence that Complainant's termination was based on poor work performance and work performance was not cited as the reason for his termination. Finally, there is no dispute that Angelastri terminated Complainant's employment.

Complainant's case, however, runs into trouble on the final element—that similarly-situated, younger employees were treated more favorably. As an initial matter, if this element is narrowly analyzed, Complainant cannot show disparate treatment because he was the only City News employee who demanded a 40-hour work week. As Angelastri testified, no one else had this requirement and the other employees were willing to be more flexible regarding their work schedules and did not require a full-time schedule. Accordingly, there were no other employees who demanded or required a 40-hour work week but were still allowed to keep their jobs. Thus, viewing the term "similarly situated" narrowly, none of City News' employees were similarly

situated with Complainant. See *Ingram, supra* at p. 5, where the complainant failed to satisfy the final element of his *prima facie* case because he did not “point...to any other driver whose car broke down during a scheduled work assignment, or who was for any similar reason unable to continue working, who was nevertheless placed back on the delivery schedule” and not terminated.

If the “similarly-situated” element is viewed more broadly to include any City News employee who had the same or similar job as Complainant, he still failed to meet the standard of proof because the evidence showed that Angelastri also subsequently laid off a younger employee—Charles Julian—who was 39 at the time of his discharge.

During the hearing, Complainant asserted in his testimony that Julian was not similarly situated because he “did not do the work I did” and “worked in the back doing other things.” (Tr. 53) However, Angelastri testified credibly that although there were some differences in the work that Julian and Complainant did, they both shared cashiering duties. (Tr. 96) Moreover, Julian held the same position—store clerk—as Complainant. (See Resp. Ex. 1) Thus, the differences between the two were negligible at best and Julian was an appropriate comparator for purposes of the analysis here.

Therefore, based on the evidence presented at the hearing, Complainant failed to establish a *prima facie* case of age discrimination because he failed to show that any similarly-situated younger employee was treated more favorably.

B. Respondent Had Legitimate, Non-Discriminatory Reasons to Terminate Complainant’s Employment

Even if Complainant were given the benefit of the doubt on the disparate treatment element and could, therefore, establish a *prima facie* case, the evidence overwhelmingly shows that Angelastri had legitimate, non-discriminatory reasons to discharge Complainant.

Toward the end of 2005 through 2006, City News’ financial condition was deteriorating. Revenues were down because business was slow. Expenses, however, were on the rise giving an increase in group health insurance costs and spending associated with the change in utilities.

The evidence showed that by the end of 2005, the Cicero store where Complainant worked was down \$80,000 in sales. In 2006, that figure ballooned to \$130,000 in decreased sales.

Although it is true that despite this decline, in the fall of 2005 Angelastri acquiesced to Complainant’s demand to be placed on a 40-hour work week with health care benefits, that action does not call into question the veracity or seriousness of the deteriorating financial condition of the business. The evidence showed that Angelastri felt forced to agree to Complainant’s demand because it came on the heels of losing another employee and Angelastri was legitimately concerned about having to hire and train two new people if Complainant quit. Further, Angelastri was legitimately concerned that if he didn’t give in to the demand, Complainant would not appear for his next shift.

Nor does that fact that Angelastri hired Danuta Kosiba call into question the financial condition of the business. Although Angelastri hired Kosiba in the fall of 2005, he decreased the overall hours worked by his employees to cut costs.

In addition to cutting his employees’ hours to save money, Angelastri ended the group health insurance coverage, switched utilities, changed scavenger services, stopped paying a

maintenance person to clean the store, and reduced phone service. He also terminated another employee. All of these factors show that Complainant's termination was based not on his age but on City News' declining financial status and Angelastri's reasonable belief that Complainant's range of skills and compensation requirements made him less flexible than the other employees in the face of this financial downturn. See *Audette v. Simko Provision Co.*, CCHR No. 92-E-39 (June 6, 1993), finding no age discrimination where the evidence established the complainant's termination was due to losing a major client and the corresponding loss of revenue.

In addition to the evidence of declining revenue and increasing costs, Angelastri testified credibly that he terminated Complainant because he was more comfortable working with employees who could be more flexible with their hours, did not demand health care coverage, and could efficiently handle multiple job duties at the store. Angelastri did not believe that Complainant was willing or able to do any of these things.

Therefore, Respondent set forth and supported by credible evidence that he had several legitimate, non-discriminatory reasons for terminating Complainant's employment and retaining his other employees.

C. Complainant Has Not Established Pretext

Complainant points to several factors in an attempt to show that Respondent's explanations for his termination were a pretext for discrimination. He argues that (1) rather than terminate him, Respondent could have terminated Danuta Kosiba, a younger employee who had worked for City News for less than six months; (2) Respondent could have asked Complainant to work part-time or could have decreased his pay rather than discharge him; (3) Respondent replaced Complainant with Michael Oelrich, who was 48 at the time, and similarly paid him an hourly wage; and (4) Respondent also decreased the hours of Donald Tanagi, who was 65 at the time. None of these arguments are persuasive.

First, even if Complainant disagrees with the business decisions made by his former employer, "the Commission will not engage in judicial review of [those] business decisions. The question before the Commission is not whether [Respondent's] methods were sound, or whether its dismissal of [Complainant] was an error in business judgment. The question is whether [he] was discriminated against because of his age." *Audette*, supra at p. 9. Here, Respondent was not required to choose to retain Complainant over Kosiba, and Complainant has not presented any evidence to prove that Respondent kept Kosiba as an employee because she was younger. Nor was Respondent required to offer Complainant a part-time position or lower pay in lieu of termination. These were business decisions and choices that Respondent had a right to make. See *Chimpoulis and Richardson*, supra at p. 31: "[Respondent] is entitled to run her business as she likes, as long as she obeys the law. [Complainant's] own disagreement with [her] business judgment is not evidence of pretext." Similarly, Angelastri was entitled to choose to retain employees who had made clear their willingness to accept fewer work hours and to do without health insurance benefits, rather than retaining Complainant at fewer hours or lower pay after he had recently insisted on full time hours with health insurance. Although it may not have been the judgment Complainant would have preferred, Respondent's business judgment was not so inherently unreasonable as to suggest that it was a pretext for age discrimination.

Second, Complainant cannot compare himself to Oelrich. Unlike Complainant, Oelrich was comfortable having flexible hours. He handled a range of more complex, professional-level duties than Complainant. He was not given a full time position; he took over only some of

Complainant's hours and took a pay cut to do so—further supporting Angelastri's position that finances rather than discrimination was the reason for Complainant's termination.

Finally, although Angelastri did reduce Donald Tanagi's hours, Tanagi was not terminated even though he was several years older than Complainant. Indeed, Angelastri continued to employ *two* individuals older than Complainant. If Angelastri was age-biased in his termination decisions, it would follow that he would have terminated Tanagi and/or Gregory Kubala (age 58 at the time), but he did not do so. Moreover, at the time of Complainant's termination, five of the seven remaining employees were over 40. Thus, the every nature of the work force employed by Angelastri undercuts arguments of pretext or motivation to discriminate against older workers. Indeed, nothing in the evidence revealed at the hearing suggests that the fact that Complainant was 56 years of age was a factor motivating his Angelastri's decision.

Accordingly, although Complainant was understandably upset by his termination and testified that he believed it "might have been" based on his age because the explanation of financial hardship "[didn't] seem to hold up," the evidence fails to support Complainant's belief. To the contrary, the evidence overwhelmingly establishes that Complainant's employment was not terminated because of his age.

The Commission has reviewed and considered Complainant's objections, and finds nothing to warrant rejection or modification of the hearing officer's recommended ruling. As provided in §2-120-510(l), Chgo. Muni. Code, the Commission must and does adopt the findings of fact recommended by a hearing officer if they are not contrary to the evidence presented at the hearing. The hearing officer's findings in this case are consistent with the evidence. Determining credibility of witnesses and the reliability of their testimony and related evidence is a key function of hearing officers, who have the opportunity to observe the demeanor of those who testify. *Poole v. Perry & Assoc.*, CCHR No. 02-E-161 (Feb. 15, 2006).

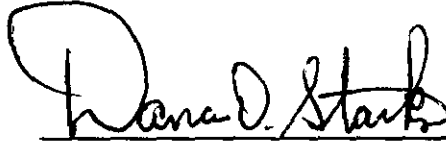
Further, the Commission accepts the hearing officer's weighing and analysis of the evidence as sound, and is not persuaded by any alternative reasoning or speculation offered by Complainant in his objections. Regarding work performed by Michael Zakarian in 2007, the hearing officer credited Angelastri's explanation that Zakarian, who had worked for City News in the past, worked only a "dozen or so" shifts around that time but did not continue after that (Tr. 115); there was no evidence that Zakarian became a full time employee or anything close to that. Regardless of who may or may not have worked for City News in later years, the evidence remains uncontroverted that after Complainant's termination, Respondent reduced total employee hours and utilized only part time employees who were willing to be flexible about the number of hours assigned and to forego health care benefits. Regarding Complainant's job evaluations, both the hearing officer and the Commission have found them not relevant to the outcome of this case because job performance was not a basis for Angelastri's termination decision. Finally, although Complainant argues that the hearing officer should have asked more questions about certain evidence during the hearing, it is not a hearing officer's role to investigate or prove a complainant's claims, and certainly not to "call or threaten to call" other witnesses. Rather, it was Complainant's responsibility to present evidence at the hearing to prove he was terminated because of his age, and to be prepared to respond to evidence presented by Respondent.

IV. SUMMARY AND CONCLUSION

For all of the reasons set forth above, the Commission on Human Relations adopts the findings of fact and recommended decision of the hearing officer that Respondent did not

terminate Complainant's employment based on his age and did not violate the Chicago Human Rights Ordinance. Accordingly, the Commission finds in favor of the Respondent and so DISMISSES the Complaint.

CHICAGO COMMISSION ON HUMAN RELATIONS

A handwritten signature in black ink, appearing to read "Dana V. Starks". The signature is written in a cursive style with a large initial "D".

By: Dana V. Starks, Chair and Commissioner
Entered: December 16, 2009