



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:

Paul Johnson
Complainant,
v.

Anthony Gowder Designs, Inc.
Respondent.

Case No.: 05-E-17

Date of Ruling: June 16, 2010

Date Mailed: June 30, 2010

TO:

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FINAL ORDER

YOU ARE HEREBY NOTIFIED that, on June 16, 2010, 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

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FINAL RULING ON LIABILITY AND RELIEF

I. BACKGROUND

On February 18, 2005, Complainant Paul Johnson filed a Complaint with the City of Chicago Commission on Human Relations alleging discrimination on the basis of his age and disability by Anthony Gowder Designs, Inc. ("AGD" or "Company").¹ On April 2, 2008, the Commission on Human Relations issued an Order Finding Substantial Evidence only with respect to the claim of age discrimination. The Commission made a determination of No Substantial Evidence concerning Complainant's allegations that AGD failed to accommodate Complainant's disability, and dismissed that claim.

After some rescheduling, the administrative hearing began on December 17-18, 2008. Additional hearing dates were necessary, and the final two dates of the hearing were January 7 and 27, 2009.² The parties filed post-hearing briefs and replies. On April 8, 2010, the hearing officer issued her Recommended Decision, recommending a finding of no liability. No objections to the Recommended Decision have been filed.

II. FINDINGS OF FACT

A. The Parties

Paul Johnson

1. Paul Johnson was born on August 22, 1942, and was sixty-six (66) years old when the administrative hearing began. (I-60)

¹ Respondent's Exhibits are referenced as "RX _____;" Complainant's Exhibits are referenced as "CX _____;" and Findings of Fact are referenced as "FOF _____."

² The transcript of proceedings is referenced by volume number followed by the page number. Volume I is the transcript of the hearing held on December 17, 2008. Volume II is the transcript of the continued hearing held on December 18, 2008. Volume III is the transcript of the continued hearing held on January 7, 2009. Volume IV is the transcript of the continued hearing held on January 27, 2009.

2. Johnson lives in Chicago and shares a home with Imerio Papalini. (I-60)
3. Johnson is a floral designer, has earned certificates in floral design, and has worked as a floral designer since 1960. (I-61)
4. After he graduated from high school, Johnson attended the American Floral Arts School in Chicago, a trade school in Florida, and the American Floral Arts School in Taipei. (I-61)
5. Johnson has taught floral design at the American Floral Arts School in Chicago, Hong Kong, Taiwan, mainland China, Thailand, and Japan. (I-61-62)
6. Johnson's work experience as a floral designer began in the 1960s and included interacting with members of the public and performing floral design demonstrations with both silk and fresh flowers for consumers, trade shows, and other floral designers. (I-63-64)
7. Johnson has written articles which have been published in the Floral and Nursery Times. Photos of his work have also been published. (I-64-65)
8. Johnson met Anthony Gowder in the mid-1990s when they both worked as freelance floral designers for Virginia Wolfe Company. (I-65; IV-20)
9. Johnson and Anthony Gowder became friendly and worked well together. (IV-20)
10. Anthony and Stephanie Gowder opened Anthony Gowder Designs, Inc., in January 1998. (III-210)
11. Later in 1998, Anthony Gowder began to recruit Johnson to work for AGD. (I-66; III-210)
12. Johnson was fifty-five (55) years old when Anthony Gowder began to recruit him to work for AGD. (I-66)
13. Johnson did not share his age with other floral designers and Anthony Gowder did not know Johnson's age when he first asked Johnson to work for AGD. (I-66-67)
14. In the fall of 1998, Johnson began to do some freelance work for AGD as one of AGD's first freelance designers. (I-66; III-104, 217)
15. Johnson became a full-time employee of AGD in March, 2001, when he was 58 years old. (I-68)
16. Johnson worked five days each week, eight or more hours a day. (I-68)
17. Johnson earned twenty dollars per hour throughout his employment with AGD, plus health insurance benefits. (I-68)

18. When Johnson was first hired, his monthly health insurance premium was \$253. The premium increased to \$325, then to \$499, then to \$660, then to \$1,312. (III-149-51)
19. Johnson first met Stephanie Gowder, Anthony Gowder's wife and AGD Vice President, in February 1998. (I-68)
20. Johnson is a very good, outstanding floral designer and was good at teaching others. (I-34; III-206)
21. Designers would go to Johnson for guidance and direction when the Gowders were not at the company location. (I-87)
22. Johnson had problems with his hip which eventually worsened. (I-75-76)
23. Johnson never asked for a change in his job duties as a result of the problems with his hip. (I-77)
24. Despite Johnson's hip problems he was able to create samples and purchase, condition, store, produce flowers, and create samples. (I-87)
25. Some segments of floral design, such as centerpieces, are relatively heavy. (I-78)
26. Because of Johnson's hip, Anthony Gowder did not like for Johnson to lift or carry things. (I-79-80; III-226)
27. Anthony Gowder made "special efforts" to have buckets of flowers brought to Johnson. Anthony Gowder would bring Johnson five gallon industrial pails which were half-filled with water and weighed about 30 pound each. (III-226)
28. The Gowders knew Johnson was in pain and they tried to help him. (I-127)
29. Anthony Gowder commented in the open on Johnson's ability to lift and/or carry things, and told Johnson to leave it to the "young ones" or "young bucks" to lift do the lifting for him. (I-79; II-11-12)
30. Anthony Gowder repeatedly asked people to assist Johnson. (I-80)
31. Johnson's hip problems resulted in his having to have total hip replacement surgery. (I-76, 81)
32. The surgery was performed on August 27, 2004. Johnson informed AGD about the need for surgery when he first learned of it. (I-82)
33. Johnson successfully completed physical therapy on October 20, 2004, six weeks after the surgery. (I-84)
34. Stephanie Gowder visited Johnson at Northwestern Hospital. (IV-132)
35. Immediately following the last physical therapy session, Johnson went to AGD to

surprise everyone with how well he was doing, and to tell them that he was ready to return to work. (I-85)

36. Johnson demonstrated that he could walk briskly and showed everyone that he was agile and that he could bend, walk, and balance. (I-86)

37. Johnson was eager to return to work. In response to Johnson's inquiry regarding his return to work, the Gowders told Johnson they would call him to discuss the matter when they returned from a short trip they were taking to Philadelphia. (I-88)

38. On October 20, 2004, when the Gowders told Johnson they would call him after they returned from vacation, the Gowders knew that they were not planning to return Johnson to his full-time position. (III-163)

39. On October 20, 2004, the Gowders did not say anything to Johnson to suggest that he would not be able to return to work. (I-88)

40. Stephanie Gowder was happy to see Johnson when he came to the shop on October 20, 2004. She was anxious because she knew they had not made a final decision regarding whether to keep Johnson full time or not. (IV-135)

41. Stephanie Gowder did not tell Johnson that she and Anthony had been discussing his employment status. It was emotional for her and Stephanie chose to defer the discussion to Anthony. (IV-135)

42. During the weeks following his conversation with the Gowders, Johnson repeatedly called AGD to discuss his return to work date. (I-88; III-137)

43. Stephanie Gowder never mentioned to Johnson, in any of their telephone conversations, that he would not be able to return to work. (III-162)

44. In November 2004, Johnson sent a certified letter to AGD asking about his work status. (I-88)

45. On November 29, 2004, Johnson spoke to Anthony Gowder and scheduled a time to meet. (I-90; III-138)

46. On December 10, 2004, Johnson and Imerio Papalini went to AGD to meet with Anthony Gowder. (I-92)

47. The meeting began with pleasantries. Papalini interjected that they had come to discuss Johnson's return to work. (IV-116)

48. Anthony Gowder told Johnson that he was too expensive and that could not afford to have Johnson's services full time. (I-95; IV-117)

49. Johnson asked Anthony Gowder what he meant. Anthony Gowder repeated that he could no longer afford to keep Johnson on staff full time. (IV-117)

50. Anthony Gowder stated that he wanted to train younger, newer designers so he could train them in his way of doing things, and because they were less expensive. (I-96, 173)

51. Anthony Gowder asked Johnson if he would agree to work on a freelance basis as needed. (I-97; IV-117)

52. Johnson agreed to work on a freelance basis. (I-97)

53. Johnson was stunned. Papalini was livid and cursed at Anthony Gowder. (IV-117)

54. On December 23, 2004, Johnson and Papalini met with Stephanie Gowder to complete Johnson's COBRA paperwork. (I-101; III-140-43)

55. During the meeting, Stephanie Gowder put her arm around Johnson and said, "I love you, and I miss you." (I-103)

56. Johnson was allowed to remain on the AGD dental plan because he agreed to work freelance. (III-142)

57. After Johnson completed the paperwork, Stephanie Gowder told Johnson that he would get nine months of COBRA insurance coverage. (III-142)

58. Stephanie Gowder asked Johnson whether he was eligible for Medicare because she believed that it might alleviate some of his health insurance expenses. (I-140-45)

59. Stephanie Gowder was, in effect, asking Johnson if he was going to reach age 65 and eligible for Medicare before his COBRA coverage was exhausted. (III-144-45)

60. Stephanie Gowder was uncertain of Johnson's exact age but had an idea of how old he was. (III-145)

61. Johnson told Stephanie Gowder that he was only 62 years old. (I-103)

62. On December 23, 2004, during a five hour car ride to Wisconsin, Johnson felt "horrible" old and like he was "being led to pasture." (I-106)

63. It was hard for Johnson to erase the negative thoughts and it was a slow process for him to feel normal again. (I-108)

64. Johnson applied for and received unemployment compensation covering the period of December 2004 through August 2005. (I-115-16)

65. Johnson never found another full time job but was able to find some freelance work. (I-109-10)

66. Johnson never worked, in any capacity, for AGD after August 26, 2004. (I-82)

67. Johnson's testimony was credible.

Anthony Gowder Designs

68. Anthony Gowder Designs is a special event florist, is primarily a floral design company founded in 1998, and is owned by Anthony and Stephanie Gowder. (III-103, 109)
69. A special event is a birthday, wedding, or any party that needs décor, flowers, and props. (III-109)
70. AGD moved to its present location in Hubbard Street, in Chicago, in 2002. (III-114)
71. Anthony Gowder is the President of AGD.
72. Anthony Gowder is a master designer through Floral Transworld Delivery, one of the two major organizations that accredit floral design. (III-204)
73. Anthony Gowder is and has always been the head designer. (III-107-108)
74. Anthony Gowder prepares the sample design for the designers to copy. (III-111-114)
75. Some designers produce one piece at a time. Other designers use a production line system. (III-117)
76. Stephanie and Anthony Gowder are husband and wife and have been married since August 2000. (III-101)
77. Stephanie Gowder is the Vice President of AGD. (III-101)
78. Stephanie Gowder's primary duties include bookkeeping, sales, staff schedules, and general business decisions. (III-102)
79. Stephanie meets with the potential client, and prepares and presents a proposal. If the clients like the proposal, they return for a showing of samples to determine the necessary changes and to follow up on details. (III-109-10)
80. The arranging is done on the first floor. There is a cooler, design table, shelving, and loading ramp. (III-116)
81. Johnson was AGD's second employee. (I-121-22; III-106)
82. Johnson and Stephanie Gowder became very close friends. (I-122-23; III-122, 128)
83. Anthony and Stephanie hosted an 80th birthday party for Johnson's mother. (I-125)
84. The Gowders drove to Minnesota for Johnson's mother's funeral and allowed Johnson to take as much time off as he needed after the funeral. (I-125-26)

85. In 2002, AGD had gross sales in the amount of approximately \$700,000. The Gowders had combined salaries of approximately \$93,000. AGD had net loss of \$59,000. Non-officer wages were approximately \$140,000. (IV-36)

86. In 2003, the Gowders began to analyze their employees and what was the best use of their payroll dollars. (IV-119-20) They discussed making Bell a manager; limiting the number of freelance designers they would have; and moving Anthony Gowder to the design table because he was faster than the others.

87. The Gowders discussed everything to try to save the business. (IV-82)

88. Conversations regarding changing Johnson's status began as they went deeper into debt. (IV-120)

89. Stephanie Gowder told Anthony Gowder that they could not let Johnson go before his hip replacement surgery. (IV-122)

90. The Gowders tabled the conversation about letting Johnson go to see how the business was going to play out. (IV-122)

91. In 2003, AGD had gross sales in the amount of \$651,613. The Gowders earned combined salaries of \$76,500. AGD had a net operating loss of \$16,496. Non-officer wages equaled \$134,274. (IV-49-50)

92. In 2004, AGD had gross sales of \$916,817. The Gowders earned \$74,307. AGD had a net operating loss of \$15,382. Non-officer wages equaled \$110,723. (IV-55-56)

93. In 2005, officer compensation was \$93,000 and AGD had a positive net of \$10,369. The corporate debt was paid down to \$10,369. (IV-105)

94. In 2006, AGD had an operating net loss of \$18,000, and gross sales were \$1,126,019. Officer compensation was \$106,539. Salaries for all other employees were \$236,134. (IV-106-7)

95. By spring 2004, the Company was running deep in the red and Anthony Gowder believed he needed to make major changes. (IV-72)

96. In spring 2004, AGD staff included Anthony and Stephanie Gowder; Johnson; Jonatas Bell, production designer; and Juan Laureano. (IV-73)

97. In March 2004, Anthony Gowder told Johnson that he could no longer afford the group health insurance package. At that time, AGD was paying 100% of the premium. (IV-74)

98. In order to continue the health insurance, Anthony Gowder told Johnson he would have to pay his share of the premium. (IV-74)

99. Johnson agreed to pay his share of the premium. (IV-74)

100. In order to reduce expenses, the Gowders removed themselves from AGD's worker's compensation policy. (IV-75)

101. The Gowders continued to determine where the business was hemorrhaging from. (IV-76)

102. The Gowders looked at fixed bills and salaries and determined there was nothing more they could do in these areas. (IV-76)

103. The Gowders determined that the hemorrhage was on the design table through the management of the freelance staff. (IV-76-77)

104. The freelancers were not self-managing and were not getting the work done for the hours paid out. (IV-77)

105. Johnson and Bell were more skilled, full-time designers, 40 hours per week salaried, and paid time and a half (1½) for overtime. (IV-77-78)

106. There were differences in skill set for the freelancers and the full-time employees. (IV-78)

107. Freelancers can copy designers but need managers to keep them focused and to talk about what's going on with errors while working on the design table. (IV-78)

108. In addition to decreasing expenses, the Gowders decided they needed to increase revenue. (IV-78)

109. The Gowders decided the best way to increase revenue was for Anthony to pull away from the design table and give more time to sales. (IV-79)

110. The plan was to promote or hire someone to be the design manager. (IV-80)

111. AGD did not have the money for a new hire. The Gowders decided to see which current employee would best fit the position. (IV-80)

112. After having worked with Bell for more than a year, Anthony Gowder decided that Bell had the best interpersonal skills to step into the role. (IV-80)

113. Anthony Gowder did not believe Johnson had the skills to step into the design manager role. Johnson was playful and jovial and did not have the ability to control the design crowd. (IV-80)

114. Bell agreed to be the design manager in May or June 2004. (IV-81)

115. In mid-July, 2004 the Gowders discussed changing Johnson from full-time to freelancer. (IV-82-84)

116. The reduction of Johnson's salary would give AGD 40-60% of his salary in relief every week for the remainder of 2004 and in 2005. (IV-115)

117. Anthony Gowder told Stephanie Gowder that they needed to save every penny they could and needed to focus on moving Johnson to freelance. (IV-83)

118. Anthony Gowder did not consider moving Bell to freelance because AGD needed his interpersonal and management skills. (IV-84)

119. Although Bell was a less experienced floral designer, Anthony Gowder could pick up the slack at the design table. (IV-84)

120. Stephanie Gowder was adamantly opposed to moving Johnson to freelance because she did not want to do anything that would threaten the possibility of Johnson having the hip replacement surgery. (IV-85)

121. As a freelancer, Johnson would not have been considered full time and would not have been covered by the health insurance. (IV-85)

122. Although he did not have any conversations with Johnson about how long he would be off of work, Anthony Gowder believed Johnson would be off two to three months, barring complications. (IV-86)

123. Anthony Gowder did not call Johnson to work freelance because he filed this Complaint with the Commission. (IV-119, 156)³

124. Stephanie Gowder did not tell Lee that Johnson was too old and needed to retire. Stephanie Gowder did not make any discriminatory age-related remarks about Johnson in the presence of Bell, Lee, or anyone else. (IV-137)

125. Bradley Rodger began to work for AGD at the end of summer 2004, first as a freelancer, then as a full time production floral designer. (I-22; II-17; and IV-88)

126. Rodger was forty-five years old when he was hired. (III-4)

127. Anthony Gowder asked Rodger to work as a full time production manager in September or October 2004. (III-88)

128. The production manager position was an expansion of the design manager position. (IV-89)

129. The design manager pushed everyone to get the work done; oversaw all the fresh flowers as they arrived and checked their condition; made sure the flowers were cut and ripened

³ Anthony Gowder's statement at the hearing implicates Section 2-160-100 of the Chicago Human Rights Ordinance, which states in relevant part, "[N]o person shall retaliate against any individual because that individual in good faith has made a charge...under this chapter." The issue of retaliation was not the subject of this Complaint. No additional complaint, amended complaint, or motion to amend has been filed alleging retaliation. Therefore, the hearing officer did not have jurisdiction to make any finding regarding retaliation, nor does the Commission. However, the hearing officer in her Recommended Decision strongly put Anthony Gowder on notice that retaliation is itself a violation of the Chicago Human Rights Ordinance and that he must avoid any future conduct which infringes upon the rights of his employees to avail themselves of the protections afforded to them by the Ordinance.

in water at room temperature; ensured that the freelancers stay true to the samples; and paced the event production to ensure that everything was completed on time. (IV-89-90)

130. The production manager encompassed being responsible for all of the delivery of jobs and installation, and made sure that the jobs were adequately staffed and that all goods were removed.

131. Rodger was going to begin the production manager duties at a salary of \$850.00 per week. (IV-91)

132. Rodger did an excellent job as production manager. (IV-92)

133. Just before Christmas 2004, Rodger told Anthony Gowder that he had been premature in his decision to accept the production manager position and resigned. (IV-92)

134. Rodger offered to stay on as a designer, if needed. (IV-92)

135. Anthony Gowder told Rodger that he did not need a designer; he needed a production manager. (IV-92)

136. Rodger's last day of work at AGD was January 8, 2005. (III-7; IV-92)

137. In January 2005, Carroll Reed returned to work for AGD as a full-time salesperson at an annual salary of \$35,000 plus approximately \$4,000 in commission. (IV-103)

138. In mid-October 2005, AGD hired Howard Silver as a full-time floral designer. Silver was 47 years old at the time. (IV-104)

139. Anthony Gowder did not contact Johnson for freelance work because Johnson filed the Complaint with the Commission. (IV-119, 156)

140. Anthony Gowder's testimony was credible.

141. Stephanie Gowder's testimony was credible.

B. Johnson's Witnesses

Jonatas Bell

142. Bell testified that Anthony Gowder used the term "young ones" when he was referring to the "helpers," laborers, not the designers, who had been hired "to clean, carry things, people who do that job." (I-28-29)

143. Bell admitted at the hearing that he told the Commission investigator that in his opinion Johnson was "too old and could barely walk around the design table before his surgery." (I-35)

144. Bell testified that he heard Anthony Gowder make comments about Johnson's age

about 10 times. However, Bell could remember only one specific instance, the summer of 2004, when the Gowders allegedly made comments about Johnson's age. (I-25)

145. Bell did not give any specifics regarding the comments allegedly made by Anthony Gowder. (I-28)

146. In September or October 2004, Bell resigned from the design manager position. (IV-89)

147. Bell acknowledged he was "not happy" with Anthony Gowder when he left AGD. (I-37)

148. Bell's testimony was biased and not credible.

Leona Lee

149. Lee first testified that she heard Anthony and Stephanie Gowder make age related comments, including the comment that Johnson was too old and should retire, in the floral design room in the lower level. (II-10) Lee originally testified that she heard Anthony Gowder make these statements two to three times. (II-13)

150. During cross examination, Lee did not have any independent recollection of the comments having been made. She could not remember when the comments were made, during which season of the year the comments were made, how many comments were made, or who was present when the comments were allegedly made by Anthony and Stephanie Gowder. (II-21-28)

151. Lee stated she was confident this happened several times because Bell often gave her a ride put of the way home and they "would talk [about it] on the way home." (II-29)

152. Leona Lee's testimony was not credible.

Imerio Papalini

153. Imerio Papalini and Johnson have lived together for 38 years. (I-170)

154. Papalini drove Johnson to AGD on October 20, 2004. (I-171)

155. Papalini was with Johnson on December 10, 2004, when he met with Anthony Gowder. (I-173)

156. Papalini was biased. However, his testimony regarding the October 20, 2004, and December 10, 2004, meetings was credible.

III. CONCLUSIONS OF LAW

1. This is an age discrimination case in which Mr. Johnson claims he was terminated because of his age.

2. Johnson has failed to prove that he was terminated based on age in violation of the Chicago Human Rights Ordinance "Ordinance", Section 2-160-030 of the Chicago Municipal Code, which provides that it is unlawful to discharge an individual "because of the individual's...age."

3. Paul Johnson is a "person" pursuant to Chapter 2-160-030 of the Ordinance and is subject to its provisions.

4. Anthony Gowder Designs is a "person" pursuant to Chapter 2-160-030 of the Ordinance and is subject to its provisions.

5. The City of Chicago Commission on Human Relations has proper jurisdiction over the parties and the subject matter of the Complaint.

A. Credibility

6. The direct contradiction between Johnson's claims and Respondent's testimony requires a judgment concerning the credibility of witnesses. It is well established that the hearing officer and the Board of Commissioners must determine the credibility of witnesses, choose among conflicting factual inferences, and weigh the evidence. See, e.g., *Ramirez v. Mexicana Airlines and Manuel Pliego*, CCHR No. 04-E-159 (March 17, 2010); *Guy v. First Chicago Futures*, CCHR No. 97-E-92 (Nov. 17, 2004); *Bray v. Sandpiper Too, Inc. et al.*, CCHR No. 94-E-43 (Jan. 19, 1996). Moreover, the Commission can disregard the testimony of any witness if it is determined that the witness was not telling the truth. *Ramirez, supra* at 13, *Guy, supra* at 8, *Bray, supra* at 4.

Based on the above authority and review of all of the evidence presented in this case, the hearing officer found that Johnson, Stephanie Gowder, and Anthony Gowder were credible witnesses. In addition, the hearing officer found that although Papalini was biased, his testimony regarding the substance of the meetings he attended with Johnson on October 20 and December 10, 2004, was credible. With the exception of Lee and Bell, the hearing officer found that all other witnesses were credible. However, she found that the testimony of the other witnesses had little relevance or probative value in determining the ultimate question of whether AGD violated the Ordinance by changing Johnson's employment status from full time to freelance.

In the hearing officer's view, Bell's credibility was undermined by his apparent bias against Anthony Gowder and by his admission that he was "not happy" with Anthony Gowder. In addition, Bell's testimony was not credible because his testimony at the hearing that his job duties as a floral designer required some physical work and that Johnson could do the work of a floral designer directly contradicted Bell's admission at the hearing that he told the Commission investigator that Johnson was "too old and could barely walk around the table." Bell's credibility was further undermined by his inability to "recall" whether, when speaking with Anthony Gowder, Gowder ever referred to Johnson as an old man. (I-35) The hearing officer

found that Lee's credibility was undermined by her friendship with Bell and by her lack of any independent recollection of any specifics regarding the age-related comments allegedly made by the Gowders.

As provided in §2-120-510(l) of the Chicago Municipal 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 and supported by the hearing record. 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). Here, the hearing officer explained the reasons for her credibility determinations and the Commission does not find them to be against the weight of the evidence. It therefore adopts them without modification.

B. Complainant's Claim of Termination Based on Age

7. The Ordinance prohibits any person from directly or indirectly discriminating against an individual in hiring, discharge, or any term or condition of employment because of the individual's age. Sec. 2-160-030, Chicago Municipal Code; see also Section 2-160-010(a), Chicago Municipal Code, defining the protected class "age" as "chronological age of not less than 40 years." Because Johnson was over age 40 at all times relevant to this Complaint, he is within the protected class.

8. Complainant has the burden of proving his claim of discrimination by a preponderance of the evidence. *Chimpoulis and Richardson v. Cove Lounge*, CCHR No. 97-E-123/127 (Sept. 20, 2000); *Mahaffey v. The University of Chicago Hospitals*, CCHR No. 93-E-221 (July 22, 1998). Age discrimination may be established by means of either direct or indirect evidence of discriminatory intent. *Chimpoulis and Richardson, supra* at 8; *Deegan v. Falasz*, CCHR No. 93-E-204 (Feb. 22, 1995) at 5. Direct evidence may be in the form of an acknowledgment of discriminatory intent by the employer or its agents. *Chimpoulis and Richardson, supra* at 8; see also *Mojica v. Gannett Co.*, 7 F.3d 552, 561 (7th Cir. 1993) (en banc).

Direct Evidence

9. To show discrimination by direct evidence in a contested disparate treatment case, a complainant may rely on statements by managers which show that the adverse employment decision was taken because of the complainant's protected group status. *Chimpoulis and Richardson, supra* at 8; *Houck v. Inner City Horticultural Foundation*, CCHR No. 97-E-93 (Oct. 21, 1998); *Buckner v. Verbon*, CCHR No. 94-H-82 (May 21, 1997); and *Richardson v. Chicago Area Council of Boy Scouts of America*, CCHR No. 92-E-80 (Feb. 21, 1996). Where there is direct evidence of discrimination, there is no need to resort to inferences. *Chimpoulis and Richardson, supra* at 8; *Matias v. Zachariah*, CCHR No. 95-H-110 (Sept. 26, 1996); *Cooper Ashmon v. Parkview Realty*, CCHR No. 91-FHO-48-5633 (Aug. 26, 1992).

In order for Johnson to prove a violation of the Ordinance using the direct evidence method of proof, he would have needed to present documents and/or credible witnesses who testify that Anthony and/or Stephanie Gowder made statements that they were going to change

Johnson's employment status from full time to part time because of his age. Johnson did not present any such direct evidence.

In attempting to prove his case by direct evidence, Johnson relies primarily on witness testimony (1) that on several occasions Anthony Gowder commented in the open on Johnson's ability to lift things and told Johnson to leave it to the "young ones" or "young bucks" to do the lifting; (2) that Anthony and/or Stephanie Gowder on multiple occasions said that Johnson was too old, that too many people had to help him, and that Johnson should retire; and (3) that Anthony Gowder made comments to Johnson and Papalini about wanting to hire young designers whom he could mold. These statements, even if proved, are not connected to the decision to change Johnson's status from full time to freelance.

Johnson did not prove the allegation that Anthony Gowder made statements that he was too old, that too many people had to help him, or that he should retire. In attempting to prove that those statements were made, Johnson relied primarily on the testimony of Bell and Lee. However, as detailed above, the testimony of the two witnesses has been found biased and not credible.

Johnson was able to prove that Anthony Gowder made statements to leave it to the "young ones" or let the "young bucks" to do the lifting. The uncontradicted testimony, however, was that those comments were made to Johnson as Gowder was directing people to help Johnson, who was having difficulty lifting and walking because of the pain he was having related to his hip. Johnson did not present any evidence to connect those statements to the decision to change his employment status.

Johnson proved that Anthony Gowder made statements related to wanting young, new designers whom he could mold and who were less expensive. This statement, in and of itself, is not direct evidence of age discrimination, however. None of the witnesses testified that Anthony Gowder stated he changed Johnson's status in order to hire younger, new, and less expensive designers. Had Gowder made that statement, it would have been direct evidence of age discrimination.

Johnson also proved that Stephanie Gowder made an age related comment when she asked about his eligibility for Medicare during their conversation about his COBRA coverage in December 2004. However, the statement at most shows that Stephanie Gowder believed Johnson was older than his true age. Johnson did not present any evidence to connect this statement or any of the statements made by the Gowders to the decision to change his employment status.

While stereotypical comments may be evidence of age discrimination, unless the remarks upon which Johnson relies were related to the employment decision in question, they cannot be evidence of a discriminatory adverse employment decision. *Chimpoulis and Richardson, supra* at 10; see also *Monaco v. Fuddrucker's*, 1 F.3d 658, 660 (7th Cir. 1993), quoting *McCarthy v. Kemper Life Ins. Companies*, 924 F.2d 683, 686-87 (7th Cir. 1991); to the same effect see *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996); see also *Deegan v. Falasz, supra*.

In this case, although Anthony and Stephanie Gowder made age-related statements, Johnson has not proved (1) that either Anthony or Stephanie Gowder harbored any discriminatory intent or motive; (2) that these statements were evidence of any discriminatory

intent; or (3) that the statements were in any way related to the spring 2004 decision to change Johnson's employment status from full time to freelance. On the contrary, the evidence at the hearing proved that the Gowders had a longstanding relationship with and cared deeply about Johnson. The decision to change Johnson's status was delayed to ensure he would have medical coverage and be able to have the necessary hip replacement surgery. While Johnson was hospitalized, Stephanie Gowder visited him. The Gowders delayed notifying Johnson of the decision to change his employment status because it was emotional for them due to their relationship. These facts do not support a finding that any of the statements made evidenced age-related animus or age discrimination. Johnson, therefore, has failed to prove he was discriminated against because of his age based on direct evidence.

Indirect Evidence

10. In the absence of direct evidence, Johnson can rely on the indirect evidence method to establish that age discrimination motivated his termination. Under the indirect method of proof, Johnson must first establish a *prima facie* case by showing (1) that he was in the protected age category; (2) that he was performing the job satisfactorily; (3) that he was subject to an adverse employment action, and (4) that he was disadvantaged in favor of a similarly situated younger person. See *Chimpoulis and Richardson, supra*; *Brooks v. Hyde Park Realty Company, Inc.*, CCHR No. 02-E-116, (Dec, 17, 2003); *Mahaffey, supra* at 14-15. Johnson has established the first, second, and third elements of his *prima facie* case.⁴ However, he has failed to prove the fourth element of his *prima facie* case. Johnson has failed to show that he was disadvantaged in favor of a similarly situated younger employee.

Johnson argues that he was the only employee affected by AGD's economic situation and that he was disadvantaged in favor of Bell and Rodger, who are both younger than he and are allegedly similarly situated to him. Johnson argues that he, Bell, and Rodger were all designers; that all performed design duties for AGD; and that minor differences in the work they were performing were not the point. However, as the hearing officer noted, the differences in their skills and duties are precisely the point. Those differences defeat Johnson's claim that he was similarly situated to Bell and Rodger.

The uncontradicted testimony at the hearing proved that Rodger and Bell had used their management skills and had managerial responsibility during their employment with AGD. Bell was a design manager and Rodger was a production manager. Both Bell and Rodger had design *and* managerial skills. Anthony Gowder's uncontradicted testimony was that he did not select Johnson for the design manager position because Johnson did not have the personality or skill set necessary for the position. Johnson had superior design skills but lacked managerial skills. Significantly, Johnson admitted that he had not been a manager and that the work he did for AGD "was typical for floral designers." Therefore, although Bell and Rodger are younger than Johnson, neither is similarly situated to him. Therefore, Johnson has failed to prove the fourth element of his *prima facie* case. Consequently, Johnson has failed to prove that he was disadvantaged in favor of a similarly situated younger employee.

⁴ Although Johnson alleged he was terminated, the testimony at hearing proved that Johnson's employment status was changed from full time to freelance. The change in status was an adverse employment action, however. And because Johnson was never called in to work freelance and collected unemployment compensation, in fact his employment with Respondent ended after he was removed from full time status.

Articulation of Defense

Assuming that Johnson had proved his *prima facie* case of age discrimination, in this case AGD has articulated and proved a non-discriminatory reason for the decision to change Johnson's employment status from full time to freelance. Specifically AGD presented credible evidence that it was trying to reduce and maximize the productivity associated with its personnel dollars, in an effort to make the Company more profitable. Therefore, even if Johnson had proved a *prima facie* case of discrimination, which he did not do, AGD has successfully presented credible evidence of a non-discriminatory reason for converting Johnson's employment status from full time to freelance.

Pretext

11. Because AGD produced credible evidence that it changed Johnson's status from full time to freelance to reallocate personnel expenses in an effort to improve the Company's economic situation, Johnson must prove that AGD's articulated reason for changing Johnson's employment status was pretextual. In analyzing whether Johnson has proved pretext, the Commission begins with what the hearing officer characterized as the "same actor presumption." The hearing officer stated in her Recommended Decision that Johnson "must overcome" such a presumption to prove pretext. She pointed to authority that the Seventh Circuit has adopted the principle that in cases where the same individual hires and fires an employee (or in this case, changes an employee's status) and the action occurs within a relatively short time span following the hiring, a "strong inference" exists that discrimination was not a determining factor motivating the adverse action taken. *Rand v. CF Industries, Inc.*, 42 F.3d 1139, 1147 (7th Cir. 1994), finding a strong inference of no age discrimination where the relevant time span was two years; *EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 153, (7th Cir. 1996), making an inference of no race discrimination where plaintiff was hired and fired by the same person within ten months. The hearing officer explained that a "strong inference" against a finding of discrimination exists because, logically, a person who intends to discriminate is unlikely to hire the person in the first place, quoting *EEOC v. Our Lady of the Resurrection, supra* at 152, as stating, "The same hirer/firer inference has strong presumptive value."

The Commission generally follows the discrimination law principles and standards of proof established by federal courts when deciding comparable discrimination cases filed under Chicago's Human Rights and Fair Housing Ordinances. Indeed, CCHR Reg. 270.510(c) provides that in deciding issues of first impression, the Commission shall look to decisions interpreting other relevant laws "for guidance." However, the Commission is not strictly bound to follow federal court interpretations of federal discrimination laws and primarily looks to its own ordinances, regulations, and precedential decisions, pursuant to CCHR Reg. 270.510(a). The Commission has not been able to identify a prior Commission decision which explicitly establishes a same actor presumption; however, it agrees with the hearing officer and the federal cases cited that a "same actor" fact situation is strong evidence supporting an inference against discriminatory intent (assuming that the decision maker was aware of the complainant's protected status at the time of hire). However, the Commission is reluctant to affirm a same actor "presumption" of non-discrimination which a complainant must overcome as threshold requirement for further consideration of a claim. The Commission prefers to consider "same actor" arguments in conjunction with other evidence and decision standards when evaluating whether complainants have met their burden to prove pretext and discriminatory intent.

Here, it is undisputed that Anthony Gowder recruited Johnson in 1998 then hired Johnson, who was 58 years old at that point,⁵ as a full time employee in March 2001. It is also undisputed that it was primarily Anthony Gowder's decision to change Johnson's employment status from full time back to freelance. Despite the three year time span, especially when considering the close personal relationship between Johnson and the Gowders, and the similarity to *Rand, supra*, this is persuasive evidence that Respondent was aware of Johnson's general age level when he was recruited and hired and his age was not a factor in Anthony Gowder's decision to change his employment status.

12. To respond to this "same actor" evidence and Respondent's articulated legitimate, non-discriminatory reasons for its decision to discontinue Johnson's full time status, Johnson must produce evidence sufficient to prove that AGD's stated motives are not believable. *Roberts v. Separators, Inc.*, 172 F.3d at 452 (7th Cir. 1999). It is not enough for Johnson to simply show that Anthony Gowder based his decision on incorrect information. Instead, Johnson must prove that Johnson did not reasonably believe he could improve AGD's financial position by changing Johnson's status from full time to freelance and reallocating the associated personnel dollars. As stated in *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1130, (7th Cir. 1997), "The mere fact that the employer acted incorrectly or undesirably, however, cannot adequately demonstrate pretext; rather, the employee must prove that the employer did not honestly believe the reasons it gave for the firing."; see also *O'Connor v. DePaul University*, 123 F.3d 665, 670 (7th Cir. 1997), stating, "Whether firing an employee based on a decision that was right or wrong, fair or unfair, well-considered or precipitous" is irrelevant.

Johnson has not presented any independent evidence that Anthony Gowder's motives are not believable and that he did not honestly believe that making personnel changes would improve AGD's financial position. Therefore, Johnson has not presented sufficient evidence to overcome the "same actor" inference and establish pretext.

Johnson attempts to prove pretext by showing that AGD's hiring and recruiting decisions were inconsistent with AGD's alleged poor financial condition. Johnson relies on the fact that Stephanie Gowder stated she hoped Johnson would accept work on a freelance basis but that she had lined up three freelancers for the holidays and through the end of the year, prior to when Johnson left for surgery. Johnson also points to the fact that when he had his surgery, Rodger, who had been hired as a freelancer, became a full time floral designer and eventually became a manager. Also, in January 2005, AGD rehired Suzanne Reed as a full time salesperson at a salary of \$40,000, despite the fact there "allegedly was no business" in January 2005. And finally, in October 2005, AGD hired Howard Silver as a full time employee.

The hiring decisions upon which Johnson relies to prove pretext do not accomplish that goal. In fact, those decisions can be viewed in a manner to support AGD's defense that it was taking steps to improve its financial status. First, it is reasonable that Stephanie Gowder, not knowing when Johnson would return after having surgery, would have hired freelancers for the

⁵ There is ample evidence that at the time Johnson was hired, Respondent perceived him to be at least 40 years of age and older than Respondent's other employees. Although Johnson did not share his age with other floral designers and Anthony Gowder did not know Johnson's precise age when he first asked Johnson to work for AGD, Anthony Gowder nevertheless had known Johnson for several years at that point and must have been generally aware of his age. In addition, Stephanie Gowder asked Johnson whether he was eligible for Medicare because she believed it might alleviate some of his health insurance expenses, so she must have believed he might be close to age 65 at that point, although it turns out that he was only 62.

holiday season prior to Johnson's surgery. It is also consistent with its defense that AGD did not hire a new full time or freelance employee when Johnson was off work for his surgery. Rather, he expanded the job responsibilities of Rodger, an existing employee. The decision to hire a full time salesperson further supports AGD's defense that it was trying to improve sales and ultimately the Company's financial condition. Finally, the fact that by October 2005, AGD was able to hire a full time floral arranger may be evidence that AGD's strategies and hiring decisions made more than a year earlier were having the desired effect. Although Johnson may disagree with the hiring and other business decisions made by AGD, they reflected legitimate business decisions AGD was entitled to make.

This situation is similar to that in *Audette v. Simko Provisions*, CCHR No. 92-E-39 (June 16, 1993), an age discrimination case in which the Commission found that the complainant did not rebut or prove incredible the respondent's defense that her primary duty was eliminated and another employee was better qualified to do the remaining work, further noting that evidence the respondent may not have followed sound business practices is not proof of pretext in the absence of actual evidence of discrimination. See also *Shein v. Garland Brothers et al.*, CCHR No. 02-E-16 (Apr. 7, 2005), another age discrimination case, noting that evidence of a bad business practice or decision is not sufficient alone to support a finding of pretext; and *Mabry v. American Airlines*, CCHR No. 02-E-111 (Oct. 5, 2006), holding that an employer's actions and decisions were not so unreasonable as to support a finding of pretext or suggest discriminatory intent.

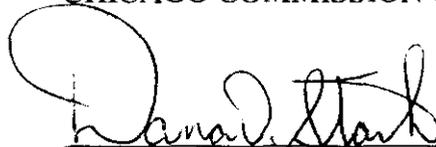
This situation is also similar to that in *Glowacz v. Angelastri*, CCHR No. 06-E-70 (Dec. 16, 2009). In *Glowacz*, the Commission found no age discrimination against a 56-year-old store clerk who was laid off, where the respondent adequately explained that he needed to make cost reductions due to declining business, that other employees but not the complainant were willing to work less than full time, and that a younger employee was also laid off.

In light of the standards and analysis outlined above, Johnson has failed to prove that AGD's reasons for changing his status from full time to freelance were a pretext for unlawful age discrimination, and thus he has not proved age discrimination by a preponderance of the evidence using either the direct or indirect method of proof.

IV. CONCLUSION

In summary, the Commission adopts the findings of fact and legal conclusions of the hearing officer. The Commission finds in favor of Respondent and specifically finds that Complainant Paul Johnson has not proved his allegations of age discrimination against Respondent Anthony Gowder Designs, Inc. Accordingly, this Complaint is DISMISSED.

CHICAGO COMMISSION ON HUMAN RELATIONS



By: Dana V. Starks, Chair and Commissioner
Entered: June 16, 2010