



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330
Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711
www.maine.gov/mhrc

Amy M. Sneirson
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

INVESTIGATOR'S REPORT

E15-0370

May 26, 2015

Jonathan D. Davis (Brewer)

v.

Home Depot¹ (Bangor)

I. Complainant's Complaint:

Complainant Jonathan D. Davis alleged that Respondent Home Depot discriminated against him on the basis of age by subjecting him to an unlawful pre-employment inquiry and by failing to hire him for a position. In particular, his claim is against Home Depot's store located in Bangor.

II. Respondent's Answer:

Home Depot denied that Mr. Davis was discriminated against on the basis of age, as Home Depot did not have an available Loss Prevention Investigator position at Store 2414 when Mr. Davis submitted his application.

III. Jurisdictional Data:

- 1) Dates of alleged discrimination: January 30, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission ("Commission"): July 27, 2015.
- 3) Respondent, which has approximately 360,000 employees, is subject to the Maine Human Rights Act ("MHRA"), the Age Discrimination in Employment Act, and state and federal employment regulations.
- 4) Complainant is not represented by counsel. Respondent is represented by Kim D. Ashford.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds" here.

IV. Development of Facts:

- 1) The parties in this case are as follows:

¹ Complainant's complaint named "Home Depot" as the Respondent; Respondent gave its legal name as Home Depot, U.S.A., Inc. Because Complainant has not amended his complaint, the name provided by Complainant has been retained.

- a) Mr. Davis was an applicant for employment at the Home Depot.
 - b) Home Depot is a home improvement retailer.
- 2) Complainant provided the following in support of his position:
- a) On January 30, 2015, Mr. Davis applied for the position of Loss Prevention with Home Depot.
 - b) Mr. Davis was 60 years of age at the time he submitted his application to Home Depot.
 - c) The application asked what year the applicant last attended educational institutions, including high school.
 - i. Mr. Davis provided an email response from the Home Depot confirming his application submission for Asset Protection/Loss Prevention in Bangor with a date of January 30, 2015.
 - d) After applying, Mr. Davis did not hear from the company, even though he was qualified for the position.
- 3) Respondent provided the following in response to Complainant's allegations:
- a) Mr. Davis submitted an application for a Loss Prevention Investigator position at Store 2414, located in Bangor, Maine, via The Home Depot's website.
 - b) Although Mr. Davis did not date his application, The Home Depot received Mr. Davis's application on January 30, 2015.
 - c) The Home Depot's application asks for the last year the applicant attended high school.²
 - i. *Investigator's Note:* The application provides that applicants in California need not provide the last year attended.
 - d) Mr. Davis submitted his application when there was no available Loss Prevention Investigator position for which Mr. Davis could have been considered or hired at Store 2414. As a result, Mr. Davis's application was not reviewed.
 - e) Between January 1, 2015 and October 29, 2015, no one was considered, interviewed, hired for, or transferred into the Loss Prevention position. Thus, there is no comparator who was hired for the position.
 - f) Mr. Davis's application expired on March 31, 2015.
 - g) The Home Depot uses a recruiting service to staff all stores. The service posts positions which remain open indefinitely, including when there is no available position. This allows Home Depot to have a pool of applicants ready when a position opens.
 - h) At the time Mr. Davis applied for employment at Store 2414, the store employed 146 associates, ranging

² The application asks for all high schools, colleges, and other education attended, and the last year attended. As requested Mr. Davis offered his high school name and the last year attended, which was 1972.

in age from 19-87. Of the 146 associates, 23 associates were 40 or more years of age: five between the age of 40 and 49; nine between the ages of 50-59; six between the ages of 60 and 69; two between the ages of 70 and 79; and one aged 87.

V. Analysis:

- 1) The MHRA provides that the Commission “shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred.” 5 Maine Revised Statutes (“M.R.S.”) § 4612(1)(B). The Commission interprets the “reasonable grounds” standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

Age Discrimination – Failure to Hire

- 2) The MHRA provides that it is unlawful, based on age or disability, to refuse to hire or otherwise discriminate against an employee in the terms and conditions of employment. See 5 M.R.S. § 4572(1)(A).
- 3) Because here there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 4) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that (1) he applied for and (2) met the minimum objective qualifications for the job sought, (3) he was rejected, and (4) the person hired was of a substantially different age than him. *City of Auburn*, 408 A.2d at 1263; *Maine Human Rights Com. v. Kennebec Water Power Co.*, 468 A.2d 307, 309 (Me. 1983). See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996) (federal ADEA).
- 5) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262.
- 6) After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. See *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet his overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16. In order to prevail, Complainant must show that he would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. See *City of Auburn*, 408 A.2d at 1268.
- 7) Here, Complainant did not establish a prima-facie case of age discrimination because no one was hired for the loss prevention position for which he applied. Even if Complainant had established a prima-facie case, Respondent articulated a legitimate, nondiscriminatory reason for not hiring Complainant, namely that there were no open positions to which Complainant applied.
- 8) In the final analysis, Complainant could not show that Respondent's articulated reason for not hiring him

was pretextual and that the real reason was his age, with reasoning as follows:

- a. Although it is undisputed that Complainant applied, was qualified, and was not hired for the Loss Prevention position, Complainant could not establish that a significantly younger applicant was hired. The record confirms that Respondent did not have an open position at the time Complainant applied, and no one was hired or transferred into a Loss Prevention Position over the next 9 months.
 - b. The record does not show a pattern of Respondent hiring younger candidates in the Bangor store. The age of the successful candidates varied, with many being older than Complainant.
- 9) It is not found that Respondent discriminated against Complainant on the basis of age by failing to hire him.

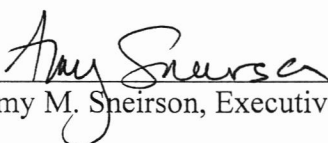
Age Discrimination – Unlawful Inquiry

- 10) The MHRA provides that it is unlawful employment discrimination for an employer, prior to employment or admission to membership of any individual, to “[e]licit or attempt to elicit information directly or indirectly pertaining to protected class.” This includes the use of any form or application for employment containing questions directly or indirectly pertaining to protected class (in this case age). 5 M.R.S. § 4572(1)(D)(1).
- 11) The Commission has published guidance which states that questions asking for an applicant’s age or date of birth prior to employment are unlawful. Examples of unlawful requests include requests for dates of graduation from educational institutions.
- a. It is undisputed that at the time Complainant applied for a position, Respondent’s online application requested dates of graduation from educational institutions. As stated above, this constitutes an unlawful pre-employment inquiry, because it is a question that indirectly pertains to a protected class.
 - b. While Respondent alleged that there was no position open at the time Complainant submitted an application, this does not change the fact that Respondent’s application contained an unlawful inquiry.
- 12) It is found that Respondent discriminated against Complainant on the basis of age by subjecting him to an unlawful pre-employment inquiry.


VI. Recommendation:

For the reasons stated above, it is recommended that the Commission issue the following findings:

1. There are **No Reasonable Grounds** to believe that Respondent Home Depot failed to hire Complainant Jonathan D. Davis due to his age in violation of the Maine Human Rights Act, and this claim should be dismissed in accordance with 5 M.R.S. § 4612(2); and
2. There are **Reasonable Grounds** to believe that Respondent discriminated against Complainant on the basis of age by subjecting him to an unlawful pre-employment inquiry, and conciliation on this claim should be attempted in accordance with 5 M.R.S. § 4612(3).



Amy M. Sneider, Executive Director



S. Audrey Gillespie, Investigator