



Maine Human Rights Commission

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INVESTIGATOR'S REPORT MHRC Case Number: E15-0526 October 13, 2017

Jo-Ann Kayatta (Portland)

v.

LG Funding d/b/a Cumberland County Mortgage (South Portland)

I. Summary of Case:

Complainant, who worked as a loan processor for Respondent, a mortgage company, alleged that Respondent discriminated against her based on age when it demoted her and terminated her employment. Respondent denied discrimination and stated that Complainant was discharged due to her bad attitude. The Investigator conducted a preliminary investigation, which included reviewing the documents submitted by the parties, holding an Issues & Resolution Conference (“IRC”), and requesting additional information. Based upon this information, the Investigator recommends that the Commission find no reasonable grounds to believe that Respondent discriminated against Complainant based on age in her demotion but find reasonable grounds to believe that Respondent discriminated against Complainant based on age in her discharge from employment.

II. Jurisdictional Data:

- 1) Dates of alleged discrimination: January 1, 2015 through January 23, 2015.
- 2) Date complaint filed with the Maine Human Rights Commission (“Commission”): November 16, 2015. Complainant filed an amended complaint with the Commission on August 8, 2017.
- 3) Respondent has three employees and is subject to the Maine Human Rights Act (“MHRA”), as well as state employment regulations.
- 4) Complainant is represented by Maria Fox, Esq. Respondent is represented by Frank K. Chowdry, Esq.

III. Development of Facts:

- 1) Complainant provided the following in support of her claim:

Complainant, who is 60 years old, has over 30 years' experience as a banking professional, primarily in the mortgage field. She had worked for Respondent's predecessor entity (“Predecessor”) for five years when the business changed hands. Under the new management (“New Owner”), Complainant was

moved into a Loan Processing position, which was a demotion with lower pay. New Owner told Complainant her position would be changing, and then stated she acted “like his 60 year old mother-in-law” when she had an emotional reaction. New Owner hired a Loan Processor (“New Hire 1”) in her thirties to head technological improvements, and excluded Complainant from the process. Complainant welcomed the changes, but expressed some concerns regarding compliance with industry standards. Soon after, Respondent discharged Complainant and hired another Loan Processor (“New Hire 2”),¹ also in her thirties. While Respondent transitioned its business, it called Complainant’s methods “old world” and described Complainant’s much younger replacement as “new world”. New Owner had already decided she was not capable of adapting to new technology, based on age. Another employee (“Compliance Technician”) who was about to turn 60, and was Respondent’s next oldest employee, was discharged the same day as Complainant.

2) Respondent provided the following in support of its position:

When New Owner bought the business, he decided to reorganize. Respondent eliminated Complainant’s position, created four loan processor positions, and offered Complainant one of these positions. Complainant reacted very emotionally to this change and stormed out of the meeting. New Owner did compare Complainant to his mother-in-law, but only to describe her resistance to change.¹ Upon acquisition, Respondent brought in New Hire 1 as an additional loan processor to make technological improvements, working closely with Complainant. Complainant objected to the technological change, specifically stated she did not want to work with new technology, and continued to have a bad attitude.² Many witnesses in the office can testify to the negative atmosphere Complainant created, and Respondent received complaints from multiple real estate professionals. Complainant’s negativity was so widespread that New Owner had to dismiss an employee for the first time in his life.

3) The Investigator made the following findings of fact based on the documentation submitted by the parties and the information gathered at the IRC:

- a) September 4, 2012, Predecessor Owner hired Complainant as a production assistant,³ and in or around June 2014, she was promoted to operations manager. Predecessor’s business volume was high and Complainant was performing the tasks of a loan processor as well.
- b) Before acquiring the business, New Owner allegedly made some statement likening Complainant to his mother-in-law. Respondent could not recollect having made this statement.
- c) In November 2014, anticipating a change of ownership and business reorganization, New Owner met with Complainant. He informed Complainant he was eliminating her position and creating more loan

¹ In Respondent’s answer to the complaint, it provided that New Hire 1 and New Hire 2 were both born on December 6, 1983. Whether or not this is an error, it is uncontested both women were significantly younger than Complainant.

¹ Complainant knows New Owner’s mother-in-law socially. Respondent argued that New Owner’s comment was only a social reference; his mother-in-law had recently moved out of state and was struggling to adjust to change. Complainant stated she had not seen New Owner’s mother-in-law in two years, and that Respondent did not provide this context at the time of the statement.

² Respondent provided that Complainant was unhappy with her new position, New Hire 1, her assigned loan officers, Respondent’s business expanding, and moving out of her office.

³ It is notable that New Owner originally referred Complainant to Predecessor Owner for employment.

processor positions to accommodate business growth. Complainant was offered one of these positions, but she became emotional and left.

- d) A few days later, New Owner and Complainant had a second meeting, and Complainant accepted the position. At the same time, New Owner instructed Complainant not to act so emotional, and made a statement comparing Complainant to his mother-in-law.⁴
 - i. Respondent provided that it specifically warned Complainant at this meeting to maintain positive business relationships with Respondent's investors and other real estate professionals, who had complained. Complainant disputes that she ever received such warnings. Respondent was asked to, but could not, produce evidence of actual complaints about Complainant or evidence that it had warned or disciplined Complainant.
- e) On January 1, 2015, New Owner officially acquired Respondent's business. New Owner is Respondent's sole shareholder and decision-maker in a small office.
- f) Respondent created a total of four loan processor positions. Respondent brought on New Hire 1, a woman in her 30's with four years' mortgage industry experience, as another loan processor. In addition, New Hire 1 was tasked with eliminating paper records and transitioning the business onto a new platform for loan origination software. Through this process, she began to work closely with New Owner.
 - i. Complainant alleged that when New Owner, New Hire 1, and Complainant met for the first time, New Owner and New Hire 1 used the term "old world mortgage processor" to refer to Complainant's methods. Respondent disputes this claim.
- g) Thereafter, New Hire 1 and Complainant worked closely together to push through a high volume of paperwork. New Hire 1 updated Respondent's operating system to create a paperless platform while Complainant managed the existing pipeline of work.
 - i. At the IRC, New Hire 1 provided that she and Complainant had different skill sets but worked well together. She credibly testified that Complainant was "fairly pleasant on a daily basis."
- h) Complainant welcomed the technological advancements, but expressed concerns about efficiency, customer service, and compliance with mortgage standards. Complainant and Compliance Technician informed New Owner and New Hire 1 about non-compliances issues. Complainant claims she was then left out of the changes being made.
 - i. At the IRC, New Hire 1 testified that everyone had concerns about the change, and Complainant's reactions were similar to the reactions of other employees in the office.
- i) On January 23, 2015, at New Owner and Complainant's third meeting, Complainant's employment was terminated due to her "negative attitude." Respondent provided that, in addition to Complainant's bad attitude, it had received complaints about Complainant from investors, other real estate professionals,

⁴ Complainant alleged Respondent made this comparison on other occasions, which Respondent denied.

and clients.⁵

- i. Despite being asked to do so during the investigation, Respondent submitted no documentation of written reprimands, warnings, or progressive disciplinary actions leading up to Complainant's discharge. Respondent also did not provide evidence regarding the complaints allegedly received about Complainant.
 - ii. Respondent stated that although all feedback had been verbal, it could rapidly produce evidence of complaints it had received about Complainant, but it then failed to respond to the Investigator's requests for further information; there is nothing in the record to support Respondent's claims that it received complaints about Complainant.
 - iii. New Hire 1 described Complainant as "pleasant on a daily basis" and stated that she had a good relationship with Complainant.
- j) The following business day, New Hire 2 was hired as loan processor. Respondent's workplace email welcomed New Hire 2, referring to her as a "new world class processer." Complainant believed this was a comparison to her, because Respondent had referred to her as an "old world" mortgage processor; she read the email as welcoming a "new world" processor.⁶
- k) The same day Complainant was discharged, Respondent also discharged Compliance Technician, who was the next-oldest employee. Respondent was asked to produce an updated roster of its employees' ages, but failed to do so. Complainant stated that the remaining employees are all under 40 years old.

IV. Analysis:

- 1) The MHRA requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The MHRA provides that it is unlawful, based on age, to "to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment". 5 M.R.S. § 4572(1)(A).

Age Discrimination - Demotion

- 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).⁷

⁵ Respondent stated it received complaints about Complainant's communication skills from one primary investor, one underwriter, one representative/associate, and bad feedback from a broker. Respondent also claimed Complainant wrote abrupt emails to clients.

⁶ In other words, Complainant believed the email called New Hire 2 a "new-world processor", while Respondent apparently intended to call her a "new, world-class processor".

⁷ "Direct evidence" consists of "explicit statements by an employer that unambiguously demonstrate the employer's unlawful discrimination...." *Doyle v. Dep't of Human Servs.* 2003 ME 61, ¶ 14, n.6, 824 A.2d 48, 54, n.6. Under the circumstance of this case, where New Owner denied most of the alleged statements and provided some context for others, New Owner's statements are not considered direct evidence of Respondent's discriminatory intent.

- 4) First, Complainant establishes a prima-facie case of unlawful age discrimination by showing that: (1) she performed her job satisfactorily, (2) her employer took an adverse employment decision against her, (3) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed, and (4) those who continued to perform Complainant's job duties were a substantially different age than Complainant. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); *cf. City of Auburn*, 408 A.2d at 1261; *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. 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 her 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.
- 6) In order to prevail, Complainant must show that she 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 has shown that she performed her job satisfactorily and that she was demoted. It does not appear that New Hire 1 replaced Complainant, because her Operations Manager position was eliminated. Solely for the purposes of Complainant's prima-facie case, however, it is assumed that New Hire 1 can be considered a "replacement" since she worked closely with New Owner, as Complainant had with Predecessor Owner.
- 8) Respondent has stated a legitimate non-discriminatory reason for its actions, namely that Complainant's position with Predecessor Owner was eliminated when New Owner purchased the business, and she was offered a Loan Processor position as a result of the company's reorganization. New Hire 1 held the exact same position as Complainant, but did additional work to assist New Owner's move to a paperless system.
- 9) Although it is a close call, in the final analysis, Complainant has not met her burden of showing that Respondent's reasons were not pretextual and the real reason for her demotion was her age, with reasoning as follows:
 - a. Complainant did have substantially more experience in the mortgage business than New Hire 1, but the additional duties performed by New Hire 1 were related to technology, not mortgages or finance.
 - b. It appears undisputed that Complainant's original position with Predecessor Owner was eliminated, and that both New Hire 1 and Complainant held the same position of Loan Processor. No one was hired to work as an Operations Manager, so it is difficult to conclude that New Hire 1 "replaced" Complainant in

that position. Instead, it appears that New Owner conducted business differently, and restructured its employment positions accordingly.

- c. Complainant's reaction to the change in her role and her reduction in pay is certainly understandable; moreover, Respondent's unwillingness to provide documents supporting its rationale for decisionmaking to the Commission's investigation raises significant concerns.
- d. Still, looking solely at the demotion issue, it appears that the demotion decision was part of a restructuring undertaken by New Owner, and that New Hire 1 was given technology-based tasks which had never been Complainant's responsibility.

10) Complainant has not established that her demotion was discriminatory on the basis of age.

Age Discrimination - Discharge

- 11) Following the same *McDonnell Douglas* analytical framework as above, Complainant has established a prima-facie case of discriminatory discharge by showing that she performed her job satisfactorily, her employment was terminated, and Respondent hired a substantially younger person into her position to perform her duties.
- 12) Respondent articulated a legitimate, nondiscriminatory reason for discharging Complainant: Respondent did not like her attitude, which was resistant to change.
- 13) Complainant established that Respondent's reason for terminating her employment was false or irrelevant and that her discharge was discriminatory, with reasoning as follows:
 - a. Although ambiguous, some of Respondent's statements suggest a discriminatory motive, most notably New Owner's comparison of Complainant to his 60-year old mother-in-law, which stereotyped older persons' disinclination to change. New Owner and New Hire 1, however, credibly denied they ever used the words "old world processor" and "new world processor"⁸ and the email produced by Complainant ("new world class processor") does not support a claim that these statements were made.
 - b. The reason Respondent proffered for Complainant's termination ("bad attitude") is wholly unsupported by the record. There is nothing to document that she was put on notice of performance issues. Respondent stated that it could provide ample testimony from her coworkers showing Complainant's poor attitude. However, it provided none. Respondent's own witness, New Hire 1, provided at the IRC that Complainant was pleasant to be around and that they shared a good working relationship.
 - c. Aside from New Owner's allegations, there is no evidence that Respondent received complaints about Complainant. While Respondent was emphatic that evidence could be produced, it ultimately declined to do so. The investigator has therefore drawn the inference that the evidence does not exist, since Respondent would likely have provided exculpatory evidence if it was available. Complainant, on the other hand, provided positive reviews that praised her attitude and relationships within the business community.

⁸ Respondent provided they would be much more likely to use the phrase "old school."

- d. Respondent was asked to produce information showing New Hire 2's qualifications; it did not. Complainant provided New Hire 2's previous experience was working for a title company, and that she had limited experience working with the mortgage industry.
- e. Complainant was dismissed less than one month after Respondent's business acquisition, on a Friday; her replacement was announced the following Monday. The same day Complainant's employment was terminated, the next oldest person in the office was also discharged.⁹ The short time frame suggests New Owner made an early, perfunctory and discriminatory decision to discharge older employees.
- f. Complainant alleged Respondent's entire workforce is now in their 30's or 40's. Respondent refused to provide an updated roster of employees to rebut this claim. New Owner did argue that he could "fill a [sports] team" with the number of persons over 60 employed by his other business. No such evidence was produced.¹⁰

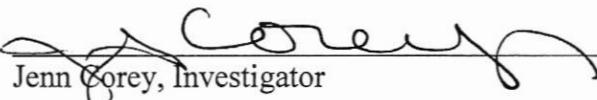
14) It is found that Respondent's termination of Complainant's employment was unlawful age discrimination.

VI. Recommendation:

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

- 1) There are **No Reasonable Grounds** to believe that Respondent LG Funding d/b/a Cumberland County Mortgage discriminated against Complainant Jo-Ann Kayatta based on age when it demoted her, 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 LG Funding d/b/a Cumberland County Mortgage discriminated against Complainant Jo-Ann Kayatta based on age when it terminated her employment, and this claim should be conciliated in accordance with 5 M.R.S. § 4612(3).


Amy M. Snellson, Executive Director


Jenn Corey, Investigator

⁹ Respondent first argued Compliance Technician voluntarily resigned and was never employed under Respondent. It later clarified that her full-time position was eliminated, but Predecessor Owner made an agreement for her to stay with Respondent part-time. The parties disputed the terms on which she separated from this part-time position, but New Owner stated he no longer had a need for her, which she was informed of contemporaneous with Complainant's termination.

¹⁰ Complainant produced a signed statement from a real estate professional who, while in his late 50's, worked with and shared a coworking space with New Owner. He stated that New Owner had a preference for younger workers, that he did not receive "the same support and treatment" from New Owner as younger real estate agents, and that "older people are not invited into [New Owner's] inner circle."