STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 08 EAG 154 EEOC NO. 16J-2008-00057

In the matter of

Rocco R. DeCarlo
Complainant

v. DECISION AND ORDER

C & D Security Management, Inc. and
Frederick Cawley
Respondents

# INTRODUCTION

On December 24, 2007, Rocco R. DeCarlo (hereafter referred to as the complainant) filed a charge against C & D Security Management, Inc. and Frederick Cawley (hereafter referred to as the respondents[1]) with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The complainant alleged that the respondents discriminated against him with respect to terms and conditions of employment and termination of employment because of his age in violation of R.I.G.L. Section 28-5-7. This charge was investigated. On October 15, 2009, Preliminary Investigating Commissioner Camille Vella-Wilkinson assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the respondents violated the provisions of Section 28-5-7 of the General Laws of Rhode Island. On December 22, 2009, a complaint and notice of hearing issued. The complaint alleged that the respondents discriminated against the complainant with respect to terms and conditions of employment and termination of employment because of his age.

Hearings on the complaint were held before Commissioner Nancy Kolman Ventrone on May 25, 2010 and May 27, 2010.[2] All parties were represented by counsel.

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[1] The charge also named "Commander" MacMullin as a respondent. The Preliminary Investigating Commissioner ultimately found that there was no probable cause to believe that "Commander" MacMullin engaged in discriminatory conduct as alleged in the charge and the Commission dismissed the charge against her.

[2] When the transcripts of the hearings are referred to in this Decision and Order, the Volumes will be referred to as follows: the May 25, 2010 transcript will be referred to as Vol. 1 and the May 27, 2010 transcript as Vol. 2.

## JURISDICTION

The respondent, C & D Security Management, Inc. (hereafter referred to as C & D) is a corporation doing business in this state that employs four or more employees and thus it is an employer within the definition of R.I.G.L. Section 28-5-6(7)(i) and is subject to the jurisdiction of the Commission. Frederick Cawley is a person who was alleged to have aided and abetted discrimination against the complainant and therefore he is subject to the jurisdiction of the Commission.

## FINDINGS OF FACT

1. The complainant was born in June 1940.

2. The complainant worked for SCG Security as a security guard at a federal building in Providence, Rhode Island (hereafter referred to as the Federal Center). He started work sometime in the fall of 2006. Lance Woodward, who later became the Area Contract Manager for C & D, hired the complainant for SCG Security.

3. C & D was awarded the contract for security at the Federal Center in or around late 2006, with the work to start on March 1, 2007. C & D's contract with the U.S. Department of Homeland Security gave the Federal Protective Service (FPS) oversight over C & D's employees working in the Federal Center.

4. When the complainant applied for employment with C & D, the application contained Guidelines for Conduct which stated that: "Violation of any of these rules, in part or in whole, shall result in disciplinary actions and/or may result in termination of employment". The rules included the following:

> …
> Sleeping while on duty.
> …
> Leaving the work assignment with out [sic] prior authorization from company supervisors.
> …
> Insubordination – failure to follow instructions from company supervisors.
> Inefficient and/or careless performance of duties.
> …
> Failure to observe good safety practices.
> Neglect of duty.
> …
> Any behavior that has an adverse effect upon the company or client.

Respondents' Exhibit H, p. 19.

5. The complainant's application for employment with C & D contained his date of birth.

He was sixty-six years old when he applied for employment with C & D.

6. On or around March 1, 2007, the complainant began his employment with C & D as a Security Officer. His duties as a Security Officer required him to rotate through various posts in the Federal Center: X-ray, Scanner, Wand, Garage and Roving Patrol.

7. Respondent Cawley was the complainant's supervisor. He was the Rhode Island supervisor for C & D. He was born in March 1945.

8. On an undetermined date, sometime on or after May 16, 2007, respondent Cawley sent a memorandum to Mr. Woodward about the complainant. The memorandum detailed an incident on April 25, 2007, when respondent Cawley was looking for the complainant at the garage post to advise the complainant about the coffee break policy. Respondent Cawley was initially unable to find the complainant. Respondent Cawley ultimately found the complainant in a little office used by the Security Officers in the winter. Respondent Cawley testified that as he entered the small office, he saw the complainant's feet coming off a table and the complainant standing up. He further testified that the complainant said to him: "I wasn't sleeping". Trans. Vol. 1, p. 143. The memorandum also states that respondent Cawley was told by other Security Guards that the complainant had been asleep while he was at his post. The memorandum mentions that on April 16, 2007, the complainant was written up by Inspector Barrus of the FPS for using the wrong form for signing in and out. The memorandum also asserts that on May 16, 2007, FPS Inspector Cabral informed respondent Cawley that the complainant was sitting on a desk, swinging his feet which the complainant had been told not to do. The memorandum states that the complainant "has a cavalier attitude towards his job and no matter how many times he is told not to continue doing something not appropriate he will continue to do it". Respondents' Exhibit K, p. 3. The memorandum concludes with the statement that "I [respondent Cawley] feel that SO [Security Officer] DeCarlo is not suited for the position of Security Officer". Respondents' Exhibit K, p. 3.

9. On or around May 23, 2007, respondent Cawley informed the complainant that his ninety-day probation period was extended another thirty days because he had been written up for using the wrong forms, because he was caught off post by respondent Cawley and because two other guards alleged that he had been sleeping on duty. The decision to extend the complainant's probationary period was made at C & D corporate headquarters. Respondent Cawley wrote to Mr. Woodward that: "I further feel that no amount of probation will change Officer DeCarlo's laid back attitude". Respondents' Exhibit L, p. 2.

10. In early June 2007, respondent Cawley recommended the termination of Security Officer Michael DiDominico. Despite being written up for his failure to adhere to the uniform requirements and being told by respondent Cawley to comply with uniform requirements, he refused to do so and had an insubordinate attitude about the subject. Respondent Cawley, in a memorandum to C & D Vice President Troy Thames,

recommended Mr. DiDominico's termination based on the uniform violations, reports of him being off post and an attitude problem. Respondents' Exhibit J. Mr. DiDominico was terminated.

11. The FPS required that C & D Security Officers follow Post Orders. The Post Orders set forth the procedures that Security Officers were responsible for following. The Post Order dated September 19, 2001 required that when Security Officers were checking employee identification: "The officer will physically secure the employee Photo ID in his/her hand". Respondents' Exhibit G, p. 6. That Post Order also required that the Security Officer identify and compare the person presenting the Photo Identification.

12. Suzanne MacMullin was the Commander of the FPS at the Federal Center at the time of the events in question. On or around August 8, 2007, Commander MacMullin was present when the complainant failed to check, in a manner consistent with Post Orders, the identification of an employee entering the building. This particular employee had been leaving and returning to the building on several occasions that day. The complainant did not hold the employee's identification in his hand to inspect it. Commander MacMullin asked him if he was going to check it and he told her that he had just seen it, that the employee had been in and out three times. On or around August 8, 2007, C & D received a "Form 2820" from Robert Barrus, FPS Inspector, which included a statement from Commander MacMullin about this incident. When a derogatory Form 2820 is issued, C & D cannot bill for the officer in question on that shift and the FPS may decide to fine C & D.

13. Respondent Cawley testified that on August 8, 2007, he also received a memorandum from Security Officer James Jager stating that on that date Mr. Jager had observed the complainant off his post. Trans Vol. 1, p. 152. The memo stated that the complainant was "putting … pressure on the rest of the Officers … because of his actions". Respondents' Exhibit M. At the time of this memorandum, Mr. Jager was 57 years old.

14. On August 9, 2007, respondent Cawley wrote a memo to Mr. Woodward discussing the complainant's actions on August 8, 2007. The memo states that the complainant waved an employee through the checkpoint without properly checking his identification. The memo also states that respondent Cawley was informed that the complainant was off post on the same day. The memo also asserts that: "This is one of several incidents involving SO [Security Officer] DeCarlo in the past five months. The other incidents involve SO DeCarlo appearing to be asleep while on post. So DeCarlo has a cavalier attitude about his position. …" Complainant's Exhibit 2, p. 3.

15. On August 10, 2007, respondent Cawley called the complainant in at the end of the day and told him that he was on administrative leave pending investigation with respect to whether the complainant failed to properly inspect an employee's identification. Respondent Cawley took the complainant's gun and identification card. Respondent Cawley testified that, when he informed the complainant of the administrative leave, the complainant responded with a sexist slur against Commander MacMullin. Respondent

Cawley testified that he told Mr. Woodward about the slur. Trans. Vol. 1, pp. 157-158.

16. Respondent Cawley did not have authority to terminate the complainant. He testified that he did not have the authority to terminate the complainant and that he did not recommend the termination of the complainant. Trans. Vol. 1, p. 158.

17. Mr. Woodward emailed a recommendation of termination to Mr. Thames. His recommendation represented that the complainant was sitting on a table and did not stand up when approached by Commander MacMullin; that the complainant allowed a person to enter the building without checking his identification; and that several officers had made written statements relating to past problems, such as not taking his job seriously and sleeping on duty. Respondents' Exhibit N. The email referenced that the complainant had been written up by Inspector Barrus of FPS and that his probation had been extended. The email also stated that when the complainant was told that he was placed on administrative leave, he used a sexist slur with respect to Commander MacMullin. Respondents' Exhibit N.

18. Troy Thames, Executive Vice President of C & D, made the final decision to terminate the complainant's employment. Mr. Thames was approximately 53 years old at the time of the complainant's termination. He testified that he based the complainant's termination on the complainant's file and a recommendation from Mr. Woodward. Trans. Vol. 1, p. 206. He testified that part of his reason for termination was the language that Mr. Woodward reported the complainant had used when he was placed on administrative leave in that it related to attitude and demeanor. Trans. Vol. 1, p. 207.

19. On or shortly after August 13, 2007, C & D terminated the employment of the complainant. Respondent Cawley and Mr. Woodward were present when he was terminated. At the time of his termination, the complainant was 67 years old, respondent Cawley was 62 years old and Mr. Woodward was 63 years old.

20. Tim Connell was a Security Officer for C & D at the Federal Center at the time of the events in question. His age at the time was approximately in his 50s. On one occasion, the FPS was testing the Security Officers at the Federal Center and a male FPS officer entered the building by showing his wife's identification card. Mr. Connell was the officer in charge of checking identification at that time. The FPS filed a Form 2820 about the incident. Mr. Connell was suspended for five days and placed on 90 days of probation, but he was not terminated. Mr. Cawley testified that Mr. Connell was "a perfect worker". Trans. Vol. 1, p. 160. Mr. Woodward testified that Mr. Connell was a valued employee, "that there has never been … one single matter of him doing anything wrong" and that was why he was not terminated. Trans. Vol. 2, p. 14.

# CONCLUSIONS OF LAW

The complainant did not prove by a preponderance of the evidence that the respondents discriminated against him with respect to terms and conditions of employment and termination of employment because of his age.

# DISCUSSION

## I. DISCRIMINATION IN TERMINATION

### THE STANDARDS FOR EVALUATING EVIDENCE OF DISCRIMINATION IN TERMINATION

The Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the state Fair Employment Practices Act (FEPA), under which the instant case was filed. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See Newport Shipyard, Inc.*, 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998). There are two common methods for analyzing evidence of discrimination, one is denominated the "pretext method" and the other the "mixed motives method".

With respect to the pretext method, the Courts in Center for Behavioral Health, Rhode Island, Inc. v. Barros, Newport Shipyard v. Rhode Island Commission for Human Rights, 484 A.2d 893 (R.I. 1984), McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) (hereafter referred to as McDonnell Douglas), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) (hereafter referred to as Hicks) set forth long-standing methods for analyzing evidence of discrimination. According to these methods, the complainant must first establish a prima facie case of discrimination. A complainant may establish a prima facie case of age discrimination with respect to termination by proving that:

1. He was forty years of age or older;
2. He was qualified for his position;
3. He was terminated;
4. He was replaced by a younger person, younger persons in similar positions were retained in employment and/or the employer continued to need a person to carry out the complainant's work.

Once a complainant has made a prima facie case of discrimination, the respondent must present a legitimate, non-discriminatory reason for its actions.

> Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case - i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, non-discriminatory reason". Burdine, 450 U.S. at 254. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. *Id*. at 254-255, and n.8.

Hicks, *supra*, 509 U.S. at 506 – 507, 113 S. Ct. at 2747, 125 L.Ed.2d at 416. [Emphases in original.]

Once a respondent has presented a legitimate, non-discriminatory reason for its actions, a complainant may prove discrimination by proving that the reason given is a pretext for discrimination. In order to prove that the respondent was motivated by discrimination, the complainant may present direct evidence or indirect evidence that the respondent was motivated by discrimination (such as evidence that the reasons presented by the respondent are not credible). Under Hicks, the finder of fact, in this case the Commission, must find that the respondent's actions were motivated by discrimination. "It is not enough to disbelieve the employer; the factfinder must believe plaintiff's explanation of intentional discrimination." Hicks, *supra*, 509 U.S. at 519, 113 S. Ct. at 2754, 125 L.Ed.2d at 424. [Emphases in original.] The "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" but it does not compel such a finding. Hicks, *supra*, 509 U.S. at 511, 113 S. Ct. at 2749, 125 L.Ed.2d at 417. *See also* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000).

The other method for analyzing evidence of discrimination is the mixed motives method. The FEPA specifically provides that a plaintiff may prove discrimination by proving that discrimination was a motivating factor for the respondent's actions, even though the decision was also motivated by other lawful factors. R.I.G.L. Section 28-5-7.3 provides that:

> An unlawful employment practice may be established in an action or proceeding under this chapter when the complainant demonstrates that race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin was a motivating factor for any employment practice, even though the practice was also motivated by other factors. Nothing contained in this section shall be construed as requiring direct evidence of unlawful intent or as limiting the methods of proof of unlawful employment practices under § 28-5-7.

Title VII of the Civil Rights Act of 1964 contains similar language (42 U.S.C. Section 2000e-2(m)) which was interpreted in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (hereafter referred to as Desert Palace). Both R.I.G.L. Section 28-5-7.3 and Desert Palace provide that a plaintiff does not need direct evidence to prove that discrimination was a motivating factor. A complainant may use circumstantial evidence to prove that discrimination was a motivating

factor. Desert Palace, 539 U.S. at 99 - 101.

Since the decision in Desert Palace, federal courts have been considering whether to modify the long-standing method of analyzing evidence of discrimination as set forth in McDonnell Douglas and Hicks to reflect the holding of Desert Palace. The results of this consideration are not uniform. White v. Baxter Healthcare Corp., 533 F.3d 381, 401 (6th Cir. 2008) gives a comprehensive review of the approaches taken by the various U.S. Circuit Courts of Appeal. For example, the Fifth Circuit has established a modified McDonnell Douglas approach, where it continues to use the first two "prongs" of the analysis – i.e., that the plaintiff must make a prima facie case of discrimination and the defendant must then proffer a legitimate, non-discriminatory reason for its actions, and then modifies the third "prong".

> This Circuit has adopted use of a "modified McDonnell Douglas approach" in cases where the mixed-motive analysis may apply. *See* Rachid, 376 F.3d at 312. After the plaintiff has met his four-element *prima facie* case and the defendant has responded with a legitimate nondiscriminatory reason for the adverse employment action:
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> > [T]he plaintiff must then offer sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is not true, but is instead a pretext for discrimination (pretext alternative); or (2) that the defendant's reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff's protected characteristic. (mixed-motive[s] alternative). *Id.* (internal quotation marks and citations omitted).

Keelan v. Majesco Software, Inc., 407 F.3d 332, 341 (5th Cir. 2005)

The Sixth Circuit has held that the McDonnell Douglas method of proof can be helpful in narrowing the issues for determination but that a plaintiff need not establish a prima facie case in order to prove discrimination.

> As the shifting burdens of McDonnell Douglas and Burdine are unnecessary to assist a court in determining whether the plaintiff has produced sufficient evidence to convince a jury of the presence of at least one illegitimate motivation on the part of the defendant, we conclude that the McDonnell Douglas/Burdine framework does not apply to our summary judgment analysis of mixed-motive claims. The only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in such cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for'" the defendant's adverse employment decision. Desert Palace, 539 U.S. at 101, 123 S. Ct. 2148 (quoting 42 U.S.C. § 2000e-2(m)).

White v. Baxter Healthcare Corp., 533 F.3d at 401 (6th Cir. 2008)

The First Circuit Court of Appeals has declined to delineate a modified standard of proof, instead giving a comprehensive overlook of the effect of Desert Palace as follows:

> Chadwick presses her claim under two separate, though related, theories. She puts forth a "mixed motives" claim, under Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L.Ed.2d 84 (2003), [Footnote omitted] and a traditional discrimination claim under the familiar McDonnell Douglas burden shifting scheme. [Footnote omitted.] Our decision here, however, is not dependent on analyzing Chadwick's claim under each of these theories,[8] because under both approaches, "plaintiffs must present enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias." Hillstrom, 354 F.3d at 31 (discussing the "interaction between Desert Palace and McDonnell Douglas").
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> ….
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> The Desert Palace decision has proved ripe terrain for scholarly debate over how that decision interacts with the McDonnell Douglas framework. *See, e.g.,* Jamie Darin Prenkert, "The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess," 45 Am. Bus. L.J. 511, 512-15 (2008) (collecting commentaries). Suffice it to say that the two decisions have not been definitively disentangled or reconciled, though we have noted that "the Supreme Court used the McDonnell Douglas framework without commentary in a post-Desert Palace case." Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 31 n. 3 (1st Cir.2003).

Chadwick v. WellPoint, Inc., 561 F.3d 38, 45, 49 (1st Cir. 2009)

The Commission has utilized a modified McDonnell Douglas standard of proof in determining discrimination cases.[3] *See* Bagnall v. UPN 28 TV, WLWC, Paramount Pictures, Commission File No. 01 EAG 069 (2005).

[3] The Commission does not intend to foreclose other methods of analysis that might be appropriate in a particular case to prove discrimination. For example, there may be cases in which a complainant who could not present sufficient evidence to establish a prima facie case of discrimination could still establish that discrimination was a motivating factor in the employer's decision. In most cases, however, the modified McDonnell Douglas approach provides a useful method of analysis.

THE COMPLAINANT DID NOT PROVE AGE DISCRIMINATION WAS A FACTOR IN HIS TERMINATION

As stated above, the complainant may prove a prima facie case of age discrimination in termination by demonstrating that:

1) He was forty (40) years of age or older;
2) He was qualified for the position that he held;
3) He was terminated;
4) He was replaced by a younger person, younger persons in similar positions were retained in employment and/or the employer continued to need a person to carry out the complainant's work.

*See* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000) and Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148 (1st Cir. 1990).

The complainant proved a prima facie case of discrimination. He was 67 years old when he was terminated. He had the experience and background for the position and had passed his extended probationary period. He was terminated. Other, younger employees were not terminated, and C & D needed people to carry out the complainant's work. A prima facie case of discrimination was established.

The respondents met their burden of proffering a legitimate, non-discriminatory reason for their actions.[4] Mr. Thames testified that he based the termination on the complainant's personnel file and Mr. Woodward's recommendation. Trans. Vol. 1, p. 206. Mr. Woodward's recommendation of termination listed a number of problems with the complainant's work performance, including that other officers had submitted statements that the complainant had been sleeping on duty; that the complainant allowed a person to enter the building without checking his identification; that he had been written up by Inspector Barrus of FPS and that when he was told that he was placed on administrative leave, he used a sexist slur with respect to Commander MacMullin. Respondents' Exhibit N. Respondent Cawley wrote two memoranda about deficiencies in the complainant's performance to Mr. Woodward and spoke to Mr. Woodward stating that the complainant had used a sexist slur when referring to Commander MacMullin. Respondents' Exhibits K, Complainant's Exhibit 2, Trans. Vol. 1, pp. 157-158. Respondent Cawley testified that it was the normal business of C & D to document personnel matters. Trans. Vol. 1, p. 124. See Findings of Fact Paragraphs 15 and 16 above.

The complainant did not prove that the reasons given by the respondents were a pretext for age discrimination. The complainant disputed the factual underpinnings of the alleged deficiencies contained in the memoranda about his performance, but he did not prove that the reasons given by the respondents lacked credibility.

[4] While respondent Cawley did not have the authority to terminate the complainant, it is clear that his reports to upper management were a causative factor in the complainant's termination.

The allegations that the complainant was sleeping while on duty were based on alleged reports from security officers who were, for the most part, not identified, and who did not testify at the hearing. The complainant maintained that these security officers had been mistaken. Trans. Vol. 2 pp. 24-25. Respondent Cawley testified that on one occasion, he found the complainant, not at his garage post, but in a small office with his feet on the desk and that complainant sprang up when respondent Cawley came in, volunteering that he had not been asleep. Trans. Vol. 1, p. 144. The complainant denied that he had his feet on the desk when respondent Cawley found him in the small office in the garage. Trans. Vol. 1, p. 24. He did not deny that he was in the office rather than at his post at the entrance to the garage[5] and he did not deny that his first remark was that he "was not sleeping". While the allegations that other security officers witnessed the complainant sleeping were not substantiated, the Commission finds credible the testimony of respondent Cawley that he found the complainant off post in circumstances which suggested that he had been sleeping.

The complainant testified that he did check the identification of the employee who entered the Federal Center when Commander MacMullin was present (Trans. Vol. 1, p. 28). However, he admitted that while he had physically touched the employee's identification the first time the employee went out of and into the Federal Center that day, he did not physically touch the identification when Commander MacMullin was there, as is required by the Post Orders. Trans. Vol. 1, pp. 87-88. Commander MacMullin had asked whether he was going to check the badge and he testified that he said: "I just saw it. He's been in and out three times…" Trans. Vol. 1, p. 28. The testimony taken as a whole convinces the Commission that the complainant did not follow Post Orders with respect to identifying the employee who came in while Commander MacMullin was present and that even Commander MacMullin's remark to him did not cause him to follow the proper procedure.

There is no question that the FPS issued a Form 2820 to C & D complaining that the complainant had not properly checked the identification of an entering employee. There is no question that the FPS can exact financial penalties if it decides that Security Officers are not following Post Orders. There is no question that FPS Inspector Barrus had previously written up the complainant for using the wrong form.

The complainant denies that he used a sexist slur with respect to Commander MacMullin. Trans. Vol. 2, p. 25.

On the whole, the Commission finds that the testimony of the respondents' witnesses was more credible than the testimony of the complainant, particularly with respect to the complainant's failure to properly check the identification of a person entering the Federal Center, the FPS request for action with respect to that failure to properly check identification and the complainant on occasion sleeping on post or being off post.

The complainant did not prove that the reasons given by the respondents for their actions constituted a pretext for age discrimination. Gigliotti v. P.W. Campbell Contracting Co., 141 Fed.

[5] He testified that he was never told that he should keep out of the office and that in inclement weather a security officer can go in the shed. Trans. Vol. 1, p. 21.

Appx. 60, 2005 U.S. App. LEXIS 14477 (3rd Cir. 2005) (unpublished) (summary judgment for the employer was upheld; whether or not the employer was wrong in its assessment of the plaintiff's performance, the court concluded that the plaintiff did not submit sufficient evidence to show that the employer was motivated by age discrimination in its decision not to rehire the plaintiff).

The question remains as to whether the complainant proved that age discrimination was one of the factors that caused the respondents to terminate him. The Commission finds that the complainant did not prove that age discrimination was a factor in the termination decision

Mr. Woodward had hired the complainant approximately one year before his termination. The complainant's age was evident at that point since his date of birth was on his application. Mr. Woodward also recommended the complainant's termination. *See* Le Blanc v. Great American Ins. Co., 6 F.3d 836 (1st Cir. 1993) (where the same person who transferred the plaintiff to his district and gave him a pay increase at age fifty-seven terminated the plaintiff two years later and retained another employee who was only one year younger than the plaintiff, there is an inference that the employer was not motivated by age discrimination) and Tucker v. Manheim Auto Auction, 194 F. Supp.2d 56, 59 (D.P.R. 2002) (where the same person who hired the plaintiff at age sixty, fired the plaintiff six months later, there is a strong inference that the employer was not motivated by age discrimination).

Other factors that suggest that age was not a factor include the respective ages of the people involved. Mr. Woodward and respondent Cawley were fairly close in age to the complainant. At the time of his termination, the complainant was 67, Mr. Woodward was 63 and respondent Cawley was 62 years old. While the Commission does not presume that members of a protected class are free from prejudice against their own class, in this case the closeness of the ages of the management personnel who instigated the complainant's termination to the age of the complainant supports the respondents' position that they did not discriminate. The ages of these managers also indicate that C & D retained employees in its workforce at that time who were in the age range of the complainant. The complainant did not testify to any age discriminatory remarks by supervisory personnel.

Further, the respondents had given the complainant opportunities to improve. On April 25, 2007, respondent Cawley observed the complainant in the garage giving the impression that he had been sleeping. The complainant had been cited by FPS Inspector Barrus for using the wrong forms a few weeks earlier. Respondent Cawley did not write a memorandum about the complainant right away. He wrote a memorandum to Mr. Woodward after May 16, 2007 when he received reports that the complainant was sitting on a desk, against orders, and sleeping on duty. This does not indicate a biased rush to judgment. Moreover, C & D, in response to that May 16, 2007 memorandum, extended the complainant's probation; it did not use those incidents as an excuse to terminate his employment on that occasion. It was only after the more serious report from FPS personnel that the complainant was not following proper identification procedures and a separate report from Security Officer Jager that he observed the complainant off post, that respondent Cawley wrote a second memorandum to Mr. Woodward about the

complainant's deficiencies and that C & D terminated him.[6]

The complainant produced evidence that another security guard, Tim Connell, violated identification procedures when FPS officers did an undercover test and was not terminated. Mr. Connell failed to check the FPS agent's identification sufficiently to notice that the identification was that of the agent's wife. Mr. Connell was suspended for five days but was not terminated. Mr. Connell was in his 50s. However, the complainant did not establish that Mr. Connell's situation was comparable to the complainant's situation, as there was no evidence that Mr. Connell had a history of other infractions. The respondents' witnesses lauded Mr. Connell as the "perfect" employee. Trans. Vol. 1, p. 160, Vol. 2, p. 14.

Taking all of the evidence into account, the evidence that the complainant violated procedures, that the FPS wanted C & D to take action, that the respondents had not rushed to terminate the complainant for previous infractions, that the complainant's age was evident when he was hired in the previous year and that his work record was not comparable to that of the younger employee who received less severe discipline, the Commission finds that the complainant did not establish that age was a factor in his termination. *See* Runyon v. Applied Extrusion Technologies, Inc., 619 F.3d 735 (7th Cir. 2010) (plaintiff did not prove age discrimination; while he was terminated for an altercation and a younger employee, who was involved in the same altercation, was not terminated, the plaintiff was not similarly situated to the younger co-worker because the plaintiff's record showed other major conflicts with co-workers while the younger co-worker had a record of only minor incidents).

## II. DISCRIMINATION IN TERMS AND CONDITIONS OF EMPLOYMENT

The complainant did not present evidence that the respondents treated him differently than similarly-situated younger employees while he was employed. Therefore, the Commission finds that the respondents did not discriminate against the complainant with respect to terms and conditions of employment.

## MOTION TO DISMISS

Having reviewed the evidence presented at the hearing and having found that the complainant did not prove that discrimination occurred as alleged in the complaint, the Commission need not address the respondents' Motion to Dismiss.

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[6] Respondent Cawley recommended the termination of another Security Officer, Michael DiDominico, who, according to respondent Cawley, had failed to follow uniform protocol and who had an insubordinate attitude. Mr. DiDominico was terminated. Evidence was not submitted as to Mr. DiDominico's age.

## ORDER

Having reviewed the evidence presented, the Commission, with the authority granted it under R.I.G.L. Section 28-5-25, finds that the complainant failed to prove the allegations of the complaint and hereby dismisses the complaint with prejudice.

Entered this [31st] day of [May], 2011

/S/

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Nancy Kolman Ventrone
Hearing Officer

I have read the record and concur in the judgment.

/S

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John B. Susa
Commissioner

/S/

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Alberto Aponte Cardona
Commissioner