

**BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY**

<hr/> <b>Russell Dillon,</b>	)	HRC Case No. 0041010618
Charging Party,	)	
vs.	)	<i>Final Agency Decision</i>
<b>Interstate Companies, Inc.,</b>	)	
Respondent.	)	
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**I. Procedure and Preliminary Matters**

Russell Dillon filed a human rights complaint alleging that Interstate Companies, Inc. (Interstate) discriminated against him on the basis of age when it discharged him from work on May 1, 2003. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on August 5, 2004 in Billings, Montana. Jeffrey Simkovic, attorney at law, represented Dillon. Lee Henderson, attorney at law appearing *pro haec vice*, and Connie Camino, attorney at law, represented Interstate.

Dillon’s exhibits 1, 2, and 3 and Interstate’s exhibits 101 and 102 were admitted by stipulation of the parties. Dillon, Vince Story, branch manager, and Brian Maher, parts department manager, testified under oath. Based on the evidence and arguments adduced at the hearing as well as the post hearing memorandums submitted by the parties, the hearing examiner makes the following findings of fact, conclusions of law, and order.

A copy of the hearing examiner’s docket accompanies this decision.

**II. Issues**

Did Interstate unlawfully discriminate against Dillon based on his age when it laid him off from his employment?

**III. Findings of Fact**

1. Interstate sells diesel engine parts and supplies. Interstate’s primary sales involves sales of parts for Allison and Detroit Diesel engines. As part of its sales programs, Interstate has had both “inside” and “outside” sales. Inside sales are sales conducted in the store through the parts department. Outside sales are done by outside salesmen who travel around calling on customers.

2. In 1973, Interstate hired Dillon to work inside sales. He stayed in this position until 1991, when he moved to outside sales. Interstate paid Dillon salary and covered his travel expenses while he worked in his outside sales position.

3. Due to diminishing sales, Interstate's branch manager, Vince Story, eliminated Dillon's outside sales position in December, 1998. Instead of laying Dillon off, Story returned Dillon to inside sales in the parts department.

4. After being returned to inside sales, Dillon's responsibilities included selling parts, obtaining materials for fabrication, and some servicing of customers that Dillon had previously serviced as an outside salesman.

5. Dillon was one of four persons working as a parts salesman at the time he returned to inside sales. Three other parts salesmen, Gary Jones, Mike Popovich, and Ray Rawlins were already working in parts when Dillon rejoined the inside sales department. Brian Maher managed the sales department. Vince Story was the branch manager of the Interstate Billings branch. In addition to the sales personnel, the parts department also had a warehouseman's position, a shipping and receiving position, and an inventory control position. The persons in these three positions were not capable of fulfilling the duties of the sales positions.

6. When Dillon rejoined the inside sales staff, computer literacy and computer technology skills were very important to fulfilling the responsibilities of an inside sales position. Many of Interstate's customers and vendors were completing orders through Internet sales methods. This required Interstate's salesmen to stay abreast of customers' and vendors' computer uses and to receive ongoing training on those uses. Interstate required its inside sales persons to have computer training and knowledge of the use of computers.

7. Dillon did not have access to computer use while on the road in his outside sales position. As a result, when he came back into the inside sales position, he lagged behind the other three salesmen in computer training. Dillon was appraised that he must obtain knowledge of appropriate computer skills and must stay abreast of necessary computer skills in order to carry out the duties of the position. Interstate expected each salesman to take the initiative to receive the training needed to remain up to speed on the use of the computer.

8. All inside sales personnel had a variety of training resources available to them if they desired to utilize the resources. Among these resources were

training on various Internet sites and training available at the branch facilities, including the Billings branch. In addition, Interstate paid for employees to receive necessary training from outside sources. During his entire tenure in sales, Dillon only availed himself of this training only one time.

9. Interstate's sales began to slump during 2002. By the end of 2002, Interstate had seen a 20% decline in sales. As required by internal business practices, each department at Interstate prepares an income forecast for the following year. In December, 2002, Interstate's income forecast for the sales department for 2003 projected a 35% and 40% decrease in inside sales.<sup>1</sup>

10. Due to the projected downturn, Story decided that one of the sales personnel had to be discharged. To determine which of the four sales persons should be laid off, Story in December, 2002 reviewed the relative strengths and weaknesses of each of the four sales persons. He reviewed each individual's skill sets (their technical proficiency), each individual's job responsibilities, each individual's relationships and attitudes with customers, and each individual's relationships with vendors. When Story completed the review, Dillon was 61 years old. Jones was 52 years old and had worked for Interstate since 1971. Popovich was 54 years old and began his employment with Interstate in 1994. Rollins was 52 years old and began working at Interstate in 1971.

11. Story considered the fact that Popovich had 20 years experience in the mining industry. The working knowledge Popovich had gained from working in the mining industry integrated well with one of Interstate's larger customers, Kress Coal Haulers (a supplier of large mining trucks). Both Jones and Rawlins were very astute at using the computer for completing orders and sales. Each was well received by customers and each had good follow through with tasks. Dillon also had good relationships with customers. He failed, however, to follow through on tasks and also exhibited some difficulty in completing the computer transactions that were a part of his assigned duties. This difficulty stemmed from his lack of training on the computer.

12. After assessing the relative strengths and weaknesses of the four sales persons, Story decided that Dillon would be laid off. At the same time, again as a result of slumping sales, four other persons in the Billings Interstate branch who were not involved in sales were also laid off. At the time of assessing and concluding which employee should be laid off, Story did not know Dillon's age.

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<sup>1</sup>The downturn in fact occurred, as demonstrated by the fact that from 2002 to 2003, parts sales dropped from \$5,800,000 to \$4,700,000, almost a 19% decrease.

13. As a matter of company policy, Story waited approximately one month (until the end of January, 2003), to implement the lay off. The reason for doing so was to see if the January, 2003 sales would pick up so that the lay off could be avoided. Sales did not pick up and Story implemented the lay off.

14. At about the same time that Story began to contemplate the lay off, Dillon began looking into retirement. His wife had been in poor health (suffering from Alzheimer's disease) and he himself had been experiencing health problems. Dillon's family had been pressing him to retire.

15. Dillon looked at retirement alternatives to determine if retirement was a viable option. Dillon discussed with his co-workers his earnest investigation into retirement. Maher became aware that Dillon was looking at the possibility of retiring. In this context, Maher asked Dillon his age. At the time that the decision was made to lay Dillon off (in December, 2002), Maher did not know Dillon's age.

16. Story informed Dillon in February, 2003 that Dillon would be laid off effective April 1, 2003. Dillon considered the option of accepting Interstate's COBRA contributions or foregoing the contribution and seeking unemployment insurance benefits. Dillon ultimately came to the conclusion that he could not afford to be laid off and, understandably, was upset that he was being laid off.

17. In order to accommodate Dillon's use of his sick leave, Interstate did not lay Dillon off until May 1, 2003. Interstate did not eliminate the sales position that Dillon held, but it did not fill the position. The remaining three employees absorbed Dillon's work load.

18. In 2004, Interstate experienced an increase in sales. In March, 2004, at least in part due to the sales resurgence, Interstate offered Dillon his job back at the inside sales desk. Dillon declined this offer.

#### **IV. Opinion<sup>2</sup>**

The Montana Human Rights Act prohibits age discrimination in employment where age is not reasonably related to the demands of the job. Mont. Code Ann. § 49-2-303(1)(a). Dillon alleges Interstate discharged him from employment based upon impermissible age considerations. Dillon had no

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<sup>2</sup> Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

credible direct evidence of discriminatory animus due to his age, so his claims are subject to the indirect evidence analysis.

Where there is no direct evidence of discrimination, Montana utilizes the three-tier standard of proof from *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, in reviewing age discrimination claims in the employment context. *Tonack v. Montana Bank of Billings* (1993), 258 Mont. 247, 854 P.2d 326. *See also, Clark v. Eagle Systems* (1996), 279 Mont. 279, 927 P.2d 995. Under the *McDonnell Douglas* analysis, the plaintiff must prove a prima facie case. Once the plaintiff has done so, the burden then shifts to the employer to demonstrate a legitimate, non-discriminatory basis for its conduct. If the employer does this, the burden then shifts back to the plaintiff to show that the employer's reasons were merely pretextual. *McDonnell Douglas, supra*.

Dillon has made his prima facie case in this instance. Interstate, citing *Clark*, contends that Dillon's failure to present evidence of the fourth element - replacement by a younger worker - amounts to a failure to present a prima facie case. In *Clark*, the Montana Supreme Court, in reviewing the propriety of granting a motion for summary judgment for the respondent, noted that the plaintiff's prima facie case is established by showing that the plaintiff (1) is in a protected class, (2) performed his job in a satisfactory manner, (3) was discharged, and (4) was replaced by a substantially younger worker. *Clark, supra*, 279 Mont. at 286, 927 P.2d at 999. The *McDonnell Douglas* standard of proof, however, is flexible rather than rigid. The four elements are not woodenly applied to every claim, but instead adapt to the nature of the proof proffered.<sup>3</sup> Here, Dillon has demonstrated that he was in a protected class, that he performed his work in a reasonably satisfactory manner (though clearly not as well as his fellow parts counter employees), that he was laid off of work, and that the three persons not laid off of work were all 7 to 9 years younger than him. In the absence of any countervailing evidence, this could establish that the employer did not treat age neutrally, since the employees who were retained were younger than Dillon. This is sufficient, under the *McDonnell Douglas* test, to make a out a prima facie case of age discrimination under Mont. Code Ann. § 49-2-303(1)(a).

Because Dillon made a prima facie case, the burden shifted to Interstate to show "some legitimate, non-discriminatory reason" for its action. *McDonnell Douglas, op. cit. at* 802. Interstate satisfied the requirements of this second tier

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<sup>3</sup> *Cf., Martinez, supra, citing Crawford v. Western Electric Company, Inc.* (5<sup>th</sup> Cir. 1980), 614 F.2d 1300 (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

of *McDonell Douglas*. It met Dillon's case by presenting a legitimate reason for the need to lay off one of the four counter sales persons and by showing legitimate, non-discriminatory reasons for choosing to lay off Dillon as opposed to the other three persons.

Interstate faced a potentially economically devastating horizon -projected declines of 35 to 40% in the sales of parts - at the time it made the decision that one of the four parts counter persons had to be released. Story, being unaware of Dillon's age, reviewed the relative strengths and weaknesses in the work of each of the employees and their relative worth to the profitability of Interstate. Popovich had 20 years of experience in the mining industry and his knowledge was particularly helpful in the interface between Interstate and an important customer, Kress Coal Haulers. Both Jones and Rawlins were very astute at using the computer for completing orders and sales. Each was well received by customers and each had good follow through with tasks. In contrast, Dillon failed to follow through on occasions and did not avail himself of training that would permit him to utilize the company computers as efficiently as possible. Use of the computers was integral to the ordering of parts from vendors and in sales to customers. Story's selection criteria were neutral and clearly tied to legitimate business needs. Interstate's legitimate business reason evidence put Dillon's prima facie case at issue. *See, Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 255-56; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 404, 886 P.2d 947, 952; *Johnson v. Bozeman School Dist.* (1987), 226 Mont. 134, 734 P.2d 209.

After Interstate produced legitimate, non-discriminatory reasons for its actions, Dillon had the opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by Interstate were only a pretext for discrimination. *Hafner, supra at 405, 886 P.2d at 953.*

Dillon's efforts in this regard failed. As Interstate correctly points out, Dillon presented no evidence to show either that Interstate's projected losses were trumped up or that Story did not analyze the relative work performance of the inside sales persons in the way that he testified. Dillon did not present any evidence to show that the looming projected million plus dollar loss was not a legitimate basis for downsizing. Moreover, Maher's questions to Dillon regarding his age, when taken in the context as explained by Maher, show that these questions were merely concomitant to Dillon's openly expressed contemplation of retirement. They were not inquiries designed to glean information to be used for an illegitimate purpose as Dillon contends. Indeed, the evidence shows that neither Maher nor Story was aware of or considered Dillon's age at the time the decision was made to lay off Dillon.

Dillon attempted to overcome Interstate's showing of legitimate, non-discriminatory reasons for the lay off by showing that Dillon's last performance review contained no commentary about his computer skills. This point, however, does not dissuade the hearing examiner from the sincerity of Story's undertaking of assessing the relative economic worth to the company of each of the four sales persons. Central to Story's decision was Dillon's failure to follow through. This problem is reflected both in the 1998 review and the 2002 review by Maher. The lack of follow through documented in these reviews and relied upon by Story in arriving at his decision both proves that Dillon had a problem with following up and demonstrates a neutral, non-discriminatory basis for the decision to lay off Dillon as opposed to the other sales persons.

## **V. Conclusions of Law**

1. The Department has jurisdiction. Mont. Code Ann. § 49-2-509(7).
2. Interstate did not illegally discriminate against Dillon on the basis of age when it laid Dillon off as a part of a reduction of force in May, 2003.
3. Having found that Interstate did not illegally discriminate against Dillon, any issue regarding damages is moot.
4. Having found no illegal discrimination, this matter must be dismissed. Mont. Code Ann. § 49-2-507.

## VI. Order

1. Judgment is found in favor of respondent Interstate and against Dillon on the charge that respondent discriminated against charging party on the basis of age.

2. The department dismisses the complaint.

DATED this 9th day of September, 2004.

/s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT, Hearing Examiner  
Montana Department of Labor and Industry

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