

BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS CASE NO. 0041010923

FLORENCE TUCKER,)	Case No. 815-2005
)	
Charging Party,)	
)	
vs.)	FINAL AGENCY DECISION
)	
ROSEBURG FOREST PRODUCTS,)	
)	
Respondent.)	

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I. Procedure and Preliminary Matters

Florence Tucker filed a complaint with the Department of Labor and Industry on March 9, 2004, alleging that Roseburg Forest Products discriminated against her on the basis of age when it forced her either to retire or to be terminated. On October 21, 2004, the department gave formal notice that Tucker’s complaint would proceed to a contested case hearing, appointing Terry Spear as hearing examiner.

The contested case hearing proceeded on February 16 and 17, 2005, in Missoula, Montana. Tucker attended in person with counsel, Howard Toole, Howard Toole Law Offices. Roseburg’s designated representative, John Mikkelson, Human Resource Safety Manager, attended with counsel, Maureen H. Lennon, Garlington, Lohn & Robinson, PLLP. Gordon Wyman, David Tromp, Florence Tucker, David Shughart, Shawn Clubb, Brian Hanna, Emily Piquette, Wally Hayes, Joe Cardin, Pat Wright, Ken Cole and John Mikkelson testified. The hearing examiner toured the physical plant, with counsel, the charging party and the respondent’s designated representative. The hearing examiner admitted Exhibits 21A through 21D and 22 (all redacted for the public record, unredacted exhibits sealed), 23, 101¹, 103, 104, 105, 108 and 112 into the record, refusing Exhibit 29 for failure timely to disclose it. Demonstrative exhibits 115 and 116 were also included with the record. The parties

¹ The transcript, at page 14, erroneously identifies the exhibit admitted as “1” rather than “101” although the context confirms that the admitted exhibit was 101.

submitted post hearing proposed decisions and briefs. A copy of the Hearings Bureau case docket accompanies this decision.

II. Issues

The issue is whether Roseburg forced Tucker to retire or be fired because of her age. For a full statement of the issues, *see* the hearing examiner's "Final Prehearing Order," February 9, 2005.

III. Findings of Fact

1. Florence Tucker was hired by Louisiana Pacific Corporation (L-P), the predecessor in interest of Roseburg Forest Products, on June 26, 1989. Roseburg assumed L-P's Missoula operation on February 23, 2003. Tucker became a Roseburg employee on February 23, 2003. She was 65 years old (born on January 22, 1938).

2. Roseburg's Missoula operation manufactured particle board. The process began with sawdust and ended with both raw and finished pieces of particle board. Operating within the plant were large saws, sanders, presses, forklifts and other dangerous equipment. Safety was of paramount concern to Roseburg.

3. Tucker's employment with Roseburg began as a "Combi-Coater" operator. When economic considerations resulted in a curtailment of a paint line shift, she was bumped back to the position she previously held with L-P as a Schelling Saw operator. This is an independent saw that takes large plywood-size particle board sheets and cuts them into smaller widths for use in shelving and other furniture products. Tucker was experienced in all phases of the Schelling Saw operation. She worked rotating shifts operating the Schelling Saw.

4. Tucker was a good worker, willing to do her work and willing to give 100%. Shift Supervisor Wally Hayes thought Tucker always did a good job. He felt they shared a mutual respect. Tucker had a good attendance record and was always trying to be attentive to her work. Hayes felt that Tucker was easy to work with even though she was always willing to speak her mind.

5. Tucker had many years of experience in the wood products industry, having grown up in a saw mill family and having worked in the saw mill business at other places of employment before going to work at L-P.

6. Roseburg had a policy, in accordance with OSHA regulations, known as "lock out" or "lockout/tag out." The importance of locking out equipment was

discussed at safety meetings on at least a weekly basis. Roseburg required Tucker, like the other employees to attend those meetings. She attended the meetings.

7. The lock out policy required that the power source for a piece of machinery be disconnected every time an employee was going to be in the way of the machine's moving parts. Strict adherence to the lock out policy was a Roseburg requirement, as the only way to ensure machinery could not "power up," move the moving parts and cause the injury or death of the employee.

8. Lock out protected employees working around the moving parts of the machinery from an unexpected start-up, whether caused by another employee, by the release of stored energy, by a computer glitch, by a power surge, or by some other source of power. Roseburg did not permit turning off the power to the piece of machinery in lieu of complying with the safety policy and performing a lock out before moving into the way of the moving parts. Much of the machinery, including the Schelling Saw, had barriers (wire fences, gates, etc.) to prevent inadvertent movement into the way of moving machine parts. The barriers served the dual purpose of delineating the boundaries of safety for employees, and reminding employees of lock out before they crossed the boundaries.

9. Tucker's coworkers witnessed her violate the lock out policy on a number of occasions. They consistently reminded her of the requirement and its importance. Tucker most often responded either by saying she knew she should lock out the machinery or by indicating she would only be a minute.

10. In October 2003, Tucker and her forklift driver, Dave Shughart, received an oral warning for violating Roseburg's lock out policy. The two were attempting to pull a board from the infeed table to the infeed hoist, which required they reach inside the gated area of the Schelling Saw. Tucker did not lock out the Schelling Saw before attempting this maneuver. Shift Supervisor Joe Cardin witnessed this violation and gave them each an oral warning. He did not make a written record of the warning. Both Tucker and Shughart admitted the incident and Cardin's response. Tucker denied that her conduct violated the lock out policy as she understood it.

11. Co-worker Emily Piquette saw Tucker adjust the scarfing blade without locking out the Schelling Saw. She told Hayes and Cardin.

12. Shawn Clubb saw Tucker repeatedly fail to lock out machinery. He reminded her about the lock out policy on these occasions, because he was both

concerned about her safety and did not want to see her lose her job. He did not say anything to management until December 2003.

13. Co-worker Brian Hanna witnessed Tucker fail to lock out.

14. Over Thanksgiving weekend 2003 (there appears to be a mistake on the date recorded on the warning), Tucker was inside the protective gate, in the way of the moving parts on the machinery, without having locked out. Shift supervisor Hayes told Tucker that she *must* comply with the lock out policy. Tucker responded, "I was only going to be in there a minute, I didn't think it would matter." Hayes responded, "It is very important and should it happen again termination could very well be the outcome." Hayes told Tucker a warning would be placed in her file as a result of the safety violation. Tucker admitted she "possibly" violated the lock out policy on this occasion.

15. On December 16, 2003, shift supervisor Cardin witnessed another lock out violation by Tucker. He saw Tucker straightening boards on the hog belt without locking out the machine. The hog belt carries trim pieces into the "hog," a machine which shreds the discarded pieces of plywood. Cardin suspended Tucker pending an investigation. Tucker was written up for the safety violation.

16. Both Hayes and Cardin have witnessed gruesome deaths of employees in the way of moving parts.

17. On December 22, 2003, Human Resources Manager John Mikkelson and Plant Manager Ken Cole met with Tucker as part of the investigation. During the meeting Tucker admitted she knew she was required to lock out the equipment and stated she understood the severity of her violation.

18. Due to the severity, proximity and repeated nature of the safety violations, Roseburg decided to terminate Tucker's employment. On December 23, 2003, Mikkelson and Cole met with Tucker to communicate Roseburg's decision. Tucker was given the opportunity to leave employment voluntarily or to be involuntarily terminated from employment. She elected to retire.

19. Tucker had weekly notice of and opportunity to ask questions about Roseburg's lock out/tag out procedures (*see* Finding No. 6, *supra*).

20. Tucker admitted to the department's Unemployment Insurance Division, in her "Leaving Employment Statement," that she made "errors in not locking out the

machine any time you leave it for any reason. . . . [N]ot locking out the machine . . . creates a safety hazard for others. My supervisor would verbally warn me from time to time about the safety hazard in not locking out my machine when I would forget and leave it. I [told him] it wouldn't happen again and that I was sorry.”

21. Safety violations are the leading cause of injury to and death of employees. Roseburg takes employee safety very seriously and insists its employees follow safety policies and procedures.

22. Tucker's employment with Roseburg ended on December 23, 2003. Roseburg awarded the Schelling Saw operator position to the next employee in line.

23. Tucker did not report alleged age discrimination to Roseburg nor did she follow the complaint procedure in Roseburg's Employee Handbook (pp. 7-8) at any time during her employment.

24. Tucker was the only individual discharged for a safety violation since Roseburg took over the plant in February 2003. Three other individuals received discipline for safety violations. One received a written verbal warning and two others received a final written warning for the first lock out violation.

25. Tucker was not treated less favorably than the younger employees who received these warnings for their initial violations.

26. Roseburg's progressive discipline policy did not purport to be a mandatory progression of steps no matter how serious the existing disciplinary record of the involved employee.

27. Discussions about retirement are common among older workers. Tucker was the oldest worker at the Roseburg operation in Missoula. She discussed retirement with other employees, and other employees asked her if or when she would be retiring. This small talk among coworkers had nothing to do with any employment decision made by Roseburg, nor was it unwelcome to Tucker.

28. Although Tucker did not mind these questions from others, including Hayes, she did not like the "attitude" of Cardin (her other supervisor) when he made the same inquiry. Cardin did not have the authority to suspend or discharge Tucker. He did not have a bias against her because of her age.

29. The stated reasons for Roseburg's adverse employment action against Tucker are not pretextual. Roseburg did not take adverse employment action against Tucker, or in any way discriminate against her, on the basis of her age. Tucker's employment ended for legitimate business reasons.

IV. Opinion²

Montana law prohibits discrimination against a person in terms and conditions of employment because of age. Mont. Code Ann. § 49-2-303(1)(a). Tucker alleged Roseburg imposed harsher discipline upon her because of her age than it imposed on other employees. She had no credible direct evidence of discriminatory animus due to her age,³ so her claims are subject to the indirect evidence analysis.

The Montana Human Rights Act's prohibitions of discrimination mirror those of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Where there is no direct evidence of discrimination, Montana utilizes the three-tier standard of proof from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).⁴

The first tier of *McDonnell Douglas*, *supra in note 7*, required Tucker to prove her prima facie case by establishing four elements, which are flexible rather than rigid. The four elements are not woodenly applied to every claim, but instead adapted to the nature of the proof proffered.⁵ For her age discrimination claim Tucker needed to prove that (1) she was a member of a protected class (older than her replacement); (2) she was qualified to continue to work in her position; (3) Roseburg gave her a choice between discharge and resignation (retirement), but did not take comparable action against younger workers who committed comparable violations of the lock out policy and (4) her replacement was younger and did not have superior qualifications.

² 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.

³ Tucker offered Cardin's inquiries about when she would retire as direct evidence, together with other anecdotal evidence of alleged age-related animus. Stray remarks in casual conversation, to the extent they were actually made, or remarks made by persons without the authority to terminate or outside the ultimate decision-making process are not sufficient to serve as direct evidence of age discrimination. *Mysse v. Martens* (1996), 279 Mont. 253, 926 P.2d 765, 772; *Nesbit v. Pepsico, Inc.* (9th Cir. 1993), 994 F.2d 703, 705.

⁴ *E.g.*, *Vortex Fishing Systems, Inc. v. Foss*, ¶ 15-16, 2001 MT 312, 308 Mont. 8, 38 P.3d 836; *H.A.I. v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813, 816.

⁵ *Cf.*, *Martinez v. Yellowstone County Welfare Dept.* (1981), 192 Mont. 42, 626 P.2d 242, 246, *citing Crawford v. Western Electric Company, Inc.* (5th Cir. 1980), 614 F.2d 1300 (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

If Tucker established her *prima facie* case, it would give rise to an inference of age discrimination regarding her termination, shifting the burden to Roseburg to present “some legitimate, nondiscriminatory reason” for the adverse action against Tucker, *McDonnell Douglas*, *supra* at 802, putting Tucker’s *prima facie* case at issue. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, (1981); *e.g.*, *Vortex Fishing Systems*, *cited in footnote 4, below*; *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 404, 886 P.2d 947, 952; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212. Tucker then had the opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by Roseburg were only pretexts for discrimination. *Vortex*, *supra*; *Hafner*, 886 P.2d at 953.

The essence of this case is whether Tucker established that she alone was discharged of the workers who committed comparable violations of the lock out policy, with the only significant difference between those other workers and Tucker being her age. The entire *McDonald Douglas* analysis can be reduced to that single question, arising out of the third element of the first tier of the analysis. Tucker always had the ultimate burden to persuade the finder of fact that Roseburg illegally discriminated against her. *Crockett*, *op. cit.*, 761 P.2d at 818 *and Johnson*, *op. cit.*, 734 P.2d at 213. If Roseburg did apply harsher discipline to her, with no other distinguishing factor than her age, then she both proved her *prima facie* case and also proved that Roseburg’s safety defense was pretextual rather than a legitimate business reason for ending her employment.

Unlike the other employees subject to discipline for violation of the lock out policies, Tucker committed multiple lock out violations. The distinction is critical. Tucker herself was not forced to end her employment after her first violation. Unlike the younger employees who violated the lock out policy, Tucker clearly constituted a grave risk of future violations, because she committed multiple violations. Unlike the younger employees who violated the lock out policy, Tucker displayed a remarkably cavalier attitude about the importance of the policy.

The substantial and credible evidence established that Roseburg had a legitimate business reason for forcing Tucker to end her employment—a pattern of disregard for the lock out policy. That evidence justified Roseburg taking the action that Hayes had warned Tucker, just a month before, would result from another lock out violation—the end of her employment.

Tucker attacked this evidence as pretextual. She failed to establish pretext. In the course of her Unemployment Insurance benefit claim as well as this proceeding, Tucker at various times has stated that (a) she did not understand the lock out policy

and was never trained in it; (b) she did not violate the lock out policy and was “set up,” either because of her age or because supervisor Cardin wanted to give her job to one of his “favorites”; (c) she might have violated the lock out policy, but only because she didn’t understand it; (d) she did violate the policy, but the violations did not cause any genuine safety risks justifying discharge and (e) she did *say* she violated the policy but either she was confused and mistaken or she was intimidated and hoping to keep her job by falsely agreeing with the accusations. Her multiple explanations of her own conduct were contradictory and self-impeaching. She lacked substantial and credible evidence supporting any of her inconsistent explanations.

Although Tucker pointed to inconsistencies in Roseburg’s evidence, she never satisfactorily explained the more glaring inconsistencies in her own evidence. Tucker ultimately failed to carry her burden of proof that animus toward her because of her age caused the employer—two supervisors and several co-workers—to conspire against her by fabricating safety violation incidents so that she would be discharged by higher management. Failing to carry her burden of proof, Tucker cannot prevail.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over the complaint. Mont. Code Ann. § 49-2-509(7).
2. Roseburg did not discriminate against Tucker in the terms and conditions of her employment because of her age. Mont. Code Ann. § 49-2-303(1)(a).

VI. Order

1. Judgment is for **Roseburg Forest Products** and against **Florence Tucker** on the charge that the corporation discriminated against her because of age.
2. The complaint is dismissed.

Dated: June 14, 2005

/s/ TERRY SPEAR

Terry Spear, Hearing Examiner

Montana Department of Labor and Industry

Tucker FAD.wpd