

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

YAKOV BELOPOLSKY
Complainant

v.

FCI USA, INC.
Respondent

PHRC Case No. 200205347
EEOC Charge No. 17FA361071

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. Yakov Belopolsky, the Complainant in this matter, was born on October 14, 1947. (NT V1 25)
2. FCI USA, Inc., the Respondent, is an international corporation whose primary business is the development and manufacture of electronic connectors, components and assemblies. (NT V157-58)
3. The Respondent herein operates worldwide across three regions: the Americas, Europe, and Asia. (NT V1 115)
4. The Respondent specifically manufactures connectors, which transmit or carry electrical power or electronic signals between devices. (NT V1 30-31)
5. The connectors are manufactured through several divisions, including communications, data, and consumer ("CDC") (also known as the electronics division); electrical; automotive; and micro connections. (NT V2 90)
6. From 2001 through 2005, the Respondent was a wholly owned subsidiary of the AREVA Group, a French conglomerate that operated nuclear and connectors businesses. (NT V2 103)
7. The specific division at issue in this matter is the CDC division in the Americas region. (NT V1 167)
8. Within the Americas Region was the Product Engineering Organization headed by its Director, Daniel Bertoncini. (NT V1 167-68)

*To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized through these findings of Fact for reference purposes.

NT V1	Notes of Testimony April 7, 2010
NT V2	Notes of Testimony April 8, 2010
RE	Respondent Exhibit
CE	Complainant Exhibit

9. The Product Engineering Organization was responsible for developing new connector products and for maintaining existing connector products, which entailed reducing costs associated with the design of a product and refining and enhancing a product to increase its usefulness to the market. (NT V1 167-68)
10. The Product Engineering Organization was comprised of separate engineering groups, which were organized by the type of connector for which the group had responsibility as well as groups that supported the product groups. (NT V2 13)
11. In 2000, the Respondent devised a strategy to develop new technologies for high-speed backpanel connectors for which there was a high demand in the telecommunications industry. (NT V1 205)
12. The most efficient way to execute the Respondent's strategy was to create a separate engineering group to which the Respondent could deploy "some very experienced resources that could be focused on developing new products and not encumber them with the day-to-day interruptions of existing products." (NT V1 205; NT V2 44)
13. In that regard, in May of 2000, Mr. Bertoncini announced the creation within his organization of a new group called "Advanced Backpanel Development" (hereinafter "ABD"). (RE 16)
14. Mr. Bertoncini assigned Clifford Winings to manage the new ABD group. (RE 16)
15. This group focused on developing new high-speed panel technology, which was a particular interest of Mr. Winings. (NT V2 197)
16. Before this assignment, Mr. Winings was responsible for "current products and dealing with customer complaints and issues and production problems." (NT V2 197)
17. The new assignment relieved Mr. Winings of the daily drudgery and headaches associated with existing products "that are no fun to work on." (NT V2 198)
18. For Mr. Winings, the appointment was an opportunity to concentrate on advanced product development and he "loved the idea." (NT V2 197)

19. At the same time he assigned Mr. Winings as manager, Mr. Bertocini assigned two other employees to the ABD group: Stanley Olsen, a senior staff development engineer and Stu Stoner, a senior product designer. (RE 16)
20. Both Mr. Olsen and Mr. Stoner reported to Mr. Winings. (NT V2 198)
21. The ABD group was intended to generate and develop new technologies for future products. (NT V1 204)
22. When the ABD group developed a new product and had proven the underlying technology, the Respondent would form a project team to complete the development of the product, put the product into production and bring the product to market. (NT V2 64-65)
23. The project team would be composed of engineers from the ABD group and the appropriate product group, as well as engineers from one of the specialty groups, such as signal integrity, whose function was to provide support services to other product groups. (NT V2 11-16, 65)
24. Once the transition was complete, the product group would assume responsibility for the product, "and the resources in the ABD group would go on and develop other new technology for the next future product." (NT V1 204-205)
25. The year 2000 was the Respondent's finest and most successful year in terms of trade bookings. (RE 2)
26. In fact, the Respondent forecasted trade booking in 2001 to increase to \$716,430,000 and trade billing to increase to \$708,921,000. (RE 2)
27. By the end of 2000 and into 2001, the telecommunications industry – Respondent's "prime market" came to a halt "with the bursting of the dotcom bubble." (NT V2 236)
28. This implosion of the telecommunications industry precipitated an immediate plunge in Respondent's sales. (NT V2 236)

29. In contrast to the budgeted trade bookings and billings for 2001, Respondent's actual trade bookings were only \$131,895,000 and its actual trade billings were just \$272,876,000. (RE 2)
30. In response to the downturn of the telecommunications industry, the Respondent instituted cost containment measures across the connectors business. (RE 6)
31. Mr. Bertoncini was directed to reduce costs in his organization. (NT V2 236)
32. Mr. Bertoncini started by cutting unnecessary spending, travel expenses, project expenses and any other expenses that were not "absolutely necessary." (NT V2 237)
33. These preliminary efforts were ineffective and in 2001, Mr. Bertoncini was directed to reduce costs further by laying off employees through reductions in force. (RIFS) (NT V2 237-239)
34. Since two thirds to seventy percent of an engineering organization is "people costs", it is difficult to reduce costs without reducing work force levels. (NT V2 239)
35. Mr. Bertoncini began instituting RIFS in 2001. (NT V2 237)
36. For each RIF, Mr. Bertoncini was instructed to reduce his organization's workforce by a certain percentage (e.g. twenty percent) or by a certain number of employees. (NT V2 238-239)
37. He was further instructed to reduce his organization's overall budget by a certain amount, meaning he had to reduce expenses in addition to reducing the workforce. (NT V2 239)
38. When carrying out a RIF in Respondent's organization, Mr. Bertoncini did not have sole authority. (NT V1 172)
39. Mr. Bertoncini's direct supervisor, Adrian Melnyk, the Vice President and General Manager of the CDC Americas Region and the Human Resources Director, Mr. William Lochman, had to approve any list of employees who were to be terminated. (NT V1 172)

40. Once Mr. Bertoncini selected the employees to be terminated, he then provided the names of those employees, with an explanation for their selection, to the Human Resources Director. (NT V2 124,252)
41. The Human Resources Director reviewed the list to insure that the RIF was being done in a manner that did not expose the Respondent to a disparate impact allegation. (NT V1 124-125)
42. Mr. Bertoncini also provided the proposed list to the Vice President and General Manager. (NT V2 253)
43. The Human Resources Director and the Vice President/General Manager then approved the recommendations and the RIF was effectuated by terminating the employees. (NT V2 253-254)
44. Mr. Bertoncini's bottom line was to effect the RIF in such a manner as to retain as much revenue to the company while minimizing the impact to the company. (NT V1 175)
45. When terminating an employee, Mr. Bertoncini did not replace that employee with a different person and he did not transfer an engineer from another group into the position of the terminated engineer. (NT V2 242)
46. The products or projects that the terminated employee had responsibility for would either be divided among the engineer remaining in the group or simply discontinued or abandoned. (NT V2 243)
47. Also, when Mr. Bertoncini eliminated an employee position and selected the employee to terminate, he did not retain the engineer by terminating or "bumping" another engineer in a different group. (NT V2 257)
48. Respondent's policy was to not bump employees between groups and Mr. Bertoncini did not do any bumping in any of the RIF's that he implemented. (NT V2 258-59)

49. The workforce reductions were implemented throughout the CDC Americas Region, which included the Product Engineering Organization of the Respondent. (NT O1 90)
50. From the end of 2000 to the end of 2001, the workforce decreased from 6,204 employees to 2,726 employees. (RE 1)
51. The workforce was reduced again in 2002 by over 500 employees, reducing the work force of 2,220, again in 2003 by nearly 700 employees reducing the work force to 1,539 and again in 2004 by over 400 employees further reducing the work force to 1,121. (NT V1 92, RE 1)
52. These workforce reductions were accomplished by RIF's implemented by Mr. Bertoncini along with plant closures and a divesture. (NT V2 92)
53. The Complainant worked in the Global Engineering Organization from September 1, 2001 until on or about January 15, 2002 when that organization was disbanded and merged into Mr. Bertoncini's Product Engineering Organization (NT V2 233-34)
54. In January 2002, the Complainant was placed into the ABD group, which consisted of three engineers: Complainant, Mr. Shuey and Mr. Olsen. (NT V2 207)
55. Mr. Bertoncini made the decision to place the Complainant in the ABD group. (NT V2 233)
56. Furthermore, Mr. Bertoncini thought that Complainant's placement was a "very good selection" because Complainant's strengths "fit very well within the ABD group working on new technology and innovations." (NT V2 234)
57. Mr. Winings also approved of Complainant's joining the ABD group, saying that he thought Complainant would be a good fit because Complainant was creative. (NT V2 208)
58. On or about March 15, 2002, Mr. Bertoncini and his staff created the 2002 ratings and rankings for engineers and designers in the Product Engineering Organization. (NT V2 211-12)

59. The ratings and rankings were created each year and are used to evaluate the performance of engineers and for salary administration among other personnel reasons. (NT V2 212-213, 235)
60. The annual ratings and rankings chart was a product of a collaborative process between Mr. Bertoncini and his managers. (NT V1 182)
61. The management team meets and based on information provided by an employee's manager, reaches a consensus with respect to that employee's ranking. (NT V1 183)
62. An employee's rank falls within one of four categories: (1) Outstanding; (2) Above Expectations; (3) Meets Expectations; or (4) Needs Improvement. (RE 17)
63. Mr. Bertoncini would send a worksheet to his managers, which was similar to the ratings and rankings chart. (NT V2 246)
64. Each manager would receive and review a self-appraisal from the employees they supervised, review or consider other information, and then complete the worksheet, rating each employee across the performance categories. (NT V2 246-47)
65. Each category was assigned a weight factor and then a numerical average rating for the employee was calculated. (NT V2 247)
66. Using the numerical average as a starting point, the manager would rank his employees in descending order (highest performer to lowest performer). (NT V2 2470)
67. After completing the worksheet, the manager would send the worksheet to Mr. Bertoncini. (NT V2 213)
68. Mr. Bertoncini would then consolidate the worksheets into a preliminary ratings and rankings chart, listing the employees in descending order of numerical average. (NT V2 214)

69. After receipt of the worksheets, Mr. Bertoncini would schedule a meeting with the managers and facilitate a discussion about each employee and the employee's relative strengths, weaknesses, accomplishments, contributions and rating. (NT V1 182, V2 214)
70. When Mr. Bertoncini first instituted this practice, he and his managers discussed each employee. (NT V2 249)
71. By 2002, Mr. Bertoncini and the managers only discussed in detail the first two categories of employees: outstanding and above expectations. (NT V2 249-50)
72. In 2002, the employees in the middle of the list, were not discussed individually because of the effort involved and because "they're all basically average employees." (NT V2 250)
73. The 2002 ratings and rankings were created in accordance with the above process. (NT V2 211-216)
74. Mr. Bertoncini and his management team reached a consensus regarding the ranking of the three engineers in the ABD group; Mr. Shuey (2); Mr. Olsen (13), and Complainant (28). (NT V2 250, RE 17)
75. Mr. Shuey was an experienced engineer who was highly regarded in the Product Engineering Organization and he had attained the title of "principle engineer." (NT V2 216)
76. Mr. Shuey was "virtually always successful in getting done what needed to be done." (NT V2 215)
77. Mr. Olsen was a very good engineer who had also been promoted to principle engineer. (CE 8)
78. Mr. Olsen was reviewed as "a very good man...just not quite as productive and high energy as [Mr.] Shuey." (NT V2 215)

79. The Complainant, who was ranked number 28, was recognized as creative and a prolific inventor, but his ability to plan and to execute a project smoothly was not at the same level as that of Mr. Shuey and Mr. Olsen. (NT V2 216)
80. The Complainant had not achieved the status of principle engineer like Mr. Shuey and Mr. Olsen. (NT V2 215-216)
81. In May of 2002, Mr. Bertoncini was instructed to implement yet another RIF, which occurred June 21 2002. (NT V2 251)
82. After meetings with his management team, along with reductions in other departments, Mr. Bertoncini decided to eliminate one of the positions in the ABD group. (NT V2 217)
83. Mr. Bertoncini reached his decision because the ABD group had been spared from previous workforce reductions. (NT V2 254)
84. However, in May of 2002, the Respondent had to curtail its investment in future product growth "because we were already making significant cuts in the rest of the current engineering organization." (NT V2 255)
85. Mr. Bertoncini communicated his decision to Mr. Winings, and though not happy about losing an engineer, Mr. Winings did not object to the decision. (NT V2 217)
86. There were three engineers in the ABD group – Mr. Shuey, age 55; Mr. Olsen, age 57; and Complainant, age 54. (NT V2 253; CE 13)
87. Mr. Bertoncini chose Complainant to terminate in the RIF. (NT V2 255)
88. The Complainant was selected, not because he was not a valued employee, but in the ABD group, he was the least valuable to the group. (NT V2 255)
89. The Complainant had the lowest rating and ranking of the three engineers in the ABD group. (NT V2 255)

90. The Complainant had the least seniority of the ABD group's three engineers in that he had thirteen years of seniority with Respondent while Mr. Shuey and Mr. Olsen had worked for Respondent respectively for thirty-six years and thirty-eight years. (CE 13)
91. As required to do in connection with a RIF, Mr. Bertoncini forwarded his list to the Human Resources Director, Mr. Lockman. (NT V2 253)
92. Upon review of the documents, Mr. Lockman had no questions about the Complainant's selection for termination, and "was satisfied that Mr. Bertoncini had gone through the appropriate steps" to implement the RIF and approved the list. (NT V2 127-28, 254)
93. In accordance with the policy consistently used in RIFs, Mr. Bertoncini did not consider bumping, or terminating, an engineer in any other department and transferring Complainant into that position. (NT V2 257)
94. Mr. Bertoncini did not bump employees between product groups in any of the RIF's affected prior to June 21, 2002, and he did not do so in the June 21, 2002 RIF. (NT V2 258-59)
95. The Complainant was terminated on June 21, 2002. (NT V1 103-04)
96. All of the projects that the Complainant was working on at the time of his termination were discontinued. (NT V2 219)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this issue.
2. The parties and PHRC have complied with all procedural prerequisites for a public hearing.
3. The Complainant is an individual within the meaning of Section 5(a) of the Pennsylvania Human Relations Act ("PHRA").
4. The Respondent is an employer within the meaning of Section 4(b) and Section 5(a) of the PHRA.
5. In order to establish a *prima facie* case of age discrimination under the PHRA, the Complainant must show that:
 - a. he is a member of a protected class;
 - b. he was qualified for the position that he held;
 - c. he suffered an adverse employment action; and
 - d. that the employer retained someone similarly situated to and younger than the Complainant.
6. The Complainant has failed to establish a *prima facie* case of age discrimination.

OPINION

On or about November 26, 2002, Yakov Belopolsky (hereafter "Complainant") filed a complaint against FCI, USA, Inc. (hereinafter "Respondent") at PHRC Case No. 200205347. The Complainant alleges he was discriminatorily terminated on June 21, 2002 by the Respondent on the basis of his age, 54. The Complainant further alleges that his termination is in violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955 (a)(hereinafter "PHRA").

Commission staff, by correspondence dated August 2, 2007, notified the Complainant and Respondent that, after an investigation, probable cause existed to credit Complainant's allegation. Thereafter, the PHRC attempted to resolve the matter through conference, conciliation and persuasion, but such efforts were unsuccessful. Subsequently, the PHRC notified the parties that the matter was approved for public hearing.

The public hearing was held on April 7 and April 8, 2010 at the PHRC Central Office, Harrisburg, PA. Permanent Hearing Examiner Phillip A. Ayers presided over the hearing. The case on behalf of the Complainant was presented by PHRC Assistant Chief Counsel William Fewell and David F. O'Leary, Esquire appeared on behalf of the Respondent. Following the public hearing, both counsel filed post-hearing briefs in support of their respective positions.

The PHRA, *inter alia*, declares it to be an unlawful discriminatory practice:

For any employer because of the ... age ... of any individual ... to discharge from employment such individual ... if the individual or independent contractor is the best able and most competent to perform the services required. 43 P.S. §955(a)

In a case involving allegations of disparate treatment, we turn to the proof formula first set forth in McDonnell-Douglas Corp. v Green 411 U.S. 792 (1973). McDonnell-Douglas involved an allegation of race discrimination in employment pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A §20000c-2(a) *et seq.* Under the McDonnell-Douglas analytical model, the Complainant bears the initial burden of establishing a *prima facie* case of discrimination. The initial burden of establishing a *prima facie* is not an onerous burden. Texas

Department of Community Affairs v. Burdine 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1980). Once the Complainant has met the initial *prima facie* burden, the Respondent must meet its burden of articulating a legitimate non-discriminatory reason for its action. Once the Respondent articulates a legitimate non-discriminatory reason, the Complainant must show that the reasons proffered by the Respondent are pretextual or unworthy of credence. McDonnell-Douglas 411 U.S. at 802.

In order to establish a *prima facie* case of age discrimination, the Complainant herein must show:

- a) he is a member of a protected class;
- b) he is qualified for the position that he held;
- c) he suffered an adverse employment action;
- d) that the employer retained someone similarly situated to and younger than the Complainant. In re Carnegie Center Association 129 F.3rd 290 (3rd Cir 1997)

There is no dispute that the Complainant has established the first three elements of a *prima facie* case of age discrimination. The Complainant is a member of the protected class in that he was fifty-four years old on the date of his termination. The Complainant was qualified to work as an engineer in the ABD group, the position from which he was terminated in the June 21, 2002 RIF. Lastly, the Complainant suffered an adverse employment decision when he was terminated in the June 21, 2002 RIF.

The last element of the *prima facie* is whether the Complainant was terminated under circumstances that give rise to an inference of discrimination. When an individual is terminated in a RIF, the fourth element of the *prima facie* can be satisfied by showing that the employer retained someone similarly situated to and sufficiently younger than Complainant. When the Complainant in the instant case was terminated, he was an engineer in the ABD group. The ABD group was specifically created to develop concepts and technologies for future products.

Each engineer assigned to this group had the same functions and responsibility to generate new technologies for the ABD group to be produced and marketed in the future. For the purposes of the *prima facie* showing, the only engineers to whom the Complainant is appropriately compared are Joseph Shuey and Stanley Olsen. On the date of termination June 21, 2002, Mr. Olsen was fifty-eight years old and Mr. Shuey was fifty-five years old, and Complainant was fifty-four years old.

In the instant case, the Complainant, through Commission Counsel, attempted to widen the pool of comparators to include engineers in the Backpanel group. However, Complainant did not produce evidence that engineers in the Backpanel group were similarly situated.

Anderson v Consol. Rail Corp., 297 F.3rd 242 (3rd Cir. 2002) First, the ABD group and Backpanel group had entirely different purposes and responsibilities. The Backpanel group was a "current" product group that managed and supported current or existing backpanel products that had already been designed and put into production. The ABD group was responsible for developing new technologies and concepts that would lead to future products. The purposes and responsibilities of the two groups were separate and distinct.

The Complainant, in presenting his case, argues that since he was qualified to perform the functions of other groups, he should be allowed to compare himself to other engineers in the Backpanel group. However, the Complainant has offered no evidence that any engineer in the Backpanel group or any other group is similarly situated to him in order to establish a *prima facie* of age discrimination. As Respondent counsel notes, it is clear that the only engineers the Complainant can compare himself to are Mr. Shuey and Mr. Olsen. Both of these engineers are older than the Complainant.

At the public hearing, there was substantial evidence presented showing Respondent's continual and drastic reduction of its workforce. As noted before, from 2000 to the end of 2001, Respondent's work force dramatically decreased from 6,204 employees to 2,726 employees. (RE 1) The reduction continued in 2002 by another 500 employees, again in 2003 by nearly

700 employees and, once again in 2004 by over 400 employees. These reductions were accomplished by the RIFs implemented by Mr. Bertoncini. There was specific detail as to how the RIF's were implemented and the process utilized by the Respondent in effectuating the RIF's. As a result of the process and the declining workforce, the Respondent had to eliminate an engineering position in the ABD group. The Complainant was chosen because he had the lowest ranking and rating and he had the least amount of seniority among the three engineers in the group. The testimony presented at the public hearing established that Complainant, though a valued employee, was the least valuable to the ABD group. It is important to note that at the Public hearing a great deal of time was spent establishing how competent the Complainant was, by a review of his patents and other accomplishments. Clearly, the Respondent does not challenge the competency of the Complainant or his accomplishments while employed by the Respondent. However, the evidence indicates that, in order to reduce costs, the Respondent had to reduce its workforce in the ABD group.

In the instant case, the Complainant has not offered any evidence of any circumstance that gives rise to an inference of discrimination. The Complainant has not presented any evidence to challenge Respondent's process of implementing the RIF or the ratings and ranking process utilized by the Respondent. As Respondent counsel notes, the Complainant did not offer any evidence or argument "that the ratings and rankings were created for any other purpose other than rational and lawful business purposes." Clearly when conducting a RIF, there is evidence of extensive planning and documentation, yet there was nothing presented to challenge the documentation of the RIFs. There was no evidence of any stray remarks indicating any bias or animus. Furthermore, the Complainant has not challenged his rating or ranking and he has not argued that he should have been ranked higher than the other two engineers. The Complainant, in simple terms, would have the Respondent terminate a less experienced, younger engineer from another group so he could be transferred into the other group. This flies in the face of what is found to be an objective and unbiased policy created to

address a necessary adjustment of nearly unprecedented magnitude. In a four-year period, this employer went from over 6,800 employees to less than 1,500. The Complainant did not present any evidence indicating age discrimination was the reason for Respondent's decision. In fact, the average age of all employees remaining in the entire Product Engineering Organization after the June 21, 2002 RIF was 43.74. (RE 8) Before the June 21, 2002 RIF, the average age of all employees working in the Product Engineering Organization was 43.54. Clearly, the June 21, 2002 RIF did not adversely affect employees forty years of age or older. Also, there was no negative impact on the average age of the workforce in the Product Engineering Organization.

Therefore, the Complainant has failed to raise an inference of discrimination.

Accordingly, the Complainant has failed to establish a *prima facie* case.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. Furthermore, the Permanent hearing Examiner recommends the issuance of the attached Final Order.

Date

1/11/11

Philip A. Ayers

Permanent Hearing Examiner

