

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & PAUL LOUIS &
JOSEPH LAURENT,
Complainants

v.

DOCKET NO. 06-BEM-00979
DOCKET NO. 06-BEM-00992

GARRISON SQUARE
MANAGEMENT, INC.,
Respondent

Appearances:

Paul R. Chomko, Esquire for Paul Louis & Joseph Laurent
Laura L. Fitzgerald, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 12, 2006, Joseph Laurent, (date of birth 6/10/44) and Paul Louis (date of birth 1/2/33), who are black men of Haitian national origin, filed complaints with this Commission charging Respondent Garrison Square Management with unlawfully terminating their employment on the basis of age, race, color and national origin. Attempts to conciliate the cases failed; and the cases were certified to public hearing. A public hearing was held before me on April 27, 2009 and May 19, 2009. After carefully considering the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent Garrison Square Management is a property management firm located at 7 Harcourt Street, Boston, Massachusetts that manages mid- to high-end condominiums on behalf of the buildings' owners, providing such services as maintenance, janitorial, snow removal, home renovations and book-keeping. Respondent also has a marketing rental sales division and a concierge services division. Respondent's contract with each building's owner is tailored to meet the needs of that owner and not every owner contracts for janitorial services. Respondent currently employs 27 people.

2. Complainant Joseph Laurent is a black man who was born June 10, 1944 in Port Au Prince, Haiti. Laurent has resided in the United States for 20 years. Laurent was hired as a janitor by Respondent in 1997. He was initially trained by a Haitian janitor, no longer employed by Respondent whose first name is Edne. Laurent's employment was terminated on February 3, 2006.

3. Complainant Paul Louis, born on January 2, 1933, is a black man who came to the United States from Croix-de-Bouquets, Haiti in 1980. He resides in Dorchester, Massachusetts. Louis and Laurent have been friends since they both lived in Haiti. Louis was first employed by Respondent as a fill-in for Laurent during Laurent's vacation. Subsequently a vacancy occurred and Louis was hired by Respondent as a full-time janitor in 2001. Louis' employment was also terminated on February 3, 2006.

4. Complainants' native language is Haitian Creole.¹ Laurent has a better command of English than does Louis, and often Laurent translated for Louis regarding work-related matters.

5. Prior to February, 2006, Respondent employed four janitors, including Complainants, Ramadan Salih Sindi, (born September 25, 1967), who is Iraqi and Gerardo Aguire (born January 9, 1982) who is Hispanic and from Guatemala. (Exh. J-9) Aguire was hired in approximately 2002 and Sindi was hired in approximately 1997.

6. Eddys Cruz (born September 3, 1962), who is Hispanic and Puerto Rican, has worked for Respondent since approximately 1988.² Cruz, who was originally hired as a janitor, was transferred to the maintenance division in approximately 1993, where he performed electrical and plumbing repairs, replaced windows and screens and made other repairs. Cruz also oversaw the janitorial division and was on call every other day for after-hours maintenance emergencies.

7. Denise Moreau has worked for Respondent for 13 years. For the past nine years she has been manager of finance and administration. Her duties include preparing financial reports and handling human resources matters such as employee benefits. Moreau oversees the condominium property management division and also manages a few buildings. She works with Caplice in coordinating the care of the buildings managed by Respondent.

8. L. David Caplice has worked for Respondent since 1994 and has been the company's vice-president since 1995. His responsibilities include working with the property managers to resolve problems with facilities and construction. Caplice oversees

¹ A Haitian Creole interpreter translated during the testimony of Complainants at the public hearing.

² Cruz had one short break in service when he left for another job. When that job did not work out, he returned to Respondent.

the janitorial and construction staffs and is the direct supervisor of the janitorial staff. He also markets Respondent's services.

9. Each of Respondent's property managers was assigned to specific buildings. Caplice testified that trustees or residents of buildings would call Respondent's property managers to complain if they had problems. The property managers would often relay the complaints to Moreau, who in turned relayed the complaints to Caplice. On occasion, Moreau and Caplice would receive complaints directly from the trustees or residents.

10. Moreau testified that Respondent's janitorial services were customized for each building, depending on the hours and services requested by the condominium trustees. Each contract specified a set number of hours of janitorial services per week. The janitors reported to Caplice daily at 7:45 a.m. to receive their assignments and a list of chores. Each janitor then proceeded separately to his assigned locations where he would perform the various janitorial tasks requested by each property owner.

11. Laurent testified that he worked at between four to six different buildings weekly, performing duties such as vacuuming, changing light bulbs, dusting, cleaning windows and putting out trash. Laurent testified that he had no difficulties with his job. He stated that he did his job so well that Caplice would call him during non-work hours to perform snow removal. Laurent liked working for Caplice and had no problems with him. He testified that no one ever complained to him about his job performance and that he never received any written or oral warnings about his performance. I do not credit his testimony that he never received complaints about his performance.

12. Louis testified that he never had any problems at work and never received any complaints about his job performance, and that he sometimes worked weekends

performing snow removal. I do not credit his testimony that he never received complaints about his performance.

13. Moreau testified that Complainants performed their jobs adequately until the last six months of their employment when Moreau began to receive complaints about them once or twice a month from property managers or trustees. I credit her testimony. Caplice testified that he received several complaints about Complainants during the last year of their employment and would send Cruz in to clean up after each complaint; and later, as Cruz had time available, he regularly sent Cruz to the properties whose owners had previously complained about Complainants' performance to make sure that those properties had been properly cleaned. I credit Caplice's testimony. Eddys Cruz testified that Respondent's property managers frequently called him to perform tasks that Complainants had failed to complete. I credit Cruz' testimony.

14. Moreau testified that in 2005, Louis was assigned to work 15.5 hours per week at the Hotel Union located at the corner of Waltham Street and Shawmut Avenue, a property consisting of three five-story walk-ups. Moreau testified that the property's trustees repeatedly complained about the building not having been adequately cleaned and on one occasion in late 2005, the board of trustees asked her and the property manager to attend its meeting in order to discuss the issue. While touring the building with the trustees, Moreau observed that the building wasn't vacuumed, the front lobby and light fixtures were dusty, numerous light bulbs were out and the janitor's closet was dirty and disorganized. Caplice testified that he also viewed the Hotel Union in 2005, after receiving complaints about lack of cleanliness. Moreau and Caplice testified that

after viewing the property, Caplice reassigned Louis and assigned Cruz to the Hotel Union. (Ex. J-8) I credit their testimony.

15. Caplice testified that the trustees at 285 Beacon Street, where Louis worked 2.75 hours per week, were unhappy with Louis' performance and asked Caplice to replace Louis with Eddys Cruz, who had previously worked at that site. Caplice testified that he talked to Louis several times regarding the complaints about his poor performance. I credit his testimony.

16. Moreau testified that Respondent received complaints about several of the buildings cleaned by Laurent; the trustees at 325 Columbus Avenue complained that the trash bags were not being replaced; the trustees at 44 Chandler Street complained that the building was dirty. The trustees at 9-17 Harcourt Street, who were particular about the building's appearance, complained that the building was filthy. Caplice testified that the trustees at 532 Massachusetts Avenue called frequently to complain about the building's lack of cleanliness. I credit their testimony.

17. Moreau commutes to work by train from Rhode Island to Back Bay Station in Boston. She testified that in the months preceding their termination, she observed Complainants sitting on benches at Back Bay Station between 8:30 a.m. and 9:00 a.m., although they should have been working at their assigned locations by 8:00 a.m. Moreau told Caplice about these incidents, which occurred once or twice a week. I credit her testimony, which was unrebutted.

18. Moreau testified that with respect to the other janitors she recalled one complaint about Ramadan Sindi by an owner who did not want to pay for his services after he cleaned over the holidays when he was not scheduled to work; on another

occasion Sindi was reassigned from a building because of a complaint. However, she stated that building owners were generally pleased with Sindi. Cruz testified that he had to clean up after Sindi on one occasion. Caplice testified that he never received complaints about Sindi. I credit their testimony.

19. Moreau testified that Gerardo Aguire is a very good janitor about whom Respondent received only one complaint from the trustees of a building when he did not show up for work as scheduled. It turned out that Aguire had unilaterally rearranged his work schedule and once Respondent explained to Aguire that he needed to follow the schedule, there were no further complaints about him. Cruz testified that he was never asked to monitor Aguire and Caplice testified that he never received complaints about Aguire. I credit the testimony of Moreau, Cruz and Caplice regarding Aguire.

20. Moreau testified that Respondent performs a comprehensive review of its finances on a division by division basis at the end of each year. Moreau testified that by January 2006, Respondent had lost a couple of big contracts and several smaller buildings, and over the preceding two and a half years, went from providing janitorial services for approximately 62 buildings down to approximately 40 buildings. According to Moreau, many of the buildings lost had been cleaned by Complainants. With the loss of buildings, several of Respondent's divisions began to lose money and by January 2006, the janitorial unit was losing \$2,500.00 per month. Moreau testified that because of its losses, she and Caplice deemed it necessary to restructure the janitorial, maintenance, marketing and property management divisions. I credit her testimony, which was corroborated by the credible testimony of Caplice that Respondent was having financial problems.

21. Respondent determined that it needed to reduce the maintenance division from three to two employees, yet, according to Moreau and Caplice, Respondent wanted to retain Eddys Cruz, who was its best cleaner and who could also perform maintenance work as needed. Therefore, rather than lay off Cruz, Respondent transferred him to the janitorial division. Respondent also needed to then lay off two of the existing janitors, and selected Laurent and Louis because Respondent had received more complaints about their performance than the other cleaners. Caplice and Moreau made the decision to terminate Complainants. I credit their testimony. After Complainants were laid off, the janitorial unit consisted of Cruz, Sindi and Aguire.

22. Respondent has since reduced the number of property managers from six to three through terminations and resignations. Respondent's administrative staff was reduced from two to one employee. Respondent's accounting staff went from four to three after an employee died and was not replaced. Two of the four painters had previously been terminated in June 2005.

23. Moreau and Caplice testified that they chose to lay off Louis and Laurent rather than Aguire, Sindi or Cruz because Respondent's property managers had received numerous complaints about Complainants' performance from condominium boards of trustees. I credit their testimony.

24. On February 3, 2006, when Complainants came to pick up their paychecks, Caplice called them into the office and told them he no longer had jobs for them. Laurent translated the message for Louis. Laurent testified that he asked Caplice if work was slow and Caplice responded that it was not. Laurent testified that he and Louis offered to work fewer than 40 hours per week, but Caplice declined their offer. Caplice testified

that he explained to Complainants that Respondent had lost a significant number of contracts and did not have enough work for them and would have to terminate their employment. He denied that Laurent asked him whether work had slowed down. He did not tell Complainants that their performance was a factor in the decision to terminate them because he did not think it was necessary. I credit Caplice's testimony.

25. Moreau and Caplice testified that they did not consider Complainants' race, age or national origin in making the decision to lay them off and stated they did not know the Complainants' race, age or national origin at the time of their termination. Moreau testified that Respondent's staff is from all over the world and many are "older." Moreau testified that Respondent's oldest employee is site attendant Les Smith, (born June 27, 1932) whose job is to refer calls from residents to the maintenance or janitorial departments. (Ex. J-9) While it is plausible that Moreau and Caplice did not know Complainants' national origin, I do not credit their testimony that they did not know Complainants' race, as Complainants are dark-complexioned and would likely be identified as "black." Moreover, while Moreau and Caplice may not have known Complainants' ages, they appeared to be close to their stated ages. Notwithstanding, I credit their testimony that Complainants' race, national origin and age were not factors they considered when making the decision to terminate their employment.

26. Moreau acknowledged that Complainants were never disciplined prior to their termination and that Respondent did not seek to terminate them until economic necessity forced a reduction in staff. Moreau testified that because theft from the properties it cleans is a primary concern, it is more expedient for Respondent to retain than to replace trustworthy employees such as Complainants, and to overlook other

deficiencies. Moreau testified that Complainants were known to be trustworthy. I credit her testimony.

27. Respondent did not keep written records of the complaints against Complainants or of any oral reprimands. Caplice testified that he did not see the need to maintain written records of employees' performance since Respondent was such a small company. Moreau acknowledged that she had no written record of complaints about Complainants. Such complaints would come to the property managers by telephone or email, and would then be relayed orally to Moreau or Caplice. None of the property managers who worked at Respondent at the time of the events in question remains employed there and their email boxes have been deleted. Moreau does not have copies of any such emails. I credit the testimony of Caplice and Moreau.

III. CONCLUSIONS OF LAW

M.G.L. c.151 §4(1B) makes it unlawful for an employer in the private sector to discriminate in employment on the basis of age. Section 4(1), makes it unlawful for any employer to discriminate on the basis of race, color or national origin. In this case, Complainants allege that Respondent's decision to terminate their employment was motivated by unlawful discrimination on the basis of age, race, color and national origin. Complainants contend that they were terminated, while a younger, non-Haitian man, Eddys Cruz was transferred into the janitorial unit and two other janitors who were not members of their protected classes were retained

In order to establish a prima facie case of discrimination where there is a reduction in force, Complainants must show that they are 1) members of a protected class; (2) that they performed their job at an acceptable level; 3) that they were

terminated and that their lay off occurred in circumstances that would raise a reasonable inference of unlawful discrimination. Sullivan v. Liberty Mutual Insurance Co., 444 Mass. 34 (2005). Because an employer seeks to reduce its work-force does not mean that it is free to make its employment decisions on impermissible grounds: "even during a legitimate reorganization or workforce reduction, an employer may not dismiss employees for unlawful discriminatory reasons. [citations omitted]." Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34 (2005).

Laurent is a 62-year-old black man of Haitian national origin and Louis is a 72-year-old black man of Haitian national origin. They are protected by c. 151B by virtue of their age, race, color and national origin. Complainants demonstrated that they performed their positions adequately and that they were terminated while workers who were at least five years younger than they were retained. Knight v. Avon, 438 Mass. 413, 424 (2003). In addition, Respondent transferred a younger, non-Haitian employee, Eddys Cruz, from the maintenance department to the janitorial department rather than laying him off. Thus, Complainants have established a prima facie case of discrimination on the basis of race, color, national origin and age.

Once Complainants establish a prima facie case of discrimination, Respondent must articulate a legitimate, non-discriminatory reason for their termination. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). As part of its burden of production, Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986). The

employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, but need only show that “discriminatory animus was a material and important ingredient in the decision making calculus.” Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003). Respondent’s articulated reasons for Complainants’ termination were the company’s loss of business due in part to the poor performance of the Complainants, and the resulting financial downturn from loss of business. The credible evidence supports the articulated financial difficulties that Respondent was experiencing. Respondent reduced the overall number of its employees, including janitors, maintenance workers, property managers and office workers, through lay-offs and attrition during the time period in and around Complainants’ lay-off. Respondent’s vice president Caplice and Moreau testified credibly that the decision to terminate Complainants was motivated primarily by financial reasons but that they were chosen to be laid off because of their poor performance relative to the other janitors. They chose to retain Eddys Cruz, because he was viewed as a more valuable employee who had the skills to perform routine and emergency maintenance duties as well as general janitorial duties.

Respondent detailed many of specific complaints about Complainants’ performance, which included its management having to attend a board of trustees meeting at one location where Louis was assigned to clean, to answer charges of poor janitorial services. In addition to the fact that I found Respondent’s witnesses generally credible, these accounts were sufficiently detailed for me to find them credible. Moreau also testified credibly and without contradiction that she observed Complainants sitting

idly at Back Bay Station during working hours on a number of occasions. In addition, while not dispositive, the fact that Caplice hired Louis at age 68 and Laurent at age 53 suggests a lack of age animus.

Once Respondent has proffered evidence of legitimate, non-discriminatory reasons for its actions, the Complainants must show that Respondent's reasons were a pretext for unlawful discrimination. Complainants argue that the lack of written record of complaints about their performance is evidence of pretext. I do not agree. I found credible Respondent's witnesses' testimony regarding the reasons for its lack of written employee discipline and record-keeping, a practice that is not uncommon in small companies. Moreover, while Complainants testified generally that they received no complaints about their work, they did not rebut Respondent's assertions regarding complaints about their performance from specific property owners. Likewise, Complainants did not rebut Moreau's testimony that she frequently saw them lounging on the benches at Back Bay Station when they should have been working, testimony that was particularly detrimental to their claims. In short, Complainants failed to demonstrate that the reasons articulated by Respondent were not the real reasons for their termination or that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Ratheon Company, 434 Mass. 493, 503 (2001). I conclude that the motivation for Complainants' termination was Respondent's deteriorating financial situation and the fact that Complainants' performance was less satisfactory than the other members of the janitorial department. Therefore, Complainants have not persuaded me that Respondent's reasons for their termination were a pretext for unlawful discrimination.

Given all of the above, I conclude that Respondent did not engage in unlawful discrimination on the basis of race, color, national origin and age when it terminated Complainants' employment, and the complaints in this matter should be dismissed.

IV. ORDER

For the reasons stated above, the complaints in this matter are hereby dismissed. This constitutes the final order of the Hearing Officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 28th day of September, 2009.

JUDITH E. KAPLAN,
Hearing Officer