

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
JEAN C. LEVEILLE and FREDDY
ST. GEORGE,

Complainants

v.

DOCKET NOS. 14-BEM-01950
14-BEM-01951

PREMIER PALLET, LLC

Respondent

Appearances: David D. Dishman, Esq. for Complainants

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 24, 2014, Complainant Jean C. Leveille filed a complaint of discrimination against Respondent, Premier Pallet, LLC, alleging disparate terms and conditions of employment and constructive discharge based on his race and color. Complainant, Freddy St. Georges also filed a complaint of discrimination against Premier Pallet on July 24, 2014, alleging he was terminated because of his race and color and in retaliation for complaining about racial comments made by co-workers. The Investigating Commissioner found probable cause to credit the allegations of both complaints and conciliation attempts were unsuccessful. Respondent did not comply with a Commission Order to respond to Complainants' discovery requests. The complaints were consolidated for public hearing. Respondent Premier Pallet, LLC and Jonathan

Hoyler were duly notified of a pre-hearing conference held on April 14, 2016, and did not appear at the pre-hearing conference. Respondent and Jonathan Hoyler were duly notified by certified mail of the public hearing to be held on June 8, 2015. Respondent did not appear at the Hearing on June 8, 2015 and an Order of Entry of Default was made on the record pursuant to 804 CMR 1.21(8(a)). A default hearing was conducted pursuant to 804 CMR 1.21 (8)(b) and both Premier Pallet, LLC and Jonathan Hoyler were named on the record as Respondents. However, the complaints were certified for hearing against Respondent Premier Pallet only and were never formally amended to add Jonathan Hoyler as an individual Respondent. Therefore, his name has been removed from the caption as a party-Respondent. Both Complainants testified at the hearing. Written notice of the Entry of Default was sent to Respondent and Jonathan Hoyler within 10 days and Respondent did not petition to remove the default. Having considered the testimony of Complainants at the default hearing, and their complaints which are part of the administrative record, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant Jean Leveille is a 54 year old Haitian man who resides in Middleboro, MA. Complainant Leveille immigrated to the U.S. from Haiti in 1988 or 1989. He worked as a mechanic's helper in Port au Prince Haiti. He worked as a Certified Nursing Assistant and as a copy machine repairer after coming to the U.S. He then worked for a number of years for companies in MA and NH repairing the pallets that are used to move and carry heavy merchandise usually with a forklift.

2. Complainant Leveille was hired to work for Premier Pallet, LLC in Holbrook, MA in December of 2013. Leveille testified that Jonathan Hoyler was the owner of Premier Pallet, LLC. According to Leveille, Respondent employed eleven to twelve employees and perhaps more. Leveille was hired at a rate of pay of \$12 per hour and received a raise to \$13 within a short time with the promise by Hoyler of an additional raise after 3 more months. He worked 40 hours per week and some overtime. (Leveille testimony; Complaint)

3. Complainant Leveille was one of two or three African American employees working for Respondent. Freddy St. George, is another African American employee who worked at Respondent first as a contractor and later as an employee. Leveille testified that the working conditions at Premier Pallet, LLC were not perfect and that a few white employees created problems for people of color. He testified that one employee who he identified only as "Jimmy Sr." and who drove a forklift, hit another Haitian employee named Jean with the forklift in the warehouse by accident. The employee sustained a major injury and Respondent did not call an ambulance, but merely asked the injured employee if there was someone they could call to pick him up. Leveille testified that "Jimmy" was dismissive of the injured employee telling Leveille, "He was not a good producer anyway... we don't even care about him." This comment upset Leveille and he felt the injured employee was dismissed with a cavalier attitude and treated badly after the accident because he was black and not one of "them."

4. Leveille testified that a group of white employees were clique-ish and often ate lunch together in the office with the boss. They never invited him to eat with them. He said that he took his lunch elsewhere in the warehouse, and sometimes ate with one white employee, who told him to be careful of the "others." It was an atmosphere where he did not feel welcome. He stated that sometimes the white workers ordered food for lunch and would eat in the office.

They would not ask him or other black employees to join in. This was in stark contrast to other places Leveille had worked where he felt welcome and like everyone was a family.

5. Leveille testified that there was an incident on June 24, 2014, when Freddy St. George was next to the lunch room where the white employees were talking. St. George overheard someone say that they don't like blacks and don't even buy anything black. St. George immediately told Leveille about this and Leveille complained to Mark, the floor supervisor. Leveille asked Mark why he was hired if they don't like blacks. Mark told Leveille he would investigate the incident. Leveille testified that the entire incident made him feel like "less of a person."

6. Leveille was not aware of any investigation having been conducted. He testified that when he asked Mark about this, Mark, told him that the white employees were speaking about the KKK. Leveille testified that he didn't understand why the white employees would be discussing the KKK. He was led to believe from St. George that the instigator of the conversation was the man he referred to as "Jimmy" who drove the fork lift. He stated that St. George told him everyone else was laughing and participating in the conversation. Leveille told his one white friend at work about the incident and his friend had heard about it. The friend told him that hearing about the discussion disturbed him because his wife was Hispanic.

7. Leveille testified that after this incident, the climate at the company changed completely for the worse for him. He stated he was treated "more toughly" as if he had become a bad employee. Despite his production always having been good, Mark began to follow him around and scrutinize his work much more harshly after he complained about the racist comment. The floor supervisor, Mark told him that the white employees felt they were like a family and they were upset that he and St. George were making trouble for them by complaining.

8. Leveille had received a salary increase of 50 cents raising his salary to \$13.50 per hour effective July 5, 2014, but when he received his July 12, 2014 check, the 50 cent raise was not reflected in his pay. When Leveille asked about this, Mark told him the raise was revoked because the owner John Hoyler did not like that fact that the black employees were causing trouble in the workplace. Leveille believed the revocation of his raise was a punishment for standing up for his race and his rights in the workplace. He told Mark if this were the case, he no longer felt safe working there. Leveille was also concerned for his safety after this conversation because he had heard that "Jimmy" carried a gun and when he had an issue with a co-worker he would gesture as if he were going to pull his gun on them. Leveille testified that this was a form of intimidation in the workplace and that the work environment did not feel safe and he felt he could not remain working there. (Leveille testimony; Complaint)

9. On July 5, 2014, St. George was terminated. On July 18, 2014, Leveille quit the job, not only because the environment was hostile and he was concerned for his safety, but because his promised raise had been revoked as a punishment for complaining about race discrimination. When asked how he felt about his raise being revoked, Leveille stated you work for two reasons... "to feed your family and for retirement." Leveille stated that this was both a current and a future loss toward his social security. He broke down and cried during a part of his testimony and was genuinely upset about the events leading up to his leaving the company. According to Leveille, it took him a long time to find another full time job. He applied for unemployment compensation and received some benefits for approximately six months. In order to survive he took temporary odd jobs such as demolition and construction, as they arose, but did not have benefits. The pay at these jobs was not comparable to what he received at Respondent and the jobs were erratic. He was often paid in cash. He currently has a full time job which he

started in June 2016, making \$19.75 per hour for 30 hours, but did not work full time before this. From July 24, 2014 to June 2016 he had no job security. There is no evidence of Leveille's interim earnings from July 2012 to June 2014 or the amount of unemployment compensation he received in 2012.

10. Complainant Freddy St. George, is a 38 year old black man who began working at Respondent in January 2014 as a contractor. Respondent stored and repaired pallets for his company and he was placed with Respondents to audit the work. He was hired by Respondent in June of 2014 when he was laid off from his company. He worked part-time at Respondent for 5 to 6 hours a day in the mornings at a rate of \$11 to \$12 per hour. He stated he was one of three African Americans out of a work force of about 20 at Respondent.

11. When St. George was first assigned by his former employer to work at Respondent, a couple of employees warned him about a group of guys he would not want to associate with because they were racist. One employee told him to stay away from those guys who are in the office having lunch around John. St. George testified that he felt a separation based on race and never went in the office but took his breaks in the lunch room or outside. He was never invited to lunch in the office and when John Hoyler ordered Chinese food for everyone, the black employees were excluded. He testified that he felt slighted by this. He stated that he was friendly with everyone but because he was an auditor he felt he was perceived as a snitch because he had to monitor everyone's work performance.

12. St. George testified about the incident in June of 2014 when he was on a break sitting in the hallway near the office. He heard someone who he believed was "Jimmy Sr." say, "I don't like anything black...I can't even stand black people." He went into the office and confronted the group of about five employees who he named, asking who said that. He stated that they had

smirks on their faces and acted oblivious. St. George was very upset by this, stating that he had heard of such things happening, but had never experienced it himself and felt like he was crying inside. He immediately relayed the incident to Jean Leveille who got upset and began crying and slamming stuff around.

13. St. George testified that after this incident everything went downhill and he felt like he was a target and had to watch his back. He stated that the owner's son would "zoom" by him driving a forklift as if to threaten him, and another forklift driver came within inches of hitting him with a forklift. He felt "they were trying to intimidate him." On the latter occasion he almost came to blows with the driver, and the other employees had to prevent a fight from breaking out. St. George told the driver, if he ever did that again, that he would "get him." St. George felt he was clearly labeled as a trouble maker and was a "target." He began to be afraid to go to work every day and feared for his safety at Respondent. St. George was told that some of the employees carried weapons in the workplace, and observed "Jimmy" put his hand on his hips as if he were going for a gun.

14. An employee who St. George was friendly with told him that another employee referred to St. George being upset by the racial comments, by stating, "F that [n-word], Freddy and what he thinks." Another employee stated about St. George, "He's just a [n-word]...I don't care if he's upset." St. George stated that "Jimmy Sr." knew there was tension between them and everyday gave him a "wave" which he took as a "taunt" and an "F-you."

15. St. George was terminated sometime in early July 2014, just a week or so after the racial incident, ostensibly for sleeping in the break room. He testified he was sitting in the break room playing a lottery scratch ticket when someone whose face he didn't see came into the room. The floor supervisor, Mark, came to him later that same day and told him to go home. When St.

George asked if there was no more work, Mark told him that he had been observed sleeping in the break room. St. George then referred to all the tension present in the workplace over the last week or so, since Leveille had complained about the racial comments, but Mark would not discuss this and told him to just leave.

16. St. George returned the next day to speak with John Hoyler. Hoyler told him he had had “enough of this,” referring to the anger, tension, and bad blood in the workplace, and told St. George his continued employment with Respondent would just not work out. St. George confronted him about the hostile work environment toward the black employees. It was clear to St. George that Hoyler was aware of the racial incident but he denied that anyone working for Respondents was a racist. St. George asked Hoyler why he did not step up and conduct an investigation or speak to him about the incident. St. George also told him that Mark said he would look into the incident but then did nothing. According to St. George, there were no complaints about his work performance and Hoyler thought he did a good job. Notwithstanding, Hoyler chose to fire him because he viewed him as a trouble maker who was causing problems in the workplace. St. George testified that the workplace environment and his termination for false reasons made him feel hurt, like less of a person, and that he had no control. He believed that he was fired for complaining about racism and felt that none of the issues in the workplace were resolved. He did not look for another job in the mornings but chose to go to the gym and work out mornings. He has worked as a licensed tattoo artist since 2010 and continues to work in that field.

III. CONCLUSIONS OF LAW

General Laws c. 151B 4(1) prohibits discrimination in employment based on race and color. Section 4(4) of c. 151B prohibits an employer from, among other things, discharging or otherwise discriminating against any person who has opposed practices forbidden under the chapter. Complainants claim that they were subjected to a hostile work environment based on their race and color, and that they were retaliated against for opposing unlawful practices, that is complaining about racial comments in the workplace. Complainant Leveille alleges that he was constructively discharged from his employment with Respondents after he was subjected to harsher standards, did not receive his promised raise, and felt unsafe in the workplace. Complainant, St. George alleges he was subjected to a racially hostile work environment and terminated from his employment for retaliatory reasons.

A. Racially Hostile Work Environment

In order to prove the existence of racial harassment, Complainants must demonstrate that they were subjected to unwelcome, racially- offensive acts that were sufficiently continuous and pervasive to alter the conditions of their employment and create an abusive working environment. Complainants must also prove that the harassment was carried out by someone with a supervisory relationship to them or that Respondents knew or should have known of the harassment and failed to take prompt remedial action. Blue v. Aramark Corporation, 25 MDLR 403, 406 (2003) citing, Beldo v. Univ. of Mass Boston, 20 MDLR 105, 111(1998); Richards v. Bull H.N. Information Systems, Inc. 16 MDRL 1639, 1669 (1994); College-Town, Div. of Interco v. MCAD, 400 Mass. 156, 162 (1987).

I conclude based on their credible testimony, that both Complainants Leveille and St. George were subjected to a racially hostile work environment. St. George testified that he was warned from the start of his employment to watch out for a group of fellow employees who were racist. Leveille also testified that one white worker with whom he was friendly warned him to be careful of certain white employees. Both Complainants testified that they felt segregated from the white work force. Leveille testified that he found the workplace atmosphere to be unwelcome. Both Complainants were routinely excluded from lunches with the group of white employees who ate regularly with John Hoyler and were not invited to participate when the white employees ordered special food in for lunch. Complainants ate and took breaks by themselves, and witnessed employees of color treated differently.

Leveille testified about the cavalier attitude of certain white employees toward a Haitian employee who was seriously injured on the job. St. George testified about an incident where he overheard a group of white employees discussing race and laughing when one stated he did not like anything black and did not like black people. St. George was told by another employee that St. George was referred to by the n-word and that certain white workers did not care what he thought or that he was upset by their racist language. When Leveille complained about the racist comments, the floor supervisor, Mark promised to conduct an investigation, but neither Mark nor the owner Respondent Hoyler took any action to alleviate the hostile work environment.

Both Complainants were treated in an intimidating and threatening manner by certain white employees after they complained about racist comments. The situation escalated to the point that they feared for their safety. From Complainants' testimony it was apparent that even prior to Leveille's complaint, Hoyler, who was described as the owner of the company, ate regularly with a group of white employees, and was aware of the work environment. Both

Hoyler and the floor supervisor were aware of racist comments. Complainants claim their employer did virtually nothing to remedy the situation other than conduct a cursory inquiry. Both Complainants testified that they felt threatened and intimidated by some of their white co-workers after they complained. They were told that some of these co-workers carried firearms in the workplace and were frightened for their safety. Given these facts, Complainants have established an un rebutted prima facie case that they were subjected to a hostile work environment based on their race.

B. Retaliation

Complainant Leveille testified that after he complained about the racist comments, the atmosphere at work became worse for him. He testified that his work was scrutinized more harshly and he was treated like a bad employee. The floor supervisor told Leveille that the white employees did not like him making trouble for them by complaining to management. Moreover, Leveille had been promised and was expecting a .50 cent raise at the time and the raise did not materialize. When he received his next pay check, he asked the floor supervisor Mark about this and Mark responded he did not get the raise because Hoyler did not like the fact that the black employees were causing trouble and tension in the workplace. The harsher scrutiny of his work and the denial of a raise were clearly acts of retaliation by management.

Leveille testified that he had no choice but to leave the job after he was denied a promised raise for complaining about racism and because he felt intimidated and concerned for his safety after being marked as a trouble maker. He was told that he was in fact being punished for standing up for his race. He alleges that under such circumstances, he was constructively discharged from his employment. "A constructive discharge occurs when the employer's conduct effectively forces an employee to resign." GTE Products Corp. v. Jefferson v. Stewart,

et al., 421 Mass. 22, 33-34 (1995) A finding of constructive discharge is warranted where there is a finding that the “working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.” Alicea Rosado v. Garcia Santiago, 562 F. 2d 114, 119 (1st Cir. 1997) Given the unrebutted evidence of a deteriorating work environment, the tension that existed between the black and white employees, the fact that Leveille felt threatened and intimidated by white employees in the workplace and was denied a promised raise because he was viewed as a trouble maker, I conclude that he was constructively discharged.

Complainant St. George testified that he felt threatened and feared for his safety after Leveille complained about racist comments. He felt intimidated by co-workers deliberately driving fork lifts too fast and too close to him in a careless manner and was taunted by one white co-worker who was believed to carry a firearm. He testified he felt clearly labeled as a troublemaker and was a target. When he was terminated, ostensibly for sleeping in the break room, a fact he denied, he raised the issue of the tension between the black and white workers and Hoyler refused to discuss the matter with him, claiming there was no racism in the workplace. He asked Hoyler why he had not come to speak with him about the incident and why he taken no action to remedy the situation and Hoyler advised him he could no longer work there. I conclude that St. George’s termination was an act of retaliation for complaining about a racially hostile work environment. Both Complainants have offered substantial unrebutted evidence that they were the victims of a racially hostile work environment in violation of G.L. c. 151B s. 4(1) and unlawful retaliation for opposing race discrimination in the workplace in violation of G. L. c. 151B s. 4(4).

IV. REMEDY

Upon a finding that Respondent has committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victims whole. G.L. c. 151B §5. This includes damages for, among other things, lost wages and emotional distress. See Stonehill College v. MCAD, 441 Mass 549 (2004).

Since I have determined that Complainant Leveille was constructively discharged, he is entitled to damages for lost wages. Leveille testified that he received unemployment compensation for a period of six months and he looked for other work and took on whatever odd jobs he could find, but that the work was erratic, and he did not earn anything comparable to what he was earning full time at Respondent. Complainant did not introduce evidence of the amount of his interim earnings but it is not his burden to do so. It is Respondent's burden to introduce any evidence of failure to mitigate damages and of interim earnings. J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204, 209-210 (1989). Respondent did not participate in Commission proceedings and did not appear at the public hearing. However, since there is evidence that Leveille received unemployment compensation for six months and had sporadic employment over a two year period with some interim earnings, I conclude that it is appropriate to base his lost wages on a period of eighteen months rather than two years.

Leveille worked full time for Respondent at a rate of \$13.00 per hour at the time of his termination and testified that he did a good job and that there were no complaints about his performance. I conclude that he should be compensated for eighteen months based on his weekly salary of \$520, an amount totaling \$40,560. I conclude that he is entitled to recoup this amount for lost wages.

Complainant, St. George testified that he did not seek other employment after his termination from Respondents and made the decision to spend his mornings at the gym, before going to his other job. Since he did not make any efforts to mitigate his lost wages by seeking other employment, he is not entitled to an award of back pay.

Both Complainants are entitled to damages for emotional distress resulting from the racially hostile work environment they were subjected to and for the distress caused by the loss of their employment. Since both had worked at Respondent for only about six months, theirs was not a long-term employment situation. Notwithstanding, both testified compellingly about the pain, hurt and anger they felt at being unwelcome in the workplace and being subjected to a racist environment that was condoned by management. They both felt threatened and intimidated by actions of some co-workers and feared for their safety after Leveille complained about the racist comments. Leveille broke down and cried during his testimony about the atmosphere in the workplace. I conclude that both Complainants suffered emotional distress as a direct result of the hostile work environment and the retaliation they were subjected to and that they are each entitled to an award of \$20,000.

V. ORDER

Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination based on race and retaliation.
- 2) To pay to Complainant, Jean Leveille, the sum of \$40,560 in damages for lost wages, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

- 3) To pay to Complainant, Jean Leveille, the sum of \$20,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 4) To pay to Complainant, Freddy St. George, the sum of \$20,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 11th day of July, 2016.



Eugenia M. Guastaferrri
Hearing Officer