

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & RAFAEL TORRES,
Complainants

v.

DOCKET NO. 10-BEM-01679

COMMONWEALTH WASTE
TRANSPORTATION,
Respondent

Appearances:

Gary P. Gianoulis, Esq. for Rafael Torres
Gregory Tumolo, Esq. for Commonwealth Waste Transportation

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about July 7, 2010, Raphael Torres, who is Hispanic, filed a complaint with this Commission alleging that Respondents Commonwealth Waste Transportation and Riccelli Enterprises of Massachusetts discriminated against him on the basis of his race, color and national origin. More specifically, Complainant alleges that when Riccelli lost a waste transportation contract to CWT, Riccelli's manager was hired by CWT and hired a number of Riccelli's white truck drivers, but did not hire Complainant. Attempts to conciliate the matter failed and the case was certified for public hearing. Prior to the public hearing, Riccelli was dismissed as a Respondent because it had no role in the hiring of Respondent's truck drivers. A public hearing was held before me on May 19-21, 2014. After careful consideration of the entire record 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. Complainant Rafael Torres is an Hispanic man, residing in Lawrence, Massachusetts. Complainant was trained as a welder in his native Puerto Rico and received training and his license as a CDL truck driver at the New England Career Centers in Manchester, N.H. Complainant possesses a CDL-A license, which qualifies him to drive tractor-trailers and he has over 15 years of experience as a truck driver. (Testimony of Complainant; Ex. J-1)

2. Respondent Commonwealth Waste Transportation, LLC, is a waste collection and transportation service, with offices in Peabody, MA. Stephen DiFava and Ken Connelly are Respondent's co-owners. DiFava and Connelly own two other companies that supply heavy equipment and personnel to operate waste transfer stations.

3. From November 2009 to June 30, 2010, Complainant was employed as a truck driver for Riccelli Enterprises of Massachusetts, ("Riccelli") whose parent company is headquartered in New York.

4. In 2009, Riccelli's Massachusetts business primarily serviced a contract with Waste Management Inc. which involved the transport of refuse, household trash and demolition material from a central transfer station in Somerville, Massachusetts to various destinations throughout New England, including dumps in Massachusetts and New Hampshire. Riccelli drivers were paid by the load and could work from 40-60 hours per week. During the course of Complainant's employment, Riccelli's office moved from Methuen to N. Andover, MA.

5. Robert Langlais was Riccelli's general manager in Massachusetts from 2002 to 2010 and was responsible for hiring and supervising employees. Langlais has been in the trucking

business for over 20 years and has hired hundreds of drivers. He estimated that at Riccelli he hired 25 to 30 truck drivers, at least six of whom were Hispanic. He testified credibly that he did not consider the race of a driver when making employment decisions. (Testimony of Langlais)

6. In November 2009, Langlais hired Complainant as a truck driver for Riccelli, to serve its contract with Waste Management Inc. (Testimony of Langlais; Testimony of Complainant)

7. In June 2010, Riccelli employed nine white and two Hispanic truck drivers, all of whom possessed CDL A licenses.

8. Scott McGibbon, who is white, has been a Class A truck driver since 2003. He worked for Riccelli from February 2010 through June 2010. He was hired by Respondent in July 2010, where he is still employed. (Testimony of McGibbon)

9. Paul Haas, who is white, has been a Class A truck driver for approximately 40 years. After working as an independent contractor for Riccelli, he was hired by Riccelli in 2006 or 2007. He continued to work for Riccelli through June 2010. He was hired by Respondent in July 2010 and continues to work for Respondent. (Testimony of Haas)

10. Samuel Ortiz, Jr., who is Hispanic, obtained a Class A, CDL license in 2003. In 2009, Ortiz moved from Rochester, New York to Massachusetts and was hired by Riccelli, where he worked for approximately one year, during which time he frequently went back and forth to New York to care for his young daughter. He is currently a truck driver for Respondent.

11. In 2010, Riccelli drivers picked up their trucks each morning at Riccelli's North Andover location and drove to the Somerville transfer station where they would pick up a pre-loaded trailer and receive their schedules for the day. The drivers were assigned staggered shifts so that their trucks would not all arrive at the transfer station at the same time in the morning.

Complainant's shift usually began around 4:00 a.m. and ended at 4:00 p.m. (Testimony of Complainant)

12. Complainant testified that the truck and various trailers assigned to him were in poor condition and the truck frequently broke down. He stated that on one occasion, at the Turnkey Landfill in New Hampshire, his truck's drive shaft broke and Riccelli sent a mechanic to repair it. On another occasion he had a minor accident which damaged the truck's right fender and headlight. (Testimony of Complainant)

13. None of the Riccelli equipment was new and it took a beating because of the nature of the trash hauling business. Equipment broke down or needed repair from time to time. (Testimony of Haas; Testimony of McGibbon; Testimony of Ortiz)

14. Langlais testified that Complainant's truck got stuck at Turnkey and, instead of calling for a tow truck, he continued spinning the tires until they began to smoke. In the process, the truck suffered severe damage; the drive shaft was torn off the truck's rear end and the differential was destroyed. Langlais further testified that Complainant's accident wherein his truck's fender and bumper were damaged indicated that he did not know the "four corners of his truck" and was an unfit driver. I credit his testimony

15. Paul Haas and Scott McGibbon testified that they observed Complainant at the Turnkey Landfill spinning his truck's wheels until the landfill operators radioed for someone to stop him. They testified that Complainant's actions could have caused a fire, damaged his truck and constituted abuse of his equipment. I credit their testimony.

16. In June 2010, Riccelli was near the end of its second five-year contract with Waste Management. When the contract went out for bid, Riccelli and others, including Respondent,

submitted bids and the contract was awarded to Respondent sometime in June, 2010.

(Testimony of DiFava; Testimony of Langlais)

17. All of Riccelli's employees, including 11 drivers, an office assistant, a loader and two mechanics were to be laid off on June 30, 2010.

18. Stephen DiFava testified that the final weeks of June were tumultuous because Respondent had no written contract with Waste Management until the last week of June and had a very short period of time in which to ramp up operations. (Exhibit J-5; Testimony of Stephen DiFava)

19. DiFava testified that after looking at the Waste Management operation, he and Connelly determined that the contract was more involved than they had realized and they decided to hire a manager with knowledge of the operation to smooth the transfer from Riccelli to Respondent. At the time, Respondent employed six drivers, three of whom were Hispanic. DiFava and Connelly determined that they would need an additional eight drivers. DiFava travelled to Riccelli's N. Andover office and introduced himself to Langlais. DiFava also travelled to the Somerville transfer station to observe the operation. (Testimony of DiFava; Testimony of Langlais)

20. Complainant testified that sometime in mid-June he approached DiFava at the Somerville transfer station to inquire about applying for a driver position and was told by DiFava that Langlais would have applications by the end of the week. DiFava recalled telling two Riccelli employees who asked for applications that applications would be available later from Langlais and at Respondent's Peabody office.

21. Complainant testified credibly that later that day, he approached Langlais in N. Andover stating that DiFava told him Langlais would have applications. According to

Complainant, Langlais replied that he did not know what Complainant was talking about and he did not even know whether he was going to be hired by Respondent. Langlais did not recall Complainant asking him for an application. However, in his affidavit of September 16, 2010, Langlais stated Complainant repeatedly asked him for an application, but he had none and had told all of the employees that they could obtain applications at Respondent's Peabody office. (Testimony of Langlais; Ex. J-4)

22. After discussing the position with Langlais, DiFava offered him the job of operations manager and told Langlais to create a list of his best drivers. Langlais accepted the job and gave DiFava a list which DiFava then reviewed. (Testimony of Langlais; Testimony of DiFava)

23. Langlais divided the Riccelli drivers into two categories. He placed his higher rated drivers on the "A list" and lower rated drivers on the "B" list. Each driver's name was accompanied by a brief description of their experience, safety record and other factors.

24. The seven "A list," drivers were white. They included Paul Haas, described as a long term employee, a top revenue producer with a good safety record and great with equipment and who coordinated other drivers and was a great team player. Scott McGibbon was described as a newer employee, but a strong revenue producer with a good safety record and good attitude and very good with equipment. (Ex. J-7)

25. There were four drivers on the "B List." Two of these drivers were recommended, with caveats; KB (white) was otherwise qualified and had no recent problems, but had past "aggressive driving issues," and Samuel Ortiz, a "strong employee with no safety or performance issues," who would have been on the A list but for a recent lengthy leave for family matters, but could be considered for employment if needed. (Ex. J-7)

26. Also on the “B list” were two drivers whom Langlais would not recommend; DB, (white), a long time driver who had recently had two preventable accidents causing serious damage; and Complainant, who had a good safety record but was not a strong revenue producer and whose tractor had recently required several very expensive repairs. (Ex. J-7)

27. Langlais testified credibly that one of the reasons he did not recommend Complainant for hire was the severe damage he caused by abusing his truck at the Turnkey Landfill and the accident with his truck that was preventable.¹

28. McGibbon and Haas testified that in late June they submitted job applications that they had obtained from Respondent’s offices.

29. DiFava testified that he informally interviewed anyone who filed an application. DiFava testified that when hiring drivers he considered their driving record and performance of primary importance. He stated that while he relied mostly on Langlais in the hiring recommendations, he made the final hiring decision. He also stated that Langlais had no authority to refuse anyone an application and that anyone had the right to apply. He testified credibly that race was never a consideration in the hiring process.

30. Complainant testified that, two days after Langlais told him he had no applications, while Complainant was at Turnkey, Langlais called him to say that Respondent was having a dinner for drivers to complete applications, but that Complainant was not invited because the positions were filled. Complainant testified that he then told Ortiz, who was present at the landfill, about his conversation with Langlais. According to Complainant, Ortiz told him that Langlais had just phoned him and told him the same thing.

¹ Complainant was terminated from a truck driver position he held just prior to Riccelli for having had three accidents in one year. (Testimony of Complainant) While the prior termination was not a factor in Respondent’s decision not to hire Complainant, it is consistent with Respondent’s position that Complainant’s poor treatment of equipment was a factor in its decision not to consider him for employment.

31. Ortiz testified that he was not worried about finding work because he had a CDL license which was valid in every state. He knew that he could obtain an application at Respondent's Peabody office, but did not apply because he intended to return to New York. Ortiz also testified that Langlais told him that Respondent was only hiring a handful of Riccelli's drivers and there were no vacancies. He denied that Langlais told him not to attend the dinner.

32. Langlais denied telling Complainant not to come to the dinner for applicants. He claimed that a poster regarding the dinner was posted by the time clock and it was an "open invitation." I do not credit his testimony, which contradicts his affidavit stating that the dinner occurred after all of the drivers were hired and the dinner was solely for Respondent's employees. (Testimony of Langlais; Ex. J-4)

33. On June 20 or 22, 2010, Respondent held a dinner at a restaurant in Middleton for Riccelli applicants and current employees of Respondent, to acquaint the new drivers with Respondent's employees and to inform them about Respondent's benefits and policies. The Riccelli applicants had been selected but had not been officially hired and they completed paperwork at the dinner. (Testimony of DiFava)

34. Respondent hired all seven of the A List drivers on July 1, 2010.

35. Ortiz remained in Massachusetts for the month of July, collected unemployment and enjoyed spending time with his family. (Testimony of Ortiz)

36. DiFava testified that after only two weeks on the job with Respondent, a former Riccelli driver went out on a workers compensation claim, which left an open position that was filled by Ortiz.

37. Ortiz testified that he was still debating whether to return to New York when Langlais called him in late July and offered him a position. He traveled to Respondent's office

in North Andover, where he completed an application, took a drug test and was hired by Respondent.² (Testimony of Ortiz)

38. DiFava testified that one-third of Respondent's 17 truck drivers, are Hispanic and that at least one-third of all his employees are Hispanic.

39. DiFava testified that Respondent has English and Spanish versions of its employee handbooks and safety videos for the benefit of its Latino employees with limited English skills. In addition, some of Respondent's employees who are fluent in Spanish and English have translated for Hispanic employees when the need arose. (Testimony of DiFava)

III. CONCLUSIONS OF LAW

M.G.L.c.151B §4(1) prohibits discrimination in employment on the basis of race, color and national origin. Complainant alleges that Respondent discriminated against him based on his race, color and national origin by subjecting him to disparate treatment by failing to hire him for a truck driver position. In order to establish a prima facie case of race, color and national origin discrimination, Complainant must show that he was a member of a protected class, that he was qualified for and applied for an open position or was discouraged from applying for such a position and that he was not hired for the position and similarly situated employees not in his protected class were hired. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wheelock College v. MCAD, 371 Mass 130 (1976).

Complainant meets the first element of a prima facie case because he is Hispanic and of Puerto Rican origin. Complainant met the minimum qualifications for the position by virtue of

² In April, 2011, Ortiz left Respondent and moved to New York. In June 2013, he returned Massachusetts and was rehired by Respondent.

his experience and licensure. Complainant did not submit a formal application for a position with Respondent. However, Complainant requested a job application from Respondent's hiring manager and was told that they were not available. No clear timeline of events could be established from the record for the final weeks of June 2010; however, I draw the inference that the application process was completed on or about June 20 to 22, when Respondent held a dinner for the successful applicants. I conclude that it was around this time that Langlais told Complainant that the positions were filled, and in fact, all of the truck driver positions were filled by similarly situated, non-Hispanic applicants. I therefore conclude that Complainant has established a prima facie case of discrimination.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000). Respondent's legitimate, non-discriminatory reasons for not hiring Complainant for a trucking position were that Complainant never applied for the position and even if he had, he would not be considered for the position because of his poor performance at Riccelli. As stated above, Complainant was hampered in his ability to obtain an application and one could reasonably conclude he was deterred from applying. Notwithstanding this fact, Respondent's hiring manager testified credibly that Complainant was a low revenue producer and that he caused severe and costly damage to his equipment beyond normal wear and tear. Respondent asserted that this abuse of and disregard for his equipment resulted in Langlais not recommending him for employment and not including him on the "A list" to Respondent. Respondent asserts that for these reasons Complainant would have been disqualified from employment even if he had formally applied for the position. The successful candidates possessed experience, produced greater revenue, had

good safety records and the endorsement of the hiring manager. All of the more highly rated drivers were hired and the drivers on the "B list," two white and two Hispanic, were not hired. I conclude that Respondent has established legitimate, non-discriminatory reasons for not hiring Complainant.

Once Respondent has articulated legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. A fact finder may, but need not, infer that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer are false. Lipchitz v. Raytheon Company, 434 Mass. 493, 498, 507 (2001). The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, but need show only 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).

Complainant has failed to establish that Respondent's articulated reasons for not hiring him are a pretext for discrimination. Complainant alleged that Riccelli provided him with poor equipment, implying that the age and disrepair of the equipment was to blame for the damage to his truck at the landfill and an accident that damaged his fender. However, the evidence established that all of the drivers had aged equipment that broke down from time to time and was subjected to significant wear and tear attendant to the trash hauling business. There was no dispute that Complainant caused severe and costly damage to his truck when it became stuck at a landfill, and the damage was credibly attributed, not to the condition of the equipment, but to the Complainant's failure to follow protocol and his careless and reckless treatment of the truck as witnessed by a number of people. While Langlais' testimony was contradictory and

unreliable in other respects, I observed that he was unequivocal in expressing his belief that the severe and costly damage to Complainant's truck at the Turnkey landfill was caused by Complainant's reckless behavior. He was clearly angered by Complainant's conduct and the damage it caused to the equipment. I credit his testimony that Complainant's careless disregard for the equipment disqualified him for a position with Respondent.

As further evidence of pretext, Complainant asserts that Samuel Ortiz, the only other Hispanic truck driver from Riccelli, was also told that there were no openings and was hired by Respondent in late July only after Complainant filed his complaint. The timing suggests that Ortiz was hired in an ex post facto attempt by Respondent to dispel the appearance of discriminatory animus by hiring an Hispanic employee. Regardless of whether or not this is true, I am not persuaded that Respondent's possibly cynical hiring of Ortiz establishes pretext for discriminatory animus against Complainant. Ortiz was initially on the "B List," notwithstanding a solid work record at Riccelli, only because he had taken time off to be in New York, raising concerns that he might not maintain a regular schedule. Ortiz' testimony regarding his plans at the conclusion of the Riccelli contract was contradictory and suggested that he remained ambivalent about whether he would stay in Massachusetts or move back to New York until Langlais called him and offered him a job, a fact which supports Langlais' reason for putting him on the "B List" in the first place.³

Finally, while not entirely dispositive of the issue of discriminatory animus, it is difficult to conceive that Langlais would have hired Complainant in November 2009 knowing he was Hispanic, but would refuse to recommend him for hire seven months later because he is Hispanic.

³ Langlais' concerns were borne out when, after a year with Respondent, Ortiz returned to New York for over two years, before returning to Massachusetts.

For the reasons stated above, I conclude that Complainant has failed to establish that Respondent's reasons for not hiring him were a pretext for discrimination. I therefore conclude that Respondent did not engage in unlawful discrimination in violation of M.G.L.c. 151B.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission by M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision 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 9th day of April

JUDITH E. KAPLAN
Hearing Officer