

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**AMERICAN GARDENS MANAGEMENT
COMPANY and BAILEY GARDENS
CORPORATION, as Joint Employers**

AND

LOCAL 32E, SEIU, AFL-CIO

CASES

2-CA-33475

2-CA-33605

Karen Newman Esq., Counsel for the
General Counsel
Katchen Locke Esq., Counsel for the Union
Jeffrey D. Pollack Esq., and *Jerald M.
Stein Esq.*, Counsel for the Respondents

SUPPLEMENTAL DECISION

Raymond P. Green, Administrative Law Judge. On November 22, 2002, the Board remanded a portion of this case to me for further findings and conclusions regarding the alleged discriminatory discharges of Mathew Roberts and Alfredo Rosales.

After considering the supplemental briefs filed by the parties and reviewing the record, I hereby reaffirm my original decision and recommend that the Complaint be dismissed.

The Board noted that under *Wright Line*, 251 NLRB 1083, (1980) enf'd. 662 F.2d 889 (1st cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983), the General Counsel is required to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the Employer's decision and if such a showing is made, the burden shifts whereupon the Employer is required to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board further stated that in order to meet the initial burden, the General Counsel must establish four elements; (1) the existence of activity protected by the Act ¹; (2) the Employer's knowledge of that activity ²; (3) the imposition of some adverse employment action; and (4) the existence of a motivational link, or nexus, between the protected activity and the adverse employment action.

In my earlier decision, I concluded that the first three elements were present. The evidence showed that the employees were engaged in union activity; that the Employer was aware of that activity; and that they suffered an adverse employment action. The difficulty I had then and which I continue to have now, is concluding that the General Counsel established by a

¹ In some situations a violation may be found even if the employee did not engage in protected activity. This would occur when the Employer was motivated by its belief that the employee engaged in protected activity.

² Proof of knowledge need not be shown by direct evidence. The General Counsel may establish that an Employer is aware of union or protected activity by the use of circumstantial evidence such as timing and/or pretext.

preponderance of the evidence, any motivational link or nexus.

As pointed out by the Respondent, it did not engage in any type of election campaign either before or after the Union filed a petition in 2-RC-22297. Its management and supervisors
5 made no anti-union speeches to employees, distributed no literature and held no meetings with employees either singly or in groups, in order to convince them to vote against the Union.

To be sure, an employee, Cardona, testified that on or about September 11, Thomas Mathews asked him why he signed for the Union and that they had some kind of a discussion
10 about benefits. But I did not credit Cardona's testimony because it was clear to me that the two men spoke in different languages and that Cardona's lack of English comprehension made his recitation of what he heard, extremely unreliable.

Another employee, Fidencio Frias, testified that sometime in November 2000, Thomas Mathews said, "why did you sign for Union?" He also testified that Thomas Mathews mentioned
15 Mathew Roberts. But Frias' testimony on this subject was murky at best. In my original decision, I concluded that this one conversation did not, even if credited, evidence animus. I now conclude that I don't credit Frias on this point.

As noted in my original decision, I dismissed the 8(a)(3) allegations concerning Frias and credited the Company's version of what took place on December 12 and 13, 2000. ³ I also
20 noted that Frias had a "somewhat volatile temperament." This was evidenced not only by his demeanor at the hearing, but also by his past difficulties with the law. In short I conclude that he was not a reliable witness.

Based on this record, I would conclude, that the General Counsel has not made out, by a preponderance of the evidence, a *prima facie* case because she has not shown evidence of
25 a motivational link or nexus, between the employees' protected activity and their discharges.

Moreover, I would also conclude that even if there was sufficient proof of such a link, the Employer has established that it would have laid off these employees for lack of work when it
30 did so. The evidence here, including the credible testimony of Thomas Mathews, Jose Acevado and Thomas John, showed that renovation work had been mostly completed by December 2000. While it is true that Mathew Roberts was originally hired by the Respondent to work at Bailey Gardens, the fact is that he was put on the payroll of the contractor who was
35 engaged to do renovation work on these apartments. And while, Roberts was kept on by the Respondent after the contractor left, he and Alfred Rosales, (hired as Robert's assistant), were primarily engaged in the renovation of apartments as they were vacated.

The evidence shows that Roberts and Rosales worked in these buildings, not as superintendents, handymen, or porters, but rather as renovation workers, a category apart from
40 the Company's normal maintenance workers. And while the nature of their work overlapped with that done by superintendents and handymen, the fact is that neither had the boiler license or the electrical or plumbing experience that was required of either a superintendent or
45 handyman.

The evidence showed that renovation work, by December 2000 had diminished to an

³ The General Counsel did not take exceptions to my decision to dismiss the 8(a)(3) allegation concerning Frias.

extent that Roberts and Rosales were spending much of their day hanging out.⁴ And although the evidence shows that the Company made subsequent attempts to hire people after they were laid off, it tried to hire people with the licenses and work experience of handymen. Also the Company, from time to time, used floaters to do work that Roberts and Rosales might otherwise have done. But these floaters were long time employees who were normally used for this purpose. Their use would make economic sense instead of requiring the Company to continue to employ two employees whose work load had diminished to the extent that it had.⁵

For all of the foregoing reasons, I reaffirm my original recommendation that the Complaint be dismissed.

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

⁴ It makes no difference whether the bulk of the refurbishing work was completed by 1998 or 1999. It is clear that after the contractor finished its work, Roberts and Rosales were hired by the Respondent and continued to do this work, as well as normal restoration work as tenants left and new tenants arrived. The relevant point is that over time, the amount of their work decreased because as apartments were refurbished, the amount of time spent on normal or ordinary renovation dropped and they had less and less to do.

⁵ The General Counsel argues that at the time of their terminations, 60% of the apartments had been refurbished. She therefore concludes that 40% of the apartments were still in need of refurbishment and that there was plenty of this type of work for Roberts and Rosales to do. But the fact that 60% of the apartments had been refurbished, does not prove that the other 40% required complete or even partial refurbishment. Moreover, even if this was the case, refurbishing these apartments could only be undertaken as the tenants of these apartments vacated them, which might or might not occur at indeterminate times in the future. (Indeed, the fact that a tenant vacated an apartment did not make the apartment automatically accessible. If a tenant simply left without turning over the keys, the landlord needed to obtain a judicial eviction in order to enter). Thus the fact that 60% of the apartments had been refurbished does not mean that there was a significant amount of readily available work for Roberts and Rosales after December 8, 2000. And in this connection, I credit the testimony of the Company's witnesses to the contrary.