NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of MARINO JAVIER, Complainant, v. P.A.A.F. REALTY CORP., Respondent.	NOTICE AND FINAL ORDER Case No. 4606798

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on July 23, 2008, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is

the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: SEP - 9 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

MARINO JAVIER,

Complainant,

v.

P.A.A.F. REALTY CORP.,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **4606798**

SUMMARY

Complainant asserts that his job as a superintendent for Respondent was terminated and he was demoted to a porter position because of his age. Complainant failed to produce any reliable evidence to substantiate his claim and, therefore, his case must be dismissed.

PROCEEDINGS IN THE CASE

On September 25, 2002, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March

24, 2008. At the hearing, Respondent submitted its answer orally, on the record. Thereafter, a written Answer to the complaint was submitted and is hereby included in the record as ALJ Exhibit 4. (Originally, the Answer that was received was not verified. Respondent subsequently submitted a *nunc pro tunc* verification that was appended to the Answer.) On March 24, 2008, Complainant verified that his correct legal name is Marino Javier and the caption was thus amended to reflect that.

Complainant and Respondent appeared at the hearing. Complainant was represented by Antonia Kousoulas, Esq. Respondent was represented by Costantino Fragale, Esq.

Permission to file post-hearing briefs was granted. Attorneys for Complainant and Respondent each filed timely submissions.

FINDINGS OF FACT

1. Complainant, who was born on January 5, 1947, has been employed by Respondent from 1982 until the present. (Tr. 11)

2. Respondent is an S-corporation. Fifty per cent of the corporate shares are owned by Joseph Furgiuele and the other shares are owned by the estate of Enos Ayala. Ayala died on March 16, 2007. (Tr. 83-84)

3. From 1982 until 1997, Complainant worked as a porter. In that position, he performed cleaning work for Respondent. (Tr. 12, 94)

4. Complainant lives in one of Respondent's two buildings, rent free. He also receives a salary for the services he performs. (Tr. 94)

5. William Torres was the superintendent of the buildings until early 1996. (Tr. 96-97) Thereafter, Felix Vargas became the superintendent. (Tr. 98) Vargas left Respondent's employ in August of 1997 and was replaced, briefly, by David Rodriguez, on a trial basis. (Tr. 99)

6. Torres and Vargas were paid $350.00 per week. Rodriguez was paid only $175.00 per week. (Respondent's Exhibits 5, 6, 7, 8)

7. In November, 1997, Complainant took on more duties and received an increase in pay from $125.00 per week to $250.00 per week. He was promoted to superintendent at that time. Laura Berardi, Respondent's office manager asserts that Complainant remained a porter, but Respondent's records identify Complainant as "superintendent." (Respondent's Exhibits1, 3, 4, 9, 10, 11; Tr. 14, 99-100)

8. Complainant remained in that position until 2002, when his services as superintendent were terminated. He was retained as a porter for one building, earning $50.00 per week. Jose Luis De Bora was hired as superintendent. De Bora's salary was $400.00 per week. (Respondent's Exhibit 15; Tr. 23, 106)

9. As superintendent, Complainant did painting and repairs. He also changed light switches and cleaned and changed the filters for the boilers. (Tr. 16)

10. Complainant did not perform plumbing or electrical work. Vargas, for example, was paid more than Complainant because he had the skills to perform those types of duties. (Tr. 100-01) When Complainant acted as superintendent, Respondent hired outside contractors to perform electrical and plumbing duties. (Tr. 105)

11. In September 2002, Complainant's employment as superintendent was terminated. He asserts that Ayala told him "you're old now" when Ayala informed Complainant of the decision. (Tr. 22) Benjamin Javier, Complainant's son, stated he was told by two tenants that they had

heard Ayala state Complainant was "too old." Benjamin Javier did not hear Ayala make any such statement, however. (Tr. 65-66)

12. Both Furgiuele and Berardi stated that Ayala said Complainant was replaced because of his inability to perform as a superintendent. (Tr. 84, 112-13)

13. Complainant's current duties include taking out the garbage at 1436 Beach Avenue, which he describes as "the hardest thing to do...because it's very heavy and there's a lot of garbage." This makes the job more physically demanding than the superintendent's job. (Tr. 59)

OPINION AND DECISION

Respondent argues that, pursuant to CPLR § 4519, commonly known as the "dead man's statute," the statements attributed to Ayala cannot be considered. Complainant argues that the dead man's statute should not apply and cites, *inter alia*, *Hand v. Stanper Food Corp.*, 224 A.D.2d 584, 585, 638 N.Y.S.2d 683, 684 (2nd Dept. 1996), wherein the court found that the defendant corporation is not a party protected by § 4519. Complainant also argues that precluding Ayala's statements would be contrary to the liberal guidelines set forth in the Division's Rules of practice. See, 9 NYCRR § 465. Inasmuch as the New York State Administrative Procedure Act § 306.1 states that administrative agencies in New York State "need not observe the rules of evidence observed by courts," I find Complainant's arguments to be persuasive with respect to the dead man's statute. However, since contradictory statements have been attributed to Ayala by both Respondent's and Complainant's witnesses, Ayala's statements cannot be afforded any weight, particularly given the fact that Ayala is not available to provide clarity or context.

To sustain a claim for discrimination, Complainant must first make out a prima facie case. In order to establish a prima facie case of discrimination in employment based upon age,

Complainant must show (1) that he was a member of a protected class; (2) that he was capable of performing the duties of the job in a reasonable manner; (3); that Complainant suffered an adverse employment action, and (4) that this occurred under circumstances which would lead one to infer that he had been discriminated against. If the Complainant succeeds in establishing a prima facie case, Respondent then must articulate a legitimate, non-discriminatory reason for its action. *Pace College v. Commission on Human Rights of the City of New* York, 38 N.Y.2d 28, 377 N.Y.S. 2d 471, 339 N.E.2d 880 (1975); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Burlington Industries v. New York City Human Rights Commission*, 82 A.D. 2d 415, 441 N.Y.S.2d 821 (1st Dept. 1981), *aff'd,* 58 N.Y.2d 983, 447 N.E.2d 1281, 460 N.Y.S.2d 920 (1983).

Complainant in the instant case has not made out a prima facie case of discrimination. Although he satisfies the first three requirements outlined above, he has not shown that the termination of his superintendent duties occurred under circumstances that would give rise to an inference of discrimination. The only connection he makes between his age and his job status is the statement he attributes to Ayala, which cannot be relied upon. Respondent also points out that Complainant did not perform many of the duties that their other superintendents have traditionally performed and the salary discrepancies bear this fact out. Complainant was simply not a skilled superintendent.

It is also significant that Ayala hired Complainant in late 1997, when Complainant was already 50 years of age, and fired him less than four years later. When the hirer and firer is the same individual, and the termination occurs within a short period of time after the employee was hired, one can usually infer that discrimination was not the reason for the adverse action. *Dickerson v. Health Management Corporation of America*, 21 A.D.3d 326, 329, 800 N.Y.S. 391,

394 (1st Dept. 2005). "There is an inherent implausibility in hiring a member of a protected class and then discriminating against that person on the basis of his or her protected status." *Youth Action Homes v. State Division of Human Rights*, 231 A.D.2d 7, 14, 659 N.Y.S.2d 447, 452 (1st Dept. 1997). Complainant has not presented any reliable evidence that would overcome the inference that there was no discrimination in this case.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the case be, and the same hereby is, dismissed.

DATED: July 23, 2008
Bronx, New York

Thomas S. Protano
Administrative Law Judge