

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of)
NALANI PAGAN,)
Complainant,)
vs.)
PREMIERE GREENS,)
Respondent,)
and)
DIRECTOR, DEPARTMENT OF)
LABOR AND INDUSTRIAL RELATIONS.)
_____)

CASE NO. OSAB 98-043(WH)
Discrimination Complaint

DECISION AND ORDER

This Occupational Safety and Health case is before the Board on a Notice of Contest, filed by NALANI PAGAN ("Complainant"), contesting a decision issued on October 23, 1998 by the Director of Labor and Industrial Relations, via the Division of Hawaii Occupational Safety and Health ("HIOSH").

In that decision, HIOSH denied Complainant's March 20, 1998 discrimination complaint against PREMIERE GREENS ("Respondent").

The sole issue before us is whether Complainant's employment termination was in violation of Hawaii Revised Statutes ("HRS") §396-8(e).

For the reasons stated below, we affirm.

FINDINGS OF FACT

1. Complainant has been in the business of providing housekeeping services to clients for about twelve years in Hawaii, and for about eight years on the Big Island.

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2. Respondent is in the business of landscaping and gardening, and was hired by the Sullivan family to perform landscaping work on its sprawling Kohala Estates property located in an affluent gated community on the Big Island. Since the Sullivans were not full-time residents of Hawaii, Respondent, as a service to its client, agreed to hire a housekeeper for the Sullivans to provide cleaning services for their home.

3. In or around February of 1997, Respondent hired Complainant to clean the Sullivan home.

4. At the time of her hiring, Complainant held a part-time housekeeping job at a local hospital and another part-time job at a health food store. Because of her other jobs, Respondent allowed Complainant to arrange her work schedule around her other employment. Complainant did not have her own set of house keys to the Sullivan home and did not have the pass code to disarm the home's security alarm. Complainant and Respondent would arrange to meet at the house so that Respondent could disarm the alarm and let Claimant in to do her work.

5. For each day that she worked at the Sullivan home, Complainant would submit an invoice to Respondent for the time she spent at the house. It was Complainant's policy to bill Respondent a minimum of four hours of work at an hourly rate of \$15.00, even if she worked less than four hours.

6. Complainant worked at the Sullivan home about once or twice a week. She usually worked between eight to sixteen hours per week at the Sullivan home.

7. Claimant had a general excise ("GET") license prior to being hired by Respondent. Her GET license had expired at the time of hiring by Respondent. Claimant renewed her GET license after being hired by Respondent.

8. Respondent paid Complainant the amount reflected in her invoices. Respondent did not withhold any income taxes for Complainant. For the calendar year of 1997 and 1998, Respondent issued to Complainant "1099 Miscellaneous Income" tax forms.

9. Claimant's cleaning supplies were provided and purchased by Respondent for her use on the Sullivan home. The Sullivans reimbursed Respondent for the supplies. The Sullivans had specific preferences as to what type and brand of cleaning supplies to use, because Mrs. Sullivan was sensitive to certain chemicals and there were special woodwork and antiques in the home that required special attention.

10. Respondent did not supervise or dictate the means and methods by which Claimant's work was to be performed. Respondent did inspect Claimant's work after it was done. Complainant worked until the cleaning was complete. There was no set number of hours that she had to maintain.

11. Complainant was free to accept housekeeping work with others, and had, in fact, provided housekeeping services to other clients, including the Clarks and Nancy Bouvet at Hospice, during the time that she worked at the Sullivan home.

12. On January 8, 1998, an exterminator was called to the Sullivan home. Complainant, who had knowledge about an ant

problem at the home, was asked by Respondent to show the exterminator the "trouble spots." Complainant did as requested, but later claimed that the pesticide spray used by the exterminator made her sick. Later that day, Complainant raised safety and health concerns with Respondent regarding her exposure to the pesticide.

13. After the pesticide incident, Complainant performed work at the Clarks residence on February 2, 1998 and February 3, 1998.

14. After February 3, 1998, Respondent, acting on instructions from the Sullivans, stopped using Complainant's services. On February 17, 1998, Respondent left a telephone message for Complainant that her services would no longer be required at the Sullivan home. According to Respondent, the Sullivans were dissatisfied with Complainant's work and decided to find another housekeeper.

15. On or about March 20, 1998, Complainant filed a complaint with HIOSH, alleging that Respondent violated HRS §396-8(e). According to Complainant, Respondent terminated her in retaliation for raising work-related safety and health concerns.

16. Based on the evidence, we find that Complainant was an independent contractor, and not an employee of Respondent. We also find that Complainant was hired by Respondent to perform domestic services in a private home.

CONCLUSIONS OF LAW

Hawaii Revised Statutes §396-8(e) prohibits an employer from discharging or discriminating against an employee for exercising his or her rights under Chapter 396 of the Hawaii Occupational Safety and Health law. This provision applies only to employees and their employers.

"Employee" is defined in HRS §396-3 as "every natural person who is required or directed or permitted or suffered by any employer to engage in any employment, or to go to work or be at any time in any place of employment."

Employer, under HRS §396-3, means "[e]very person having direction, management, control, or custody of any employment, place of employment, or any employee."

Employment, pursuant to HRS §396-3 includes "the carrying on of any trade, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged to work for hire except domestic service in or about a private home." (emphasis added).

Based on our findings, we conclude that Complainant's termination did not violate HRS §396-8(e). This provision did not apply to either Complainant, or Respondent. As the evidence shows, Respondent was not Complainant's employer, and that Complainant was an independent contractor, rather than an employee. Furthermore, the type of work that Complainant was

hired to do, i.e., domestic service in a private home, is excluded from the definition of employment under HRS §396-3.

For these reasons, we conclude that there was no violation of HRS §396-8(e) in this case.

ORDER

The decision of the Director, dated October 23, 1998, is affirmed, in accordance with the foregoing.

Dated: Honolulu, Hawaii, MAR 13 2000.


FRANK YAP, JR., Chairman


CAROL K. YAMAMOTO, Member

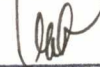
EXCUSED
VICENTE F. AQUINO, Member

Nalani Pagan
Complainant

John and Kay Storck
Respondents

Leo B. Young, Esq.
for the Director, Department
of Labor and Industrial Relations

I do hereby certify that the foregoing
is a full, true and correct copy of
the original on file in this office.



NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Decision and Order to a duly recognized representative of the employees.