

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW  
JUDGES

The Secretary, United States  
Department of Housing and Urban  
Development, on behalf of  
Enrique and Lizette Flores,

Charging Party,

v.

1430 Seagirt Boulevard Corp.,  
Steve Mauceri, Leonard Cohen,  
Stuart Cohen, MZ Realty Corp.,  
Robert Zelman, Thomas Gregory,

Respondents.

HUDALJ 02-96-1124-8  
Decided: February 17, 1998

Michael A. Kaufman, Esq.,  
Richard M. Howard, Esq., and  
Christina Bennett, Esq.  
For the Respondents

Sara Manzano, Esq.,  
Louis Smigel, Esq., and  
Julia A. Solo, Esq.  
For the Secretary and the Complainants

Before: Robert A. Andretta  
Administrative Law Judge

**INITIAL DECISION**

**Jurisdiction and Procedure**

This matter arose as a result of a complaint filed by Enrique Flores and his

daughter, Lizette Flores (“Complainants”), alleging that the 1430 Seagirt Boulevard Corporation, Leonard Cohen, Stuart Cohen, Steve Mauceri, MZ Realty Corporation, Robert Zelman, and Thomas Gregory (“Respondents”) retaliated against them, for their having filed a previous complaint, in violation of the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, as amended (“Act”). It is adjudicated in accordance with 42 U.S.C. § 3612(b) of the Act and the regulations of the Department of Housing and Urban Development (“HUD”) that are codified at 24 CFR Part 180, and jurisdiction is thereby obtained.

On June 17, 1997, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, HUD’s Assistant General Counsel for the New York/New Jersey Office issued a Charge of Discrimination against the Respondents alleging that they had retaliated against the Complainants for filing a previous complaint, which action is unlawful under that part of the Act that can be found at 42 U.S.C. § 3617 and violates the HUD regulation that is codified at 24 CFR 100.400(c)(5).

A hearing was conducted on October 15 and 16, 1997, in Hempstead, New York, and post-hearing briefs were timely submitted by December 19, 1997. Thus, this matter was ripe for decision on the last-named date.

### **Findings of Fact**

Complainant Enrique Flores is 63 years of age and comes from Puerto Rico. He was hired, without a written contract, to work as the sole superintendent of a 113-unit cooperative apartment house at 1430 Seagirt Boulevard, Far Rockaway, New York, (“the building”) in 1989. (T 44-5, 48, 280).<sup>1</sup> He worked there until he was terminated on November 29, 1996, a total of seven years. (T 44). As part of his oral employment agreement, Flores was provided with apartment L-3 in the lobby of the building, rent free and with no lease, and he lived there throughout his tenure as superintendent. (T 44, 75).

Mr. Flores’s starting pay in 1989 was \$350 per week, which is \$18,200 per year. (T 47). Thereafter, he received annual raises. (T 47, 76; S 13). He also received occasional letters of commendation for the quality of his work. (S 9; R 11). At the time of his termination, Flores was being paid \$525 per week, or \$27,300 per annum. (T 47). During his tenure, Flores was also hired sometimes by the cooperative management or by individual apartment owners to perform extra work, for which he was paid separately.

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<sup>1</sup>The transcript of the hearing is cited with a capital T and a page number. The Secretary’s exhibits are identified with a capital S and an exhibit number; those of the Respondents are identified with an R.

(T 143-44).

Complainant Lizette Flores is the adult daughter of Enrique Flores. Ms. Flores began to live with her father in apartment L-3 in February, 1996. (T 65). The two Complainants continued to live in L-3 until they were evicted in July, 1997. (T 68-9, 196).

Respondent 1430 Seagirt Boulevard Corporation is a housing cooperative located at 1430 Seagirt Boulevard, Far Rockaway, New York. This Respondent was the employer of complainant Enrique Flores throughout his seven-year tenure as superintendent of the building. (S 3, 13). The Board of Directors of the corporation, at all times relevant, was made up of Steve Mauceri, Beth Hachtman, Dani Sanchez, Leonard Cohen, and Claire Cohen. (T 46).

Respondent Stephen Mauceri was the president of the Board of Directors of 1430 Seagirt Boulevard Corporation from May 1995 through May 1997. (T 245). He was also one of the named respondents in the Floreses' first Fair Housing complaint, which was filed in September 1996, and which will be mentioned later in these findings. (G 11). Mauceri owns one apartment in the building, which he rents to a tenant, but he does not live there himself. (T 250).

Respondent Leonard Cohen was, at one time, the sole owner of the building when it was an ordinary, privately-owned apartment house. In 1984, he converted the building to a housing cooperative, but he continues to own approximately 20 apartments which he rents to tenants. Cohen does not live in any of the apartments he owns in the building; he lives in Great Neck, N.Y., and in Coconut Beach, Florida. (T 330). Leonard Cohen was the Vice President of the Board of Directors at the time Enrique Flores was terminated from his job. (R 12).

Respondent Stuart Cohen is the son of Leonard Cohen, and owns approximately 19 apartments in the building. (T 330). Stuart Cohen also does not live in the building, but rents all his apartments to tenants. (T 331, 335). Stuart Cohen is employed by his family to manage the approximately 57 apartments that are owned by his father, his sister, and himself. (T 329-30). His management duties include making sure the tenants pay their rent and that the apartments are kept in repair. (T 92-3, 331).

Respondent MZ Realty Corporation ("MZ") is the management company for 1430 Seagirt Boulevard, and has been such for over ten years. ( 336-37, 341, 352). As managing agent, MZ is obligated to oversee the superintendent of the building. (T 342).

Respondent Robert Zelman is the son of MZ's president, Martin Zelman, and is a supervising employee of MZ Realty. (T 336). As part of Zelman's job duties, he oversees

the management of 1430 Seagirt and supervises Thomas Gregory, another MZ employee.

Respondent Thomas Gregory has been an MZ employee for 22 years. (T 352). His job duties include supervision of the superintendent of 1430 Seagirt Blvd. (T 252, 361-63).

Enrique Flores's job duties as building superintendent included making daily checks of the entire building, including the boiler and the elevator, cleaning the boiler and keeping it in good repair, showing apartments to potential tenants, collecting rents from some tenants, making repairs to apartments, including both cooperatively-owned and privately-owned apartments, making monthly submissions of his work orders, supervising the porter, tending the garden, recommending the employment of outside contractors when needed, and reporting regularly to the management company and the Board of Directors. (T 46, 161, 290-92, 303, 355-56, 360, 369-71).

The tenants in the building could individually ask Flores to do repairs in their apartments. (T 46, 292, 331, 369). Both resident and non-resident owners could do the same. (T 369). In the alternative, people needing repairs could place requests for the work with MZ Realty, and MZ would pass the requests along to Flores. (T 46, 299). After Lizette Flores moved into Enrique's apartment, she would frequently take messages on the phone regarding jobs to be done. (T 176).

Flores reported daily to Respondent Gregory. (T 44, 75, 176, 361). The Respondents Cohen also frequently called upon Mr. Flores regarding work to be performed. (T 46, 331). Eventually, as board president, Respondent Mauceri began to ask that Flores report directly to him. (T 44, 293, 297-98).

Throughout his tenure at the building, up until the spring of 1996, Flores performed his duties well and, in spite of the multi-layered supervision, he got along well with the board members, MZ staff, and individual apartment owners. (T 307-09, 346-47). In the spring of 1996, Flores became uncooperative with and belligerent towards his supervisors and some owners. (T 144-45).

During the period that Mr. Flores served as superintendent, the building was plagued by a significant number of major problems, including a faulty boiler, deteriorating mortar lines, and weakened balcony railings. (T 158, 163-66, 178, 180, 278-80, 297; G 41-44). As a result, residents were sometimes without heat or hot water, and rain water leaked into the building, doing damage to ceilings and walls.

In spite of serious conditions in the building and the chaotic system by which repairs were planned and assigned, it is undisputed that Enrique Flores performed well in the job of superintendent of the building until the spring of 1996. During that time, he

was also frequently called upon to perform extra jobs on the building and for various individual apartment owners. (T 144-45). The most recent major job performed for the building was the painting of the lobby, for which Flores was paid \$2,000 beyond his normal salary. In the summer of 1996, Respondent Mauceri wrote a letter to Flores complimenting him on a job well done and tendering the remainder of the special payment. (R 11).

In 1995, Enrique and Lizette Flores purchased an apartment in the building. In 1996, the Floreses purchased two more apartments in the building. (T 175, 180, 186). The two Respondents Cohen did the Floreses' legal and other paper work for these purchases without charge. After closing on the later two purchases, the Floreses did not receive the "proprietary leases" required for renting the apartments. Believing that the Board of Directors and the Cohens refused to provide them with proper legal documents for the apartments, and that this was racially motivated, Lizette Flores filed a Fair Housing complaint on her own and her father's behalf with HUD on September 18, 1996. (T 52, 175; S 11). Leonard Cohen, Stuart Cohen, Steve Mauceri and Beth Hachtman were named as Respondents. (G 11, as amended). After a thorough investigation, HUD dismissed the complaint for lack of evidence. (Secretary's Post-Hearing Brief, n. 2 [hereinafter "Sec. Brief"]).

Enrique Flores's change of attitude and demeanor towards his supervisors occurred in about May of 1996. He displayed a hostile and sarcastic attitude with Board members as well as the management company. (T 307-09, 346-47). Respondent Zelman noticed Flores's sarcastic attitude towards Mauceri. (T 337-38). Flores also displayed a belligerent attitude towards Hachtman regarding damage to the hallway walls that she asked him about. (T 307; R 12). He made rude faces at Sanchez whenever they met. (T 261; R 12).

Clearly, the attitude of the Complainants and the members of the Board and management company towards each other changed during the spring of 1996. The former felt compelled to complain of their treatment, and the latter felt slighted by their superintendent and the addition of his daughter to the equation. This opposition is reflected in the minutes of the Board's meeting of June 22, 1996, which reads in pertinent part:

The problems we are having with the super's daughter and the super were discussed. Lizette Flores, an employed woman, appears to be residing in her father's apartment, while the apartments she owns with the super are rented to others. ... Lizette has become a disturbing factor in running the building because she is interfering with the super's duties. Mr. Mauceri had suggested that all

communication concerning the building should be made directly with Mr. Flores and not with his daughter. We are to discuss this further at our next meeting. (R 12).

Subsequent to this meeting, Mauceri sent a letter dated July 9, 1996, to Enrique Flores in which he asked how long Lizette would be residing in the superintendent's apartment. (R 11). This inquiry was never answered. (T 179).

The boiler in the building was old and would cease functioning from time to time. (T 276). Approximately a year prior to Flores's termination, Mauceri told him to post signs whenever the boiler broke down to notify tenants when service would be restored. (T 275-76). Notwithstanding these instructions, and that they were repeated a number of times, Flores never posted such notices for the tenants' information. (T 276). When Mauceri needed to get in touch with Flores, he would page him and leave messages for him with Lizette at his apartment. (T 302). Sometimes he would page him hourly to make sure he was receiving the page, "just in case he happened to be in a non-page zone." (T 302). Flores ignored the pages and refused to return the phone messages from the president of the Board. (T 260-61). This lack of communication with Flores concerned Mauceri because, as Board president, he felt responsible for the building. Moreover, he viewed the lack of communication with Flores as undermining his authority in the building and detracting from his credibility with the tenants and apartment owners. (T 250, 300).

Mauceri was not the only person who had trouble contacting Flores during his last half year on the job. Gregory also had tenants, as well as Mauceri, complain to him that they had been unable to get a response from Flores to their phone calls. (T 259). Gregory spoke to Flores a number of times about this problem, and each time Flores assured him he would return the calls and would call Mauceri when paged. (T 360). Nonetheless, he continued to fail to return Mauceri's pages and his calls. (R 12).

In the second week of November of 1996, Respondent Hachtman noticed that there was damage to the stucco finish of the hallway walls on at least two floors. (T 305). Marks, which appeared to be made with a wire brush such that the rough stucco finish had been removed along with the paint, were placed at six- to eight-inch intervals. The marks were in the shapes of an F, a Y, an X, an arrow and others. The regularity and shapes of the damage marks initially made her think they were a sort of vandalism. (T 306). When she asked Flores what he knew of the marks, he answered in a belligerent tone, "They want me to clean, I clean". Hachtman took this to be an admission that Flores himself had purposely damaged the walls in this manner. (T 307). From this incident, she became concerned that Flores's behavior would persist and that he would do further damage to the building. (T 305).

In a meeting in the spring of 1996 in which some of these problems were discussed, the Board directed MZ to require Enrique Flores to prepare and keep a daily log of his hourly activity. (T 247-49). Thus, MZ notified Flores at that time that he was to start immediately to keep a log. However, Flores never complied with this directive. (T 338-39). Respondent Zelman repeatedly asked Flores both orally and in writing to see his log, but it was never produced. (T 356-58; R 1). Respondent Gregory also asked Flores on a number of occasions about the logs, but they were never shown to him either. (T 356; R 2). Gregory warned Flores that he would have to report this failure to comply to the Board if Flores persisted in not producing the log. He eventually did report to the Board that he had asked for the log a number of times, but that he had never been shown one. (T 360; R 2).

Flores had always supplied “work orders” to MZ to show what jobs he had performed and in which apartments the services had been rendered. However, in the fall of 1996, he stopped supplying the work orders. (T 353-55). Gregory, by direction of the Board, also asked Lizette Flores about the log, work orders, and maintenance checks that the Floreses had collected. She claimed that these items had all been sent to MZ, but a log and work orders never arrived, although the checks did arrive within a few days. (T 355). Weeks later, the work orders also arrived, but still no log. (T 355). In November of 1996, Gregory warned Enrique that the Board members were “perturbed” by his failures to comply with their direction regarding work orders and a log. (T 360).

On November 5, 1996, Respondent Gregory sent a letter to Enrique Flores advising him that numerous complaints had been received from tenants regarding his failures to make requested repairs in the building. (R 9). The letter did not state the names of complaining tenants, but it did cite specific apartment numbers that needed work, and instructed Flores to make the repairs needed and to get work orders for the jobs.

On November 28, 1996, Mauceri called for and conducted an emergency meeting of the Board of Directors to discuss their superintendent’s performance and behavior. Mauceri, Hachtman, and Sanchez were the only members present because Leonard and Claire Cohen were in Florida. They discussed at length the problems they were each having with Enrique Flores, and at one point they went to the damaged halls to view the damage that Hachtman had described to them. At the conclusion of the discussions, the three Board members decided unanimously to terminate Flores’s services for the reasons they had discussed. (R 12). No mention was made at this Board meeting about the HUD

complaint that had been filed.<sup>2</sup> There is no evidence of record that any Board member or any Respondent ever voiced any desire to retaliate against the Floreses, and there is testimony to the contrary. (T 267, 296)

On November 29, 1996, Enrique Flores was terminated from his position as building superintendent. (T 54; S 3). Respondent Gregory told Flores that he was fired, and handed him a written notice of the termination from the Board of Directors. The letter advised Flores that his termination was effective immediately, and it ordered him to vacate apartment L-3 and return all keys to the building and the apartment.

At the time Flores received the notice of termination, Respondent Gregory hired a locksmith to change the locks to the storage and maintenance rooms. (T 57). Lizette Flores complained of this to the police, and they came to the building. Because the police stated that changing the locks would constitute an illegal eviction, the locks were not changed. (T 183-84).

Upon receiving the notice of termination, the Floreses filed an amendment to their original complaint to HUD. (T 184). The amendment alleged that Respondents terminated Enrique Flores in retaliation for having filed the first complaint in September, 1996. (T 185). The amended complaint led to this proceeding.

Also upon receiving the notice of termination, Lizette Flores, on behalf of her father, filed a complaint with Local 918, IBT, AFL-CIO (hereinafter “the union”) in which she claimed that her father had been fired for engaging in union activity. (T 213-216). Enrique Flores was not actually a member of the union at the time; he never attended a meeting, never paid any union dues, and never voted in a union election. (T 217). Nevertheless, Lizette Flores was assured by union officials that her father would become a member upon “signing the papers” for the complaint. (T 216-17).

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<sup>2</sup>In fact, the only meeting at which the complaint was mentioned at all was the one conducted on October 5, 1997. The following paragraph is quoted from the minutes of that meeting:

Steve [Cohen] then brought up the matter of supplying Enrique Flores and Lizette Flores with a replacement proprietary lease for apartment L5. This lease had been lost by the Dime Savings Bank, the seller of the apartment to the Floreses *[sic]*. The Board then unanimously voted to give the Floreses *[sic]* a replacement proprietary lease. Leonard [Cohen], who had prepared the replacement proprietary lease, then gave it to Steve. Steve said that the Floreses *[sic]* had filed a complaint with the U.S. Department of Housing and Urban Development that we were discriminating against them because they are Hispanic. That one of the Floreses' complaints was that we had not supplied them with a replacement proprietary lease for apartment L5. Steve said that he would mail the replacement proprietary lease to HUD.

Lizette Flores requested the union to take action on her father's behalf, and it filed a complaint with the National Labor Relations Board ("NLRB"), alleging that Enrique Flores had been terminated for support for Local 918 in violation of Section 8 of the National Labor Relations Act, as amended. (R 8). In a letter dated April 9, 1997, the Region 29 Director of the NLRB stated that the charge had been carefully investigated and considered and that he "... [refused] to issue a complaint in this matter." (R 8). The reasons stated for this determination were as follow:

The investigation failed to establish that 1430 Seagirt Boulevard Corp. hereinafter called the Employer, unlawfully terminated its employee, Enrique Flores, and attempted to evict him because of his support for Local 918, International Brotherhood of Teamsters ... as alleged in your charge.... the evidence failed to establish that the Employer terminated him because of activities on behalf of the Union. The evidence revealed that Flores' termination, and the Employer's attempt to evict him, was caused by the belief of the Employer's Board of Directors that he was arrogant, belligerent, non-responsive, and dilatory in connection with his performance as the building Superintendent.

Complainants Enrique and Lizette Flores were evicted from apartment L-3 by order of the Civil Court of the City of New York, Housing Part, dated June 11, 1997, as a result of an eviction case brought by Respondent 1430 Seagirt Boulevard Corporation. (S 20, 20A). The eviction was carried out in July of 1997. (T 68-9, 196).<sup>3</sup>

The Secretary claims that, as a result of the Respondents' firing of Enrique Flores and the subsequent eviction of both Floreses from the superintendent's apartment, the Floreses were forced to live without wages, to attend numerous civil court proceedings, to vacate their apartment, to live in a hotel, to place their belongings into storage, and to lose articles that were left stored in the building. (T 57, 69, 194, 196; G 20, 20A). The Secretary also states that the termination and resultant eviction of the Floreses by Respondents also caused them public humiliation, feelings of anxiety, rage, and uselessness, insomnia, and emotional distress. (T 71, 195).

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<sup>3</sup>HUD intervened to seek a stay of the eviction in January, 1997. Respondents agreed orally to delay the eviction, which they did until April of 1997. The United States Attorney for the Eastern District of New York moved in U.S. District Court for a stay of the eviction, but the motion was denied. (Sec. Brief, n. 4).

### Applicable Law

Under section 818 of the Fair Housing Act, it is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed ... any right granted or protected by 803, 804, 805, or 806" of the Act. 42 U.S.C. § 3617. Examples of prohibited interference, coercion and intimidation are provided in HUD regulations, and include, "Retaliating against any person because that person has made a complaint ... under the Fair Housing Act." 24 CFR 100.400(c)(5). In this case, the Secretary asserts that the Respondents retaliated against Enrique Flores and Lizette Flores because they had filed a previous complaint with HUD against some of the same Respondents.

The legal framework to be applied to cases alleging violations of the Fair Housing Act is dependent on whether the evidence offered to prove the violation is direct or indirect. Direct evidence of discrimination presented by the complainant, if it constitutes a preponderance of the evidence, is sufficient to support a finding of discrimination. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990); *HUD v. Jerrard*, Fair Housing - Fair Lending (P-H) para. 25,005, at 25,087 (HUDALJ Sept. 28, 1990). If the evidence of discrimination is indirect, the analytical framework to be applied is that which was developed as the three-part test for employment discrimination cases brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989). *See also*, R. Schwemm, *Housing Discrimination Law*, at 323, 405-10 & n. 137 (1983). That burden of proof test is as follows:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence ... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, undiscriminatory [sic] reason" for its action .... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact pretext ....

*Politt, supra*, at 175, *citing McDonnell Douglas, supra*, at 802, 804.

However, pretext alone does not necessarily prove discrimination. The complaining party still has the burden of demonstrating that an asserted reason, even though demonstrably pretextual, shows an intent to discriminate. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993).

In *HUD v. Murphy*, 2 Fair Housing - Fair Lending (P-H) ¶25,002, 25,051, it was held that the analytical framework set out in Title VII cases could be looked to for guidance in resolving a retaliation case under the Fair Housing Act. The elements for a *prima facie* case of employment discrimination were found to be: “1) that an employee was engaged in activity protected by the statute; 2) that the employer took an ‘adverse employment action’ against the claimant; and 3) that a causal connection exists between the protected activity and the adverse action.” Citing, *Zanders v. National R.R. Passenger Corp.*, 898 F 2d 1127, 1135 (6th Cir. 1990); *Dwyer v. Smith*, 867 F 2d 184, 190-91 (4th Cir. 1989); *Williams v. Cerberonics, Inc.*, 871 F 2d 452, 457 (4th Cir. 1989); *Ross v. Communications Satellite Corp.*, 759 F 2d 355, 365 (4th Cir. 1985). Since then, the Office of Administrative Law Judges has formulated the following elements for establishing a *prima facie* case of housing discrimination by retaliation under the Fair Housing Act: “(1) that the Complainant was engaged in an activity protected by the Act; (2) that Respondents took some adverse action against Complainant; and (3) that there is a causal connection between the Complainant’s protected activity and the Complainant’s injury.” *HUD v. Holiday Manor Estates Club*, 2 Fair Housing - Fair Lending (P-H) ¶25,027, 25,298 (November 26, 1991).

### **Discussion**

In this case, there is no direct evidence of discrimination. Thus, application of the three-part *McDonnell-Douglas* test is appropriate. The first issue to be resolved is whether the elements of a *prima facie* case are shown by the facts.

Enrique and Lizette Flores filed a Fair Housing complaint on September 18, 1996, alleging discrimination on the basis of national origin in violation of Section 804 of the Fair Housing Act. The complaint alleged that the Floreses were being treated differently than other purchasers of cooperative apartments at 1430 Seagirt Boulevard, and that such difference in treatment was related to their national origin.

Complainants’ filing of their Fair Housing complaint was an exercise of their rights under the Act. See *HUD v. Kogut*, 2 Fair Housing - Fair Lending (P-H) ¶25,100, 25,901 (April 1995). The Fair Housing Act provides an aggrieved person the right to “file a complaint with the Secretary alleging [that a] discriminatory practice [has occurred].” 42 U.S.C. § 3610(a). Thus, the filing of the complaint was a protected activity under the Act, and the first element of the *prima facie* case is met.

The second element is whether the Respondents took the alleged adverse action against the complaining parties. Three members of the board of directors (Mauceri, Hachtman, and Sanchez) voted unanimously on November 28, 1996, to terminate Enrique

Flores. Of these three, only Mauceri is named as a respondent.<sup>4</sup> The three board members issued a letter dated November 29, 1996, which informed Flores of his immediate termination and demanded that he vacate the superintendent's apartment in the building. It is undisputed that the order for Flores to vacate the apartment served also as an order for Lizette Flores to vacate the apartment. The vote and the letter constituted the adverse action taken against the complaining parties by Mauceri. The question remains whether the adverse action can be properly attributed to the other respondents.

Respondent Leonard Cohen was the vice president of the Board of Directors of 1430 Seagirt Boulevard at the time that the board voted to terminate Enrique Flores. He was also "on file with the Office of Code Enforcement" of the City of New York as the "Registered Managing Agent" for the property, "in control of and responsible for the maintenance and operation of the dwelling" for purposes of compliance with the Housing Maintenance Code. Although L. Cohen was away in Florida and not present at the meeting of the board in which the decision was made to terminate Flores, the Secretary argues that these roles give L. Cohen a significant position of leadership in the operation of the building, that he always had an ongoing dialogue with what was going on in the building, and that, therefore, he should not be excused from liability simply because he was in Florida during the emergency meeting which resulted in the termination of Complainant Flores.

There is no evidence that Leonard Cohen took part in any way in the decision to fire Enrique Flores. He was in Florida at the time of the emergency meeting, and there is no evidence that his opinion, much less his vote, on the issue was given, either then or before his departure for Florida. There is no evidence that he was even aware of the emergency meeting or that consideration was being given to the termination. In fact, any involvement in the decision by L. Cohen was denied in the hearing by other Respondents.(T 252)<sup>5</sup>

L. Cohen's mere membership on the board of directors and listing as a managing agent by the housing offices of the city of New York are not enough to serve the second element's requirement that a Respondent be shown to have taken the adverse action against the complaining parties that is the subject of their complaint. Since there is no *prima facie* case against Respondent Leonard Cohen, this action will be dismissed as it pertains to him as part of the Order that follows this discussion.

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<sup>4</sup>It is not known why Hachtman and Sanchez were not included as Respondents in this proceeding.

<sup>5</sup>Respondent Leonard Cohen was unable to attend the hearing and testify on his own behalf because he was hospitalized and undergoing surgery at the time.

Respondent Stuart Cohen was not a member of the board of directors. He was the managing agent for approximately 57 apartments in the building that he owned or were owned by other members of his family. He told the Board of Directors he was having some problems with Enrique Flores, and he sent them a list of apartments needing attention that Mr. Flores had not given them. He also attended some board meetings because he transported his parents, Leonard and Claire Cohen, to the meetings. While there, he frequently made comments on the business being discussed.

The Secretary argues that S. Cohen's "significant fiduciary interests in the corporation ... necessitates his inclusion as a responsible Respondent in this action." (Sec. Brief 19). This argument is not persuasive. There must be more than a tenuous connection to the adverse action taken against the Complainants to fulfill the second element of the *prima facie* case. This Respondent was neither an officer nor a director of Seagirt at the time of the Flores termination. (T 326-27). Other Respondents testified that he provided no input in the decision to terminate Flores and that he was not consulted. In fact, S. Cohen was unaware of Flores's termination until after the fact. I find that Stuart Cohen took no part in the adverse action against the Complainants. Accordingly, this action will be dismissed as it pertains to him.

As to Respondents Zelman and Gregory, both testified that Enrique Flores had become belligerent and non-responsive, and that he had failed to produce work orders that they had requested of him. However, they took no part in Flores's termination and knew nothing of the Board of Directors meeting until later. Mauceri directed Gregory to deliver the termination letter to Flores, and he did so. Zelman knew nothing of the termination until after Gregory delivered the letter.

The Secretary argues that the board "simply could not have made an informed decision to terminate Flores without input from the management," and that these two managing agents "must ... have exercised great influence over the decision to terminate." He further argues that MZ Realty "knew very well that the board was out to get rid of Flores, and they did more than sit idly by." (Sec Brief 20). This is all conclusionary speculation. There is nothing in the record to show that the board was "out to get" Flores. The Secretary has failed to present proof that these three Respondents took part in the adverse action complained of within the meaning of the criteria for making a *prima facie* case of discrimination. Thus, this action will also be dismissed as to these three Respondents.

Respondent Steve Mauceri was one of three members of the board who took part in the decision to terminate Enrique Flores. Thus, he took adverse action against the Complaining Parties within the meaning of the second criterion for establishing the *prima facie* case. Since the Board of Directors is the decision making body that acts on behalf

of 1430 Seagirt Boulevard Corporation, the second criterion is also met for establishing the *prima facie* case against the corporation.

The next step is to determine whether there is a causal connection between the protected activity and the adverse action; *i.e.*, whether there is a causal connection between the Complainants' filing of a complaint of discrimination against Respondents and the Respondents' subsequent termination of Enrique Flores.

The minutes of the board meeting at which it was decided to terminate Enrique Flores from his job reveals no discussion of the first complaint. There is only discussion of Flores's then recent failings as the superintendent of the building. In fact, the minutes of all the board meetings during the relevant period reveal only one passing comment regarding the first complaint. (See n. 2). The Secretary presented no proof to show a connection between the filing of the complaint and Enrique Flores's firing, and such a connection was credibly denied under oath by the Respondents and other witnesses.

The third criterion of the *prima facie* case, a causal connection between the filing of the complaint and the termination, cannot be satisfied by an inference or application of *post hoc, ergo propter hoc* reasoning. *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789 (7th Cir. 1997). It does not necessarily follow that an adverse action following a complaint must have been taken in retaliation for filing the complaint. *Cross v. Bally's Health & Tennis Corporation*, 948 F. Supp. 993 (D. Md. 1996). Like the first two criteria, the third must be proven by a preponderance of the evidence, and it has not been. *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984). Moreover, and importantly, the Respondent is not required to prove an absence of retaliatory motive. *Ross v. Communications Satellite Corp.*, at 366, citing *Texas Dept. of Community Affairs v. Burdine.*, 450 U.S. 248, 252-53 (1981). To hold otherwise would invite the filing of frivolous complaints for the purpose of setting up later claims of retaliation. A Fair Housing complaining party should not, by becoming one, be insulated from later adverse action, notwithstanding egregious conduct or even simple disqualification from buying or renting a dwelling. *See Ross*, at 366.

The Secretary argues that the Respondents' reasons for firing Flores are pretextual. However, under the *McDonnell-Douglas* analysis cited in the previous section, the law only requires respondents to articulate nondiscriminatory and nonpretextual reasons for their action if the plaintiff sufficiently establishes a *prima facie* case. Where the *prima facie* case has not been made, *i.e.*, where the first step of the *McDonnell-Douglas*, shifting burden of proof analysis has not been fulfilled, we do not reach that third part of the analysis.

Since the *prima facie* case against Respondents 1430 Seagirt Boulevard Corporation and Steve Mauceri has not been established, this matter will also be dismissed as it pertains to both of them.

**ORDER**

The Charging Party has failed to prove by a preponderance of the evidence that any of the Respondents engaged in discriminatory housing practices in violation of the Fair Housing Act. Accordingly, this matter is **DISMISSED**.

This Order is entered pursuant to 42 U.S.C. §3612(g)(3) and 24 CFR 104.910, and it will become final upon expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

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ROBERT A. ANDRETTA  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by ROBERT A. ANDRETTA Administrative Law Judge, in HUDALJ 02-96-1124-8, were sent to the following parties on this 17th day of February, 1998, in the manner indicated:

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