

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

KELVIN K. HARRIS,

Complainant,

v.

PSCH, INC.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10112659

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 August 22, 2008, by Robert M. Vespoli, 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: **OCT 02 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. 10112659

SUMMARY

Complainant alleged that Respondent unlawfully discriminated against him based on his prior criminal conviction for murder in the second degree. Respondent claimed that it lawfully terminated Complainant's provisional employment because employing Complainant as an IPRT program coordinator posed an undue risk to the safety and welfare of its fragile consumer population in need of special protections. The credible record establishes that Respondent acted in a lawful manner. Accordingly, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On July 10, 2006, 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 Tammy B. Collins, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 29 and 30, 2007. The case was subsequently reassigned to Robert M. Vespoli, ALJ.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Dianne M. Camelo, Esq.

FINDINGS OF FACT

1. Complainant alleged that Respondent unlawfully discriminated against him based on his prior criminal conviction. (ALJ's Exh. 1)
2. Respondent claimed that it lawfully terminated Complainant's provisional employment because employing Complainant as an IPRT program coordinator posed an undue risk to the safety and welfare of Respondent's special consumer population. (Tr. 173-79)
3. Complainant was convicted of murder in the second degree in April 1978 and served 15 years in prison for this crime. (Tr. 35; Joint Exh. 7) Complainant received a certificate of relief from disabilities ("CORFD") on May 30, 2002. (Tr. 35-36; Joint Exh. 2)
4. In March 2006, Complainant met with David Roberts, Respondent's recruiter, to discuss employment opportunities with Respondent. (Tr. 96-97, 133)
5. On March 16, 2006, Complainant sent Roberts an email informing him of Complainant's prior murder conviction. (Joint Exh. 1)
6. On May 17, 2006, Complainant interviewed with Nelly Sancassani, Respondent's Intensive Psychiatric Rehabilitation Treatment ("IPRT") program supervisor and hiring manager. (Tr. 137-39) During this meeting, Complainant formally applied for the position of IPRT program coordinator in the mental health services department. (Tr. 139; Respondent's Exh. 1; Joint Exh. 3) On his application form, Complainant answered "yes" to a question asking

12. Rinko Hemnes, Respondent's employee labor relations manager, testified that she was unaware of Complainant's criminal record prior to receiving OMH's background check, and that she met with Complainant on June 15, 2006 to discuss his conviction record. (Tr. 125, 149-51)

13. Hemnes also contacted Alan Wienstock, Respondent's executive vice-president, to apprise him of the situation. (Tr. 149, 167-68)

14. Prior to becoming Respondent's executive vice-president, Wienstock spent thirty-three years working for OMH, including two years as the executive deputy commissioner of OMH. (Tr. 167) Wienstock had over ten years of experience reviewing employee criminal background checks involving serious crimes before he began working for Respondent in 2005. (Tr. 167-69)

15. During his tenure with Respondent, Wienstock reviewed several cases in which he had to assess whether an applicant with a criminal conviction should be hired by Respondent. In making his determination, Wienstock considered factors that included: (1) the nature of the position sought, (2) the crime of conviction, (3) the applicant's explanation of the circumstances surrounding the conviction, (4) the amount of time that elapsed since the date of conviction, (5) any subsequent employment obtained by the applicant, and (6) whether the applicant has obtained a "certificate of relief or good conduct." (Tr. 169-70) Wienstock stated that the most significant factor in his analysis was the nature of the position sought. (Tr. 171)

16. Respondent produced evidence showing that it hired many individuals with prior criminal convictions in 2005, 2006 and 2007. (Tr. 170-72; Respondent's Exh. 2)

17. On June 27, 2006, Respondent terminated Complainant's provisional employment. (Joint Exh. 8)

18. Wienstock made this decision because he determined that employing Complainant as an IPRT program coordinator posed an undue risk to the safety and welfare of Respondent's

fragile consumer population. (Tr. 173-79) Wienstock gave great weight to the fact that, as IPRT program coordinator, Complainant would have extensive interaction with more than forty of Respondent's most fragile mentally ill and disabled consumers in an unsupervised capacity. (Tr. 175-77) Wienstock considered the gravity of Complainant's crime and the fact that, at twenty-five years of age, Complainant was a mature adult when he committed the crime. He further concluded that the serious nature of Complainant's crime coupled with his failure to properly explain his crime worked against him. (Tr. 177-78) Wienstock also considered the fact that Complainant was disruptive and confrontational at his orientation session with Respondent. (Tr. 180) Wienstock was mindful of the fact that Complainant was successful in his post-conviction employment. (Tr. 178) However, he also recognized that Complainant had no full-time employment since 2004 and had no prior experience working with this population. (Tr. 178-79) Finally, Wienstock acknowledged that Complainant's CORFD, although a positive, did not outweigh his overriding concerns for the welfare of Respondent's vulnerable consumer population. (Tr. 179)

OPINION AND DECISION

It is unlawful for an employer to deny employment to any individual because that individual has been convicted of one or more criminal offenses "when such denial is in violation of the provisions of article twenty-three-A of the correction law." N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.15.

An employer is obligated to consider the factors enumerated in N.Y. Correct. Law, art. 23-A before denying employment based on an individual's criminal conviction record. The exceptions contained in the statute permit Respondent to consider prior criminal offenses where there is a direct relationship between the offense and the employment sought, or the employment

sought would involve “an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.” N.Y. Correct. Law § 752. Additionally, Respondent must consider factors including the seriousness of the offense, the job duties and responsibilities related to the employment sought, Respondent’s legitimate interest in protecting the safety and welfare of specific individuals or the general public, Complainant’s age at the time of the offense and the time elapsed since the commission of the offense. N.Y. Correct. Law § 753(1).

In the instant case, Respondent properly weighed the statutory factors and acted accordingly. The IPRT program coordinator position involved extensive, unsupervised interaction with more than forty of Respondent’s most fragile consumers who have significant mental illness, mental retardation, developmental disabilities and clinical dependency.

Wienstock, Respondent’s executive vice-president, was a credible witness with extensive experience in these matters. Over the years, he has reviewed the qualifications of a plethora of applicants to determine their suitability for working with this special population. The record shows that Respondent hired many employees with prior criminal convictions during Wienstock’s tenure.

Wienstock gave great weight to the fact that, as IPRT program coordinator, Complainant would have extensive interaction with many of Respondent’s most fragile mentally ill and disabled consumers in an unsupervised capacity. He considered the severity of Complainant’s crime and the fact that, at the age of twenty-five, Complainant was old enough to understand the consequences of his conduct. In his review, Wienstock also concluded that the gravity of Complainant’s crime coupled with Complainant’s failure to adequately explain his crime weighed against hiring Complainant. Wienstock acknowledged Complainant’s successful post-conviction employment, but also recognized that Complainant had no full-time employment

since 2004 and had no prior experience working with this population.

Finally, Wienstock was entitled to reach the conclusion that Complainant's CORFD, although a positive, did not outweigh Wienstock's overriding concerns for the protection of Respondent's consumers. *See Arrocha v. Bd. of Educ. of the City of New York*, 93 N.Y.2d 361, 365, 690 N.Y.S.2d 503, 505 (1999).

The record establishes that Respondent properly analyzed the statutory factors and did not simply issue a cavalier denial of Complainant's employment. The Division finds that it was reasonable under these circumstances for Respondent to conclude that employing Complainant as an IPRT program coordinator posed an undue risk to the safety and welfare of its fragile consumer population in need of special protections.

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 instant complaint be, and the same hereby is, dismissed.

DATED: August 22, 2008
Hempstead, New York



Robert M. Vespoli
Administrative Law Judge