



DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

JERRY HINES, JR.,

Complainant,

v.

VETERANS OUTREACH CENTER, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10131780

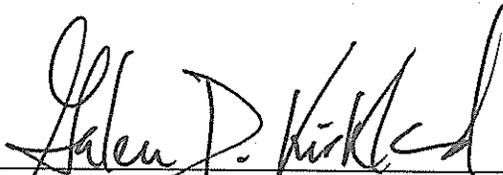
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on February 19, 2010, by Spencer D. Phillips, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity 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: **APR 07 2010**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



DAVID A. PATERSON
GOVERNOR

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

Case No. 10131780

SUMMARY

Complainant alleged that Respondent subjected him to unlawful discrimination because of his race, sex and disability. Complainant failed to demonstrate a prima facie case of race or sex discrimination, and those claims are dismissed. Complainant demonstrated a prima facie case of disability discrimination, but failed to rebut Respondent's legitimate, non-discriminatory reason for terminating his employment. Therefore, Complainant's disability discrimination claim is also dismissed.

PROCEEDINGS IN THE CASE

On February 23, 2009, 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 Spencer D. Phillips, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 17 and 30, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent was represented by Jennifer A. Mereau, Esq.

Permission to file post-hearing briefs was granted. Timely briefs were received from the Division and the Respondent.

FINDINGS OF FACT

1. Complainant is an African American male. (Tr. 17-18)
2. Respondent is an organization providing outreach and support services to veterans and their families. (Tr. 12)
3. Judy Gilbert was Respondent's Director of Residential Services. At all relevant times, Gilbert directly supervised Complainant, Andrew King, and Bob Webster. King and Webster are both male. (Tr. 23-24, 82, 131-32, 134)
4. Gilbert's supervisor was Bozena Robertson, Respondent's Vice President of Clinical and Supportive Services. (Tr. 194, 224-25)
5. In October 2006, Respondent hired Complainant as a per diem staff member. (Tr. 18, 20, 67)

6. After six months of employment, Complainant applied for a Case Manager I position ("CM-I"). Gilbert interviewed Complainant, recommended that Respondent promote him to the CM-I position, and Respondent did so. Complainant's duties as a CM-I included transporting veterans to and from appointments, performing drug/urine screens, and other assigned duties. (Respondent's Exh. 1; Tr. 20-21, 67)

7. In April 2008, after approximately one year of employment as a CM-I, Complainant applied for a Case Manager II position ("CM-II"). Gilbert interviewed Complainant, recommended that Respondent promote him to the CM-II position, and Respondent did so. (Respondent's Exhs. 2, 13, 14; Tr. 23-24, 33, 67, 134-35, 139-40, 152)

Complainant's Failure to Obtain CASAC Certification

8. On or about April 9, 2008, Respondent gave Complainant a letter indicating that he was being promoted to the CM-II position. This letter informed Complainant that the CM-II position required Credentialing of Alcoholism and Substance Abuse Counselors ("CASAC") certification and that his promotion was conditioned upon obtaining such certification. (Respondent's Exh. 13; Tr. 140, 146, 152-53, 233)

9. In addition to the written notification described above, Gilbert verbally discussed the CASAC requirements with Complainant in May 2008. (Tr. 27-28)

10. Complainant testified that he was "quite aware" that acceptance of the CM-II position required him to obtain CASAC certification. (Tr. 71)

11. In July 2008, Robertson learned that Complainant was unable to afford tuition costs associated with obtaining CASAC certification. Robertson met with Philip Brown, Respondent's Vice President of Finance, and requested full tuition assistance for Complainant. Brown informed Robertson that Respondent could not afford to subsidize the CASAC tuition for

Complainant. Robertson then informed Complainant that the CASAC certification requirement was rescinded “due to unavailable funds.” (Complainant’s Exh. 3; Tr. 30-31, 122, 146-48, 251)

12. A short time later, Respondent’s managers agreed to reimburse Complainant for up to 50% of the tuition costs for obtaining the required CASAC certification. Robertson told Complainant that partial funding had been secured, thereby reinstating Complainant’s obligation to obtain the CASAC certification. Robertson gave Complainant a reimbursement form which Complainant filled out and returned to Robertson. (Respondent’s Exh. 16; Tr. 252-53, 260)

13. Complainant attended several CASAC-related courses, but did not complete the remaining courses and requirements necessary to obtain CASAC certification. (Tr. 30)

Complainant’s Poor Work Performance

14. In or about September 2008, Gilbert told Complainant that he was required to attend Alcoholics Anonymous (“AA”) and Narcotics Anonymous (“NA”) meetings as part of his job duties. (Tr. 32)

15. Complainant claims that he attended AA and NA meetings while working a second job for another employer, but he never reported this alleged attendance to Gilbert. (Tr.75-82, 210)

16. Complainant conceded that he never attended drug court, despite being directed several times by Gilbert to attend. (Respondent’s Exh. 10; Tr. 94, 102, 162-63, 191-92, 211)

17. Complainant failed to attend biweekly supervisory meetings with Gilbert. (Tr. 153-56, 175-76)

18. While employed as a CM-II, Complainant repeatedly failed to perform the essential duty of conducting weekly, random urine screens for veterans, and improperly delegated that duty to lower-level employees. (Tr. 160-62, 175-76, 178-79)

19. While employed as a CM-II, Complainant repeatedly failed to monitor the living conditions of clients assigned to his caseload, thereby allowing those clients to create, and live in, squalor conditions. (Tr. Respondent's Exh. 12; Tr. 238-242)

20. Complainant told Gilbert that his job duties were too great. Gilbert responded by cross-training several employees to perform some of Complainant's job duties. Gilbert also began managing some cases previously assigned to Complainant in order to further reduce his workload. (Tr. 165-66, 182-83, 186-87, 191-92, 236-37)

21. In October 2008, Gilbert counseled Complainant, in writing, about his failure to keep his client files up-to-date. Gilbert's letter identified specific deficiencies and set clear expectations for improved work performance. (Respondent's Exh. 3; Tr. 48-49, 92-93, 164-65, 175-76)

22. On November 11, 2008, Complainant sent an email message to Gilbert, Respondent's CEO Tom Cray, and other members of Respondent's senior management team. In the email, Complainant expressed his dislike of Gilbert's "style of management," claimed that Gilbert lacked the necessary expertise for her job, accused Gilbert of substandard performance, and suggested that Gilbert needed a "mentor" to learn how to do her job. Complainant's email did not allege that he had been subjected to unlawful discrimination. (Respondent's Exh. 4; Tr. 42-45, 84, 170-73, 230-32)

23. Complainant's email violated Respondent's communication channels policy by complaining directly to senior management about an immediate supervisor prior to sharing that concern with the supervisor. Respondent issued Complainant a verbal warning for violating the communication channels policy. (Respondent's Exh. 4; Tr. 45-47, 234-35)

24. In December 2008, Gilbert warned Complainant on two separate occasions about his failure to keep his client files up-to-date. Complainant failed to improve his performance, and was warned again in both January and February, 2009. (Respondent's Exhs. 3, 11; Tr. 49, 103, 179-80, 242-44)

Alleged Discriminatory Actions and Termination of Employment

25. Complainant testified that Respondent began discriminating against him in December 2008. (Tr. 86-88, 115-18)

26. In December 2008, Gilbert told Complainant that "if [he] didn't change [his] personality [he] would be considered a chump in the eyes of the clients." (Tr. 87-88)

27. At an unidentified time prior to December 2008, a female coworker was not required to perform urine screens on Respondent's clients, all of whom were male. (Tr. 115-18, 126)

28. In January 2009, Robertson called Gilbert to discuss Complainant's work performance and the possible termination of Complainant's employment. (Respondent's Exh. 10; Tr. 212-13, 215, 236-37, 246-47)

29. On February 5, 2009, Complainant told Gilbert that he needed time off work to undergo a colonoscopy on February 26, 2009. Gilbert granted Complainant's time off request. One week later, Complainant told Gilbert that his medical appointment on February 26, 2008 was actually for emotional stress and a back injury, rather than a colonoscopy. (Complainant's Exh. 5; Tr. 53-55, 63-64, 187-90, 198, 268-72)

30. On February 16, 2009, Gilbert reviewed case notes prepared by Complainant, and noted that various items continued to be incomplete, late or missing. Gilbert reported Complainant's continuing poor work performance to Robertson. (Tr. 194-95)

31. On or about February 18, 2009, Robertson made the decision to recommend to Respondent's HR Committee that Complainant's employment be terminated. The HR Committee agreed and approved the termination. (Respondent's Exhs. 3, 8, 9; Tr. 194-197, 216, 237, 247-50, 259)

32. Neither Robertson nor Respondent's HR Committee were aware that Complainant was on disability leave at the time they decided to terminate Complainant's employment. (Tr. 261)

33. On February 23, 2009, Complainant visited a psychiatrist and was diagnosed as having a mood adjustment disorder. The psychiatrist prescribed certain medications and ordered Complainant to take a two-week medical leave from work, following which Complainant could return to work with no limitations. After visiting the doctor's office, Complainant sent an e-mail message to Gilbert and Robertson stating that he would need to be out of work for two weeks. (Complainant's Exh. 1; Respondent's Exhs. 6, 8; Tr. 53-57, 262-63)

34. On February 25, 2009, Complainant gave his doctor's note to Gilbert and Robertson. After receiving the note, Robertson informed Complainant that his employment had been terminated after consultation with Respondent's HR Committee. (Tr. 49, 57-58, 60, 197-200)

35. I do not credit Complainant's testimony that Gilbert had a dispute in May 2008 with Respondent's Chief Financial Officer, who is African American, and that Gilbert subsequently mistreated Complainant because he is also African American. (Tr. 39)

36. I do not credit Complainant's testimony that Gilbert terminated his employment because she "had four previous black boyfriends and the last one beat her up...[and] she took it out on me." (Tr. 63)

37. Gilbert did not terminate Complainant's employment and had no power to do so. (Tr. 195)

OPINION AND DECISION

Complainant claims that his supervisor, Gilbert, subjected him to unlawful discrimination because of his race and disability. To satisfy his prima facie burden on these discrimination claims, Complainant must show that (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant, an African American male, was medically diagnosed as having a mood adjustment disorder on February 23, 2009. Complainant was therefore protected from discrimination on the bases of race, gender, and disability. Respondent does not dispute that Complainant was qualified for each of the positions for which Gilbert interviewed him and to which Respondent hired and/or promoted him. Complainant suffered an adverse employment action when Respondent terminated his employment on February 25, 2009.

Race Discrimination Claim

To show that his termination occurred under circumstances giving rise to an inference of race discrimination, Complainant alleged that (1) Gilbert “had four previous black boyfriends and the last one beat her up...[and] she took it out on me” and that (2) Gilbert had a dispute in May 2008 with Respondent’s Chief Financial Officer, who is African American, which caused Gilbert to mistreat Complainant seven months later, because Complainant is also African American. Complainant offered no evidence to support these allegations. Conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

Complaint also alleged that Gilbert once commented, in December 2008, that clients would consider him to be a “chump” if he did not change his personality. Complainant did not complain to Respondent about this alleged statement, and raised it for the first time at the public hearing. I find that the race-neutral “chump” statement does not suggest that his termination occurred under an inference of prohibited discrimination. Accordingly, Complainant has failed to satisfy his prima facie burden of race discrimination, and that claim must be dismissed.

Gender Discrimination

In support of his gender discrimination claim, Complainant testified that a female co-worker was excused from performing urine screens on Respondent’s clients, all of whom were male. However, Complainant conceded that the female coworker was no longer working for Respondent when the alleged discrimination began in December 2008. Complainant offered no testimony or evidence of events occurring during or after December 2008 suggesting that termination of his employment occurred under an inference of gender discrimination. Furthermore, the proof establishes that the other two employees supervised by Gilbert, both of whom are male, remained employed by Respondent at the time of public hearing. Therefore, Complainant failed to demonstrate a prima facie case of gender discrimination and that claim must be dismissed.

Disability Discrimination

The proof establishes that Respondent terminated Complainant’s employment on February 25, 2009, the same day that Complainant delivered to Gilbert a doctor’s note excusing him from work for two weeks after being diagnosed with a mood adjustment disorder. Therefore, Complainant’s employment was terminated under circumstances giving rise to an inference of disability discrimination.

Because Complainant satisfied his prima facie burden, Respondent must present a legitimate, non-discriminatory reason for terminating Complainant's employment. If Respondent does so, Complainant must show that the reasons presented were merely a pretext for discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004). The ultimate burden of proof always remains with the complainant. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997).

Respondent demonstrated that Complainant's employment was terminated for poor work performance and for failure to obtain mandatory CASAC certification. After Complainant was promoted to the CM-II position, he failed to attend drug court, failed to attend AA/NA meetings, failed to keep his paperwork up-to-date, failed to attend biweekly supervisory meetings, failed to conduct random urine screens, improperly assigned urine screen duties to subordinate employees, failed to monitor living conditions of clients assigned to his caseload, failed to obtain required CASAC certification, and engaged in insubordinate criticism of his supervisor. When Complainant told Gilbert that his workload was too great, Gilbert cross-trained other employees to perform some of Complainant's duties, and personally began counseling several clients assigned to Complainant's caseload. Despite Gilbert's efforts, as well as frequent verbal and written instruction, Complainant's work performance did not improve.

The proof further demonstrates that the decision to terminate Complainant's employment was made on February 18, 2009, by Gilbert's supervisor, Robertson. The decision was finalized only after Robertson carefully reviewed Complainant's record of poor work performance with Respondent's HR Committee. Neither Robertson nor the HR Committee knew that Complainant was out of work on disability leave at the time they decided to terminate his employment. Gilbert, Complainant's direct supervisor who twice recommended that Complainant be

promoted, had no authority to terminate Complainant's employment and was not involved in the ultimate termination decision.

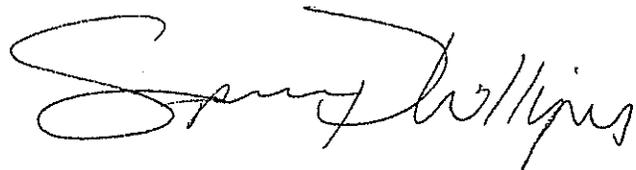
Complainant failed to rebut Respondent's legitimate, non-discriminatory reasons for terminating his employment. Rather, Complainant conceded that he failed to satisfactorily perform many of the duties associated with his CM-II position. Accordingly, Complainant's discrimination claim fails and must be dismissed.

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 complaint be, and the same hereby is, dismissed.

DATED: February 19, 2009
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is fluid and cursive, with a large initial "S" and "P".

Spencer D. Phillips
Administrative Law Judge