ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF HUMAN RIGHTS**
on the Complaint of

**COLLINS LINDSEY,**

Complainant,

v.

**NEW YORK STATE, WORKERS' COMPENSATION BOARD,**

Respondent.

Federal Charge No. 16GB104410

**NOTICE AND FINAL ORDER**

Case No. 10150366

**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 March 13, 2013, by Christine Marbach Kellett, 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: 6/6/13
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE**
**DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**COLLINS LINDSEY,**

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v.

**NEW YORK STATE, WORKERS' COMPENSATION BOARD,**

Respondent.

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

Case No. **10150366**

## SUMMARY

Complainant charged Respondent with discriminatory conduct in employment based on creed when it refused to accommodate his religious beliefs and assigned him to mandatory overtime on his Sabbath and on race in connection with leave requests. Complainant has failed to meet his burden of proof. The complaint should be dismissed.

## PROCEEDINGS IN THE CASE

On August 22, 2011, 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 Christine Marbach Kellett, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on May 23, 2012.

Complainant and Respondent appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. . Respondent was represented by Craig S. Better, Esq.

At the public hearing Complainant withdrew his charge of discrimination based upon race. (Tr. 133)

On July 11, 2012 Complainant sent a letter to the ALJ containing certain allegations regarding contract security guards, an issue that had been raised during the hearing. This letter is received as Complainant's Exh. 6. Respondent's attorney's responded to the July 11, 2012 letter on July 18, 2012 and this response is received as Respondent's Exh. 28.

After the hearing, Complainant submitted a supplement affidavit sworn to on July 26, 2012 clarifying the schedule of his church services. This is received as Complainant Exh. 5.

During the hearing Respondent's motion to dismiss was received as ALJ Exh. 4. The opposing papers submitted by the Divison attorney are received as ALJ Exh. 7. Due to the recommendation detailed below, the motion is rendered moot.

## FINDINGS OF FACT

1. Respondent, a state agency, employs Complainant as a full time security officer at its Menands, New York facility. The security guards are responsible for the security of the property and the persons assigned to use the property. (Tr. 21-22, 30-31, 85)

2. Although Complainant is one of six security officers at the Menands facility, one of the security officers is out on extended leave, leaving five full time security officers there. (Tr. 85)

3. Respondent also operates offices at Park Place in the City of Albany. (Tr. 97; ALJ Exh. 3)

4. Respondent's security officers are members of the New York State Corrections Officers Police Benefit Association (NYSCOPBA). (Tr. 78)

5. Complainant works the midnight to 8 a.m. shift: Sunday through Thursdays completing his usual work week at 8 a.m. Friday morning. He is usually then off on Friday and Saturday, return to duty Sunday evening just before midnight. (Tr. 22- 23; ALJ Exhibits 1 and 3)

6. Since March 2011 Respondent has opened its Park Place facility for a special project on Saturdays from 8:45a.m through 2 p.m. (Tr. 97; ALJ Exh. 3)

7. Respondent assigned the security officers from its Menands location for security duty at the Park place location on Saturdays for a shift that runs 7 a.m to 3 p.m. (Tr. 26-27; ALJ Exh.3; Complainant's Exh. 5)

8. Such Saturday assignments are considered mandatory overtime, with assignments governed by the terms of the collective bargaining agreement with NYSCOPA. (Tr. 78, 83; ALJ Exh. 3; Respondent's Exh. 20)

9. Under the terms of the collective bargaining agreement, any overtime assignments, including the Saturday security duty at Park Place have a two step process: first, the overtime opportunity is offered to the eligible security guards on a voluntary basis (emphasis added); and second, if no one volunteers, a mandatory overtime clause goes into effect wherein the least senior security guard must work the mandatory overtime on a rotating basis. Once the least senior gets a mandatory assignment he or she then moves to the top position, and the next opportunity for mandatory overtime goes to the next least senior employee. In this way, mandatory overtime is spread out over all security guard staff. (Tr. 79-85; Respondent's Exh. 20)

10. Mandatory overtime may be triggered by another security officer's absence or by additional hours being required, as is the case with the Park Place facility. (Tr. 23-24)

11. Until June of 2011 Complainant worked overtime, during the week and on the occasional Saturday, without issue. (Tr. 25, Respondent's Exh. 15)

12. In June of 2011 Complainant became a member of the Living Church of God. Members of the Living Church of God observe the Sabbath from sunset Friday evening through sunset Saturday evening. The Sabbath is to be used for prayer, reflection, and family[1]. (Tr. 24-25; Complainant's Exh. 2; Respondent's Exh. 19)

13. Complainant's church services are conducted in person locally one Saturday a month with the in-person service beginning at 11a.m. (Tr. 27; Complainant's Exh. 5)

14. On the other Saturdays, services are broadcast over the Internet or can be attended by phone between 2:30 p.m. and 4:30 p.m. (Complainant's Exh. 5)

15. On June 28, 2011, Complainant filed a request to be exempted from mandatory overtime at the Park Place facility on Saturdays on the basis of his religious beliefs and he submitted a statement from his pastor confirming this Sabbath observance. (Tr. 27-28, 32-33; Complainant's Exhibits 1 and 2)

16. After consulting with his supervisors and with its Personnel Office and GOER (Governor's Office of Employee Relations), Respondent advised Complainant that it could accommodate his Sabbath observance, except if undue hardship existed, by skipping him for mandatory Saturday overtime. (Tr. 34, 112; ALJ Exh. 1; Complainant's Exh. 3; Respondent's Exh. 17)

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[1] The church observes other religious holidays and festivals but these have not been a problem for Complainant to get time off for and they are not at issue. His work schedule permits him to fulfill his religious obligations or he is able to take the day off. (Tr. 42-48)

17. Between June 2011 and August 16, 2011, Complainant was exempted from mandatory overtime on Saturdays. (Tr. 120; ALJ Exh. 3)

18. Complainant's co-workers however complained to the union about the hardship on them this exemption caused. (ALJ Exh. 3)

19. Complainant's union then advised Respondent that it would not consent to any deviation from the terms of the collective bargaining agreement regarding mandatory overtime as such an exemption acted as a penalty on Complainant's co-workers. (Tr. 35-36, 121-123; ALJ Exh. 3; Respondent's Exhibits 12, 20, 21, 22, and 25)

20. On August 16, 2011, Respondent advised Complainant that it had rescinded its approval of the religious accommodation initially granted and returned Complainant to the Saturday mandatory overtime rotation. (ALJ Exh. 1; Complainant's Exh. 4; Respondent's Exh. 23)

21. Between August 16 and December 2011, Respondent followed the exact language of the collective bargaining agreement regarding rotating mandatory overtime assignments: it first requested volunteers and then mandated overtime on the basis of the rotation detailed in the collective bargaining agreement. (ALJ Exh. 3)

22. Between August 16, 2011 when Respondent rescinded its original religious accommodation determination and December 2011, Complainant was assigned to work two Saturdays as mandatory overtime: August 27, 2011 and October 1, 2011. (Respondent's Exhibits 2 and 3).

23. Complainant also attended, without objection, a mandatory Security training class on Saturday, September 3, 2011, and *he volunteered to work Saturday* October 29, 2011 (emphasis added). (Tr. 57-58, 132; Respondent's Exhibits 6, 7)

24. Beginning December 2011, at the suggestion of the Division's Investigator, Respondent added an additional step in those instances where Complainant's turn for mandatory overtime came round: Complainant's supervisor began soliciting volunteers a *second* time by emailing the security officers and asking if anyone would volunteer to work the Saturday in order for Complainant to honor his Sabbath. (Respondent's Exhibits 8, 9, 10, 15, and 16)

25. Since December 2011 through the public hearing date, no one had volunteered to work a Saturday in order to assist Complainant with his Sabbath observance. (Respondent's Exhibits 9, 10, and 11).

26. As a consequence Complainant has worked one Saturday, March 10, 2012, since December 2011 until the public hearing under the rotating assignment of mandatory overtime. (Tr. 62-63; Respondent's Exh. 4)

27. Complainant explained he would volunteer to work a particular Saturday because knowing his turn would come up, he preferred to select which Saturday he would work. (Tr. 53-54)

28. Complainant believed the Respondent could use contract security guards to provide Saturday coverage. (Complainant's Exh. 6) However these contract security guards could not be used for the Saturday overtime positions filled by the Respondent's Security Officers as the contract security guards do not have the security clearance, codes or access necessary. (Respondent's Exh. 28)

29. Complainant had offered to work other hours during the week as mandatory overtime but Complainant admitted that working additional hours during the week or even a particular Saturday would not guarantee he would not have to work another Saturday as the mandatory

overtime requirements are dependent on the number of mandatory overtime incidents during the week. (Tr. 58-59).

30. At the public hearing Complainant withdrew the charge of discrimination based on race. (Tr. 133)

## OPINION AND DECISION

Complainant charged Respondent with unlawful discriminatory practices in employment based on his creed. Complainant failed to meet his burden of proof and the complaint should be dismissed.

New York Exec. Law, art 15, §296.10(a) ("Human Rights Law") states in pertinent part that:

> It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business.

The standards for establishing unlawful discrimination under the Human Rights Law are identical to the federal standards under Title VII of the Civil Rights Act of 1964 ("Title VII"). *Rainer N. Mittl, Ophthalmologist, P.C. v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 330, 763 N.Y.S.2d 518, 520 (2003).

In order to establish a prima facie case, a complainant alleging a violation of Human

Rights Law § 296.10 must show that: "( 1) he or she has a bona fide religious belief that conflicts with an employment requirement; ( 2) he or she informed the employer of this belief; ( 3) he or she was disciplined for failure to comply with the conflicting employment requirement." *Bowles v. New York City Transit Auth.*, 285 Fed.Appx. 812, 813 (2d Cir. 2008) (citations and internal quotation marks omitted).

If the Complainant establishes a prima facie case, "the burden shifts onto the employer to show that it cannot reasonably accommodate the {complainant} without undue hardship on the conduct of the employer's business." *Philbrook v. Ansonia Bd. Of Educ.*, 757 F 2d 476, 481(2d Cir. 1985)

Complainant charged Respondent with violating the HRL when it would not excuse him from mandatory overtime on Saturdays, resulting from the provisions of the collective bargaining agreement. Under the circumstances of this case, Complainant cannot meet his burden of proof.

Complainant cannot sustain his burden of proof for discriminatory failure to accommodate because he was not threatened with discipline if he did not come to work on Saturdays. *Siddiqi v. New York City Health & Hosp. Corp.*, 572 F. Supp. 2d 353, 370 (S.D.N.Y. 2008) (reviewing cases where courts have limited a complainant's ability to establish a claim of religious discrimination for failure to accommodate if there is no adverse employment action). The record shows Complainant volunteers for some Saturday hours and expressed no concern for mandatory Saturday training.

In the instant case, Complainant never refused to work on a Saturday when he was scheduled to work. In fact, when it suited him, Complainant volunteered to work some Saturdays. Furthermore, Complainant acknowledged that Respondent did not take any

disciplinary action against him because of his religious beliefs. Had Respondent threatened Complainant with disciplinary action, Complainant may have been able to establish the third prong of the prima facie case. *Siddiqi*, 572 F. Supp. 2d at 370. However, the record is devoid of evidence showing that Respondent threatened to do so. The Division cannot speculate or infer that Respondent would have subjected Complainant to discipline if he had refused to work on Saturdays. *Id.*

More importantly, the record here established that granting the exemption to Complainant would create an undue hardship for the Respondent. The initial grant of the accommodation to Complainant created bad feelings among his coworkers and they complained to the union. The Supreme Court has noted that accommodations that result in an imposition on other workers can constitute undue hardship. *See: TWA v. Hardison, 432 U.S. 63, 82 (1977)* After his co-workers complained to the union about the burden on the co-workers of his removal from the shift, the union advised the employer that it could not permit the employer to violate the terms of the collective bargaining agreement and exempt Complainant from the mandatory overtime provisions as to do so would penalize his coworkers.

An employer is obligated to make a good faith effort to accommodate an employee's Sabbath observance obligations. An employer is not obligated to initiate adversarial proceedings against a union when the provisions of a collective bargaining agreement limit an employer's ability to accommodate any single employee's religious observance or practice. *See: New York City Transit Authority v. State of New York, Executive Department, State Division of Human Rights, 89 NY2d 79, 651 NYS 2d 375 (1996)* The record established that Respondent employer met its obligations under the HRL with respect to honoring the Complainant's religious convictions. Respondent even added a *second* opportunity for co-workers to volunteer for the

mandatory overtime, this time specifically to relieve Complainant of mandatory overtime. This met the employer's obligations under the Human Rights Law. *See: New York City Transit Authority, ibid.*

Complainant failed to meet his burden of proof and the complaint should 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 that the complaint be and the same hereby is dismissed.

DATED: March 13, 2013
Bronx, New York

Christine Marbach Kellett
Administrative Law Judge