NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

LESHAWN MOORE,

Complainant,

v.

NEW YORK STATE, OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Respondent.

and NEW YORK STATE, OFFICE OF THE STATE COMPTROLLER, NEW YORK STATE, DEPARTMENT OF CIVIL SERVICE, Necessary Parties.

**NOTICE AND FINAL ORDER**

Case No. 10116220

**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 June 24, 2008, by Michael T. Groben, 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: JUL 30 2008
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10116220**

## SUMMARY

Complainant alleges that Respondent discriminated against him in employment, on the basis of his race and color, in violation of Article 15 of the Executive Law. Complainant has failed to prove that Respondent terminated him from his employment on the basis of his race and color. Accordingly, the complaint must be dismissed.

## PROCEEDINGS IN THE CASE

On February 20, 2007, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 25 and 26, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Senior Attorney Lawrence Zyra. Respondent was represented by Patrick F. MaCrae, Esq.

Permission to file post-hearing recommended findings of fact and conclusions of law was granted, and briefs were timely filed by both parties.

## FINDINGS OF FACT

1. As observed by presiding ALJ Groben, Complainant is an African American man. (ALJ's Exhibit 1)

2. The Broome Developmental Disabilities Service Office ("Broome") is a residence and treatment facility for the developmentally disabled operated by the New York State Office of Mental Retardation and Developmental Disabilities, located in Binghamton, New York. (ALJ's Exhibit 1, 2)

3. Complainant was hired on March 5, 2005 as a probationary Developmental Aid Trainee at Broome. (Respondent's Exhibit B [p. 5]; Tr. 12, 257)

4. Complainant was terminated from his position as a Developmental Aid Trainee effective June 28, 2005, for sleeping on the job. Complainant was a probationary employee at that time. (Respondent's Exhibit J; Tr. 12-13, 267-70).

5. Complainant made a complaint to CSEA, the union which represented permanent employees at Broome. He then wrote a letter which he submitted to Broome, in which he apologized for the appearance that he had been neglectful in fulfilling his duties, admitted that he should have "called in" the night of the incident, and noted that he had been extremely tired that night due to his family situation. (Respondent's Exhibit K; Tr. 15, 64-66)

6. Complainant was re-hired as a probationary Developmental Aid Trainee at Broome on October 27, 2005. Complainant's probationary period was to last for one year. (Respondent's Exhibit B; Tr. 68, 270-71)

7. On November 10, 2005, Complainant, as a new employee, received a copy of the Broome facility policy which prohibited sleeping while on duty. (Respondent's Exhibit B [p. 2], M; Tr. 253-54)

8. On July 20, 2006, Complainant was promoted to the position of Developmental Disabilities Secure Treatment Aide trainee at the Broome facility. Said position was also on a probationary basis for one year, commencing on the date of promotion. (Tr. 20-21, 271-72)

9. On the night of January 12 through the morning of January 13, 2007, Complainant worked the night shift at Broome from 11:30 p.m. to 7:30 a.m.. Complainant was assigned to supervise a patient, referred to herein as "John Doe", during a portion of that time. (Tr. 19-20)

10. John Doe had a condition known as "PICA", which caused him to ingest inedible objects. Due to this condition, John Doe had undergone surgery, resulting in the placement of a permanent colostomy bag. (Respondent's Exhibit F; Tr. 21-22, 43-44, 402-03)

11. Broome required that any employee assigned to supervise John Doe during sleeping hours remain on the left side of his bed, within arm's length of the patient, in order to keep him

from ingesting inedible items. This type of supervision was known as a "one-to-one" supervision. ( Respondent's Exhibit I; Tr. 21-22, 73, 89-93, 124-25)

12. On the night of January 12 through the morning of January 13, 2007, four employees of Broome performed one-to-one supervision of John Doe: Jamie Thorick (from 11:30 p.m. to 2 a.m.), Complainant (from 2 a.m. to 4 a.m.), and Collin Leonard, Complainant's then-supervisor, from 4 a.m. to approximately 6:30 a.m.. Complainant was also required to perform one-to-one supervision of John Doe from approximately 6:30 a.m. to 7 a.m., and Keith Williamson, from 7 a.m. on. (Respondent's Exhibit F, I; Tr. 21, 26, 72, 114, 128-29)

13. Jamie Thorick ("Thorick.") is a white female; Collin Leonard ("Leonard"), is a white male, and as observed by ALJ Groben, Keith Williamson ("Williamson"), is also a white male. (Tr. 38)

14. Williamson reported for work at a few minutes after 6:30 a.m. on the morning of January 13, 2007, and shortly thereafter, he observed Complainant seated slumped in a chair in the doorway of John Doe's room, with his back to the doorway and facing the television set on the wall opposite. The television set was on, and Complainant was wearing a hooded sweatshirt with the hood pulled up over his head. (Tr. 114-23)

15. While seated in that position, Complainant could not easily observe John Doe, and was not in compliance with the one-to-one supervision requirements. (Respondent's Exhibit I, L; Tr. 120-25)

16. Williamson spoke to Leonard regarding Complainant's seating position, and Leonard then walked off in the direction of John Doe's room. (Tr. 125-26)

17. Complainant admitted at the hearing that he had been seated in this position during one-to-one supervision of John Doe on the morning of January 13, and that Leonard had

reproached him regarding same, but asserted that it had been during his first one-to-one supervision of John Doe, from 2 a.m. to 4 a.m., rather than at the second supervision. (Respondent's Exhibit G [pp. 8-10]; Tr. 75-78)

18. During a subsequent investigation by Broome, Complainant stated that that while seated in this position facing the television, he had been watching television. However, Complainant testified at the hearing that he had not been watching television on said occasion, merely using it for light. (Respondent's Exhibit G [pp. 10, 14-15]; Tr. 76-77). In addition, Complainant's testimony under questioning at the hearing was often evasive. Therefore, Complainant's testimony that he had been seated in the doorway of John Doe's room during the 2 a.m. to 4 a.m. one-to-one supervision, rather than at the second supervision at 6:30 a.m., was not credible. (Tr. 65-67, 74-77)

19. Williamson returned to John Doe's room at approximately 7:00 a.m. to take over one-to-one supervision from Complainant, at which time he observed Complainant seated in a chair near John Doe's bed at more than arm's length distance, with his sweatshirt hood up covering his face, and snoring. (Respondent's Exhibit I; Tr. 129-30)

20. Williamson also observed at that time that John Doe was awake, that he had blood on his bed sheets and on himself, and that the bandage from his colostomy site was missing. (ALJ's Exhibit 1, 2; Tr. 131-32)

21. Williamson then notified Leonard, who entered the room and called Complainant's name twice before he responded. (Tr. 133-34)

22. The gauze from John Doe's colostomy site was later found in his colostomy bag, indicating that he had ingested it by mouth. (ALJ's Exhibit 1, 2; Respondent's Exhibit F [pp. 1-2, 5]; Tr. 132)

23. During a subsequent investigation of the incident by Broome, Complainant, Thorick, and Leonard were all placed on administrative leave; and an investigation report was produced by Broome personnel. (ALJ's Exhibit 1, 2; Respondent's Exhibit F)

24. Both Thorick and Leonard were permanent employees, who could not be terminated or otherwise disciplined except pursuant to the provisions of their collective bargaining agreement. Complainant was a probationary employee, with no such rights. (Tr. 87-89, 273, 275-79)

25. John Doe stated to Broome investigators that Thorick had been sleeping during her one-to-one shift on the night in question; however his assertion was not corroborated and his credibility was found to be questionable. (Respondent's Exhibit F [p. 5]; Tr. 344-45)

26. An administrative committee convened by Broome concluded that the filing of formal disciplinary charges against Thorick was unwarranted, and she was then issued a counseling memo. (Respondent's Exhibit D; Tr. 278, 352-53)

27. The Broome investigation report indicated that on the night in question Leonard had failed to stay within arm's length of John Doe's bedside during his own one-to-one supervision. (Respondent's Exhibit F [p. 9])

28. Formal disciplinary charges were then brought against Leonard on the grounds that he had been aware of Complainant's sleeping on the job on the night in question and had failed to take measures to prevent or report same, and Leonard, pursuant to a bargained-for disposition of those charges, was demoted from his supervisory position. (Respondent's Exhibit C; Tr. 274-78, 353-55)

29. The Broome investigation report concluded that Complainant had been sleeping, and had not stayed within arm's length during his one-to-one supervision of John Doe on January 13, 2007. (Respondent's Exhibit F [p. 9])

30. Following administrative review of the charges, Complainant was terminated from his probationary position effective February 9, 2007. (Respondent's Exhibit B [p. 4]; Tr. 355-56, 272)

31. The Director of Broome, Patricia McDonnell, who initially hired Complainant in 2005, also authorized his initial termination, his re-hiring and promotion in 2006, and his final termination in 2007. (Respondent's Exhibit B [pp. 1,3], J; Tr. 245-47)

32. Complainant's termination was based on the statements of Complainant's fellow employees Williamson (corroborated in part by John Doe) and Raymond Kuhr, and on his previous discharge for sleeping on the job. (Respondent's Exhibit F; Tr. 341-42, 357, 383-84, 387-88)

33. Broome maintains a general policy of terminating probationary employees who are found to be sleeping on duty or otherwise endangering the welfare of a patient. (Tr. 243-44, 306-18, 356, 381)

34. During the period 2005 through January 2008 , two other probationary Broome employees were found to be sleeping on the job, both were white, and both were terminated. (Respondent's Exhibit P; Tr. 306-18, 381)

## OPINION AND DECISION

Under the Human Rights Law, it is an unlawful discriminatory practice for an employer "because of the... race (or)... color... of any individual, to... discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment". Exec. Law art. 15, § 296.1(a)

A complainant alleging racial discrimination in employment may establish a prima facie

case by proving that (1) he is a member of a protected class; (2), he was qualified to hold the position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind* , 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 391 (2004). Once complainant has made this showing, the burden then shifts to the employer to set forth legitimate, independent and nondiscriminatory reasons for the decision. *Ferrante v. American Lung Association* , 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997). If the employer has met the burden, the complainant must then prove that the proffered reasons for his discharge were a pretext for discrimination. However, complainant always bears the ultimate burden of proof to show that intentional discrimination has occurred under a consideration of all the evidence. *St. Mary's Honor Center v. Hicks* , 509 U.S. 502, 508, 113 S. Ct. 2742, 2747 (1993).

In the instant matter, Complainant did demonstrate a prima facie case by proving that (1) he is an African-American man; (2) he was qualified to hold the position; (3) he was terminated from his position; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination, because the other two white employees involved in the John Doe incident were not terminated. However, Respondent set forth legitimate, independent and nondiscriminatory reasons for the action it took against Complainant.

First, Respondent demonstrated that it had a policy of terminating probationary employees who were found to be sleeping on the job. Of course, the fact that an employee has no contractual rights or protections against termination does not entitle an employer to discharge her for a statutorily impermissible reason. *Cottongim v. County of Onandaga Sheriff's Department* , 71 N.Y.2d 623, 528 N.Y.S.2d 802 (1988). However, Respondent demonstrated that

this policy was also enforced against white probationary employees under similar circumstances.

Respondent also proved that Complainant, unlike the white employees involved in the John Doe incident, had been found guilty of this behavior before, and had been discharged for same, before being re-hired. Complainant, in essence, had been given a second chance to work at Broome. Respondent was also able to show that despite the different status of the permanent white employees, and the lesser proof of their misconduct, Respondent had taken action against them, and had in fact demoted Complainant's supervisor for his role in the affair. Complainant's own testimony regarding his actions on the night in question was not credible.

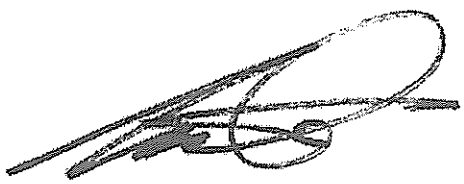
Finally, it is noted that the same person held office as the Director of Broome during the entirety of Complainant's short career at Broome, and was responsible for initially hiring Complainant, discharging him for cause, hiring him again, promoting him, and then finally discharging him again for neglect of duty. Under these circumstances, invidious discrimination against Complainant appears unlikely. Complainant failed to establish that the reasons proffered by Respondent for his discharge were a pretext for discrimination.

## 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 hereby is dismissed.

DATED: June 24, 2008
Bronx, New York



Michael T. Groben
Administrative Law Judge