

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

BYRON STRICKLAND,

Complainant,

v.

LEAKE & WATTS SERVICES, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10108477

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 April 8, 2008, by Thomas S. Protano, 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, ACTING 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,

JUN 20 2003



GALEN D. KIRKLAND
ACTING COMMISSIONER

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

Case No. **10108477**

SUMMARY

Complainant alleges he was harassed and his employment with Respondent was terminated because he is African American and because he suffered from a disability. The evidence at hearing revealed Complainant's work record was poor and he was let go because of that, not because of his race, national origin or disability. His case must, therefore, be dismissed.

PROCEEDINGS IN THE CASE

On October 26, 2005, 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 23, 2008, January 24, 2008 and February 1, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Sandra S. Thomas O’Neil, Esq. Respondent was represented by Jackson Lewis LLP, by Susan M. Corcoran, Esq.

Permission to file post-hearing briefs was granted. Respondent’s counsel filed a timely submission.

FINDINGS OF FACT

1. Complainant was hired as a direct care supervisor for Respondent in January 1999. In that capacity, he worked at a juvenile detention facility run by Respondent know as Woodfield Cottage (“Woodfield”). (Tr. 13-14)
2. As a direct care supervisor, Complainant’s duty was to maintain a safe, secure environment where residents can follow a structured program while in detention. (Tr. 14)
3. When Complainant was hired, George Walters was Respondent’s assistant director at Woodfield and was Complainant’s immediate supervisor. Thereafter, in 2000, Walters became the director at Woodfield and Michael Poindexter became the new assistant director. (Tr. 18-19)
4. Poindexter was promoted to the position from direct care supervisor by Walters. When Poindexter was promoted, Russell Sutton, African American, was also promoted by Walters from recreational specialist to direct care supervisor. (Tr. 379)
5. Walters is Jamaican. Complainant is African American. Poindexter is African American. Complainant alleges that Walters discriminated against him and singled him out for

discipline because he is African American, and because he suffered from an injury while working for Respondent in 2003. (ALJ Exhibit 2; Tr. 375)

6. In 2003, after Complainant suffered his ankle injury, Complainant was forced to return to work before he was ready. (ALJ Exhibit 2)

7. Complainant's employment was terminated on October 3, 2005. He alleges that he was dismissed because of his national origin, race/color and disability. (ALJ Exhibit 2)

8. Complainant's performance while he worked for Respondent was poor. He was received numerous warnings and counseling memos during his tenure with Respondent. Through the course of his employment with Respondent, Complainant received at least 28 counseling or warning memos. He received two "final warnings" during his six-year tenure with Respondent. (Respondent Exhibits 3-34)

9. Walters issued 18 warning and counseling memos to Complainant. Poindexter issued seven warning and counseling memos to Complainant. Gene Brown, Walters' predecessor, issued three memos. (Respondent Exhibits 3-34)

10. June Reece, assistant executive director, issued a memo after Complainant appealed a two-day suspension. Although Reece reduced the suspension to one day, she upheld the disciplinary charges against Complainant. (Respondent Exhibit 27)

11. Reece and Brown are both African American, not of Jamaican descent. (Respondent Exhibit 44; Tr. 16)

12. Among other infractions, Complainant lost his badge on two occasions; he falsified time records; he angrily told Walters "this is bullshit" after a disagreement over work assignments; he was suspended at least twice for his actions and was cited numerous times for negligence. (Respondent Exhibits 21, 24, 31; Tr. 26, 51, 69)

13. In April of 2005, Complainant requested a schedule change because he was having problems appearing for work on time. Walters granted Complainant's request in a memo dated April 22, 2005. (Respondent Exhibit 30)

14. On September 17, 2005, Complainant was seen by Walters out of uniform. Complainant was wearing shorts and a T-shirt. When Walters asked Complainant why he was dressed that way, Complainant stated he was working out. (Respondent Exhibit 34)
Complainant agrees that this incident occurred, however, he states he told Walters that he was "doing pushups." (Tr. 128)

15. As a result of this incident, Walters recommended terminating Complainant's employment to Anthony Hairston, director of human resources. (Tr. 507)

16. Hairston met with Walters and reviewed Complainant's personnel file. He also spoke with Complainant. After considering the charges against Complainant and his poor work history, Hairston concurred with Walters' decision to fire Complainant. (Respondent Exhibit 48; Tr. 515)

17. While he was employed by Respondent, Complainant never complained about discrimination to either Hairston or Reece. (Respondent Exhibit 44; Tr. 516)

18. Hairston is African American, not of Jamaican descent. Complainant was replaced by Oscar Walker, who is also African American. (Tr. 499, 520)

OPINION AND DECISION

To make out a prima facie case of unlawful discrimination under the Human Rights Law (N.Y. Exec. Law §296(1)(a)), a complainant must show (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the

adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Pace College v. Commission on Human Rights of the City of New York*, 38 N.Y.2d28, 39-40, 377 N.Y.S.2d 471, 479, 339 N.E.2d 880, 885-886 (1975), citing, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Assuming Complainant in this case has established a prima facie case of discrimination, Respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If Respondent does so, then Complainant must show that the proffered reason is a pretext for discrimination. *Matter of Pace University v. New York City Comm. On Human Rights*, 85 NY2d 125, 128 (1995); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S.133, 120, S.Ct. 2097, 147 L.Ed. 105 (2000).

Respondent in this case has articulated a legitimate, non-discriminatory reason for its actions, which Complainant has not shown to be pretextual. Complainant's work performance was not up to Respondent's standards. Complainant was written up numerous times, by different people, some of whom were, like Complainant, African American. In addition, the idea that Walters was motivated by some sort of animus towards African Americans is belied by the fact that Complainant was replaced by an African American and Walters promoted African Americans and accommodated Complainant when he needed a change in his schedule. Complainant's behavior when Walters caught him out of uniform and working out was the final straw for Complainant and Walters, with Hairston's approval, decided Complainant had to be fired. He was fired because of that incident and his performance while working for Respondent, not fired because of his race, national origin or color.

The only allegation Complainant makes with respect to his disability is an assertion that

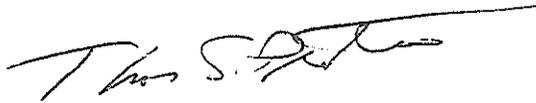
he was forced to return to work too soon after an injury in 2003. This event is time barred since it occurred more than one year prior to the filing of the instant complaint. Human Rights Law §297.5.

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 case be, and the same hereby is, dismissed.

DATED: April 8, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge