



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ADRIAN L-A PANTRY,

Complainant,

v.

INDEPENDENCE RESIDENCES, INC.,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10131027

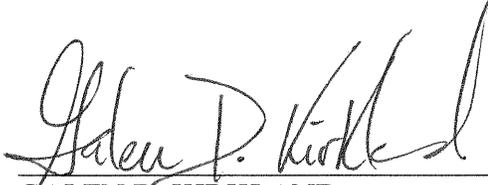
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 23, 2012, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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: 2/24/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

After due notice, the case came on for hearing before Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on September 26 and 27, 2011.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondent was represented by Keith J. Frank, Esq., of Perez & Varvaro.

Permission to file proposed findings of fact and conclusions of law was granted. Respondent so filed after the conclusion of the public hearing.

FINDINGS OF FACT

1. Park Lane South is a group home for ten people (“consumers”) with developmental disabilities or other impairments. Park Lane South is one of several facilities operated by Respondent; it is classified by the State of New York as an intermediate care facility. (ALJ’s Exhibit 1; Respondent’s Exhibit 12; Tr. 326, 340, 352-53, 396-98, 404-05, 413, 416-17, 429-32)
2. On February 19, 2008, Complainant, who is homosexual, was hired to work, part-time, at Park Lane South as a Direct Support Professional (“DSP”), also known as a Direct Care Professional, assisting consumers in accordance with the treatment plans created by Edwitch Pierre (“Pierre”), who was employed at Park Lane South as a Qualified Mental Retardation Professional (“QMRP”). (Complainant’s Exhibit 4; Respondent’s Exhibits 5, 6, 7, 12; Tr. 20-24, 64-65, 325-30, 356-57, 436-38)
3. In and around August of 2008, Respondent was preparing for a State of New York survey related to its recertification with the State of New York. As part of this preparation,

Pierre was making observations of staff performance and giving instruction with regard to the proper implementation of treatment plans. (Respondent's Exhibit 7; Tr. 400, 407-09)

4. In or around August of 2008, Complainant took exception to Pierre directly instructing him and complained to Railynn Frizzell ("Frizzell"), a Residential Program Coordinator for Respondent, that, "Edwitch should not be telling me what to do!" (Respondent's Exhibit 7; Tr. 396-97, 407-09)

5. On August 8, 2008, Frizzell met with Complainant, Pierre, and Yvonne Roberts, an Assistant Program Manager at Park Lane South, and informed Complainant that it was Pierre's responsibility to so instruct Complainant and it was Complainant's responsibility to follow Pierre's instructions. At no time did Complainant allege to Frizzell that Pierre or anyone was acting in any way toward him that he considered to be discriminatory. (Respondent's Exhibit 7; Tr. 34-39, 45-46, 52, 54, 57-63, 169, 178-79, 236-41, 258-61, 334-36, 400, 406-09)

6. On November 23, 2008, Berline Derival ("Derival") was a shift supervisor at Park Lane South with responsibilities that included ensuring that the staff performed their duties in a professional manner. On that day, Complainant arrived late for his shift and appeared agitated. Derival spoke with Complainant about being late and about his behavior with the consumers. At some point while speaking with Derival, Complainant said to Derival, "I'm not your fucking child." Thereafter, at some point on November 23, Complainant picked up a tea kettle with hot water in it, raised the tea kettle over Derival's head, and threatened to burn her with the hot water if she said anything. (Respondent's Exhibits 5, 6, 8, 9, 11, 13, 14; Tr. 119-22, 191-92, 278-91, 242-44, 298-301, 338-40, 371, 378-91, 401-03, 422-23)

7. On the same day, Derival reported Complainant's conduct to Pierre who reported it to Frizzell. Frizzell told Pierre to inform Complainant that he was suspended and that he should

leave Park Lane South. Pierre so informed Complainant. While Complainant was leaving, he threatened Derival that, if he was fired, her career would be in jeopardy. Complainant was suspended with pay. (Complainant's Exhibit 8; Respondent's Exhibits 5, 6, 8, 9, 11, 13, 14; Tr. 118-22, 191-92, 345, 360, 385-89, 401-03, 447-49, 455)

8. By letter ("the letter") dated November 24, 2008, Complainant informed Respondent that he felt he was "being targeted unfairly" and that the targeting "may be due to discrimination against [his] sexual orientation." In the letter, Complainant contended that Pierre's behavior toward Complainant made the work environment intolerable. He further contended that he left telephone messages for Frizzell to complain about Pierre's behavior but that Frizzell failed to return his calls. He also contended that Derival's accusations were false. In addition, he said he had applied for four other positions with Respondent but was not chosen for any of those positions. (Complainant's Exhibit 8; Tr. 113-118, 122-23, 171-75)

9. On November 28, 2008, Complainant filed the instant complaint (Case No. 10131027) with the Division, alleging that Respondent unlawfully discriminated against him because of his sexual orientation and because he opposed unlawful discrimination. Complainant alleged that the unlawful discrimination included the following: being called names, having inappropriate comments made to him, and not being chosen for other positions for which he applied.

(ALJ's Exhibit 1)

10. Respondent has a written policy that employees must perform in a satisfactory manner for at least 180 days in their position before applying for another position. On February 19, 2008, Complainant acknowledged receiving this written policy. On or about June 24, 2008, Respondent again provided Complainant with this written policy. Complainant applied for various positions before completing 180 days in his position. Complainant thinks he applied for

one position after satisfying the requirement of 180 days as a DSP. However, Complainant made no effort to determine the outcome of that application. (Complainant's Exhibits 2, 3, 4, 5, 6; Tr. 64-92, 153-58, 188-90)

11. Between November 25, 2008 and January, 12, 2009, Clifford Emmerich ("Emmerich"), Director of Human Resources for Respondent, conducted two investigations, one concerning the allegations of misconduct of Complainant on November 23, 2008, and the other concerning Complainant's claim of discrimination as set forth in the letter. Emmerich interviewed six employees: Complainant, Frizzell, Pierre, Derival, and two other DSPs, Valerie Fabius and Kirtney Daniel. At the conclusion of his investigations, Emmerich made two determinations: that there was no evidence of discriminatory actions taken by or discriminatory statements made by employees because of Complainant's sexual orientation; and, that Complainant's behavior on November 23 toward Derival was inappropriate and threatening and that it warranted termination of employment. (Respondent's Exhibits 13, 14; Tr. 123-24, 147-48, 194-217, 259, 446-82)

12. By January 12, 2009, Respondent informed Complainant that his employment was being terminated because of his inappropriate and threatening conduct on November 23, 2008. (Complainant's Exhibit 9; Tr. 467-68)

13. Pierre was professional in his interactions with Complainant and never called Complainant any names or spoke to him in a derogatory manner. (Tr. 328-37, 358, 360-65)

14. Derival was professional in her interactions with Complainant and never called Complainant any names or spoke to him in a derogatory manner. (Tr. 374-90, 392-95)

15. Complainant's testimony was, at times, inconsistent, evasive, and lacking in credibility. (Respondent's Exhibits 3, 8; Tr. 33-34, 38-54, 68-69, 84-86, 92-97, 105-07, 130-36, 153-56, 164-69, 175-85, 217-21, 228-30, 242-43, 423)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sexual orientation, or to retaliate against an individual in the terms, conditions, or privileges of employment because that individual opposed unlawful discrimination. *See* Human Rights Law §§ 296.1(a), 296.7.

Complainant raised issues of unlawful discrimination, alleging that he experienced a hostile work environment because of his sexual orientation, that he was denied opportunities for advancement because of his sexual orientation, and that he experienced unlawful retaliation because he opposed discrimination.

When a complainant raises issues of unlawful discrimination, he has the burden to establish by a preponderance of the evidence that unlawful discrimination occurred. *See Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630, 665 N.Y.S.2d 25, 29 (1997). In all cases involving allegations of unlawful discrimination, conclusory allegations, unsupported by credible evidence, are insufficient to establish unlawful discrimination. *See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support Complainant's allegations. I credit the testimony of Frizzell, Pierre, Derival, and Emmerich and find that Complainant's work environment was devoid of discriminatory animus. The first time Complainant raised an issue of unlawful discrimination was after he was suspended for his unprofessional behavior with Derival. Thereafter, Respondent undertook an investigation into his claim of discrimination and determined that it was without merit. I find no causal connection

between Complainant's claim of unlawful discrimination and any employment action he experienced including termination of employment.

Complainant has failed to meet the burden of showing that any conduct attributed to his employer constituted unlawful discrimination in violation of the Human Rights Law. Therefore, the complaint 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: January 23, 2012
Bronx, New York



Thomas J. Marlow
Administrative Law Judge