



DAVID A. PATERSON
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JESS A. BERNSTEIN,

Complainant,

v.

ROCHESTER-GENESEE REGIONAL
TRANSPORTATION AUTHORITY,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10130197

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 December 31, 2009, 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: **FEB 24 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. **10130197**

SUMMARY

Complainant alleges that Respondent subjected him to unlawful discrimination on the bases of disability and creed. Complainant failed to satisfy his prima facie burdens and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On December 10, 2008, 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. A public hearing session was held on November 10, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Rosalind M. Polanowski, Esq. Respondent was represented by Roy R. Galewski, Esq.

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

FINDINGS OF FACT

1. Respondent is a public authority subsidiary operating public bus services in Rochester, New York. (Tr. 140)

2. Complainant is an Orthodox Jew. As part of his religious observance, Complainant does not work on Saturdays. (ALJ's Exh. 2; TR. 19-20)

3. In the fall of 2007, Complainant applied for a bus driver position with Respondent. (ALJ's Exh. 2; Respondent's Exh. 7; Tr. 20, 22-25)

Sabbath Work Issue

4. Respondent requires all bus driver applicants to take a video test as part of the application process. (Tr. 24, 141-42, 145)

5. Respondent scheduled Complainant to attend a video test on a Saturday. Complainant asked a friend to notify Respondent that Complainant could not participate in Saturday testing for religious reasons. (Tr. 21)

6. After learning of Complainant's objection to Saturday testing, Respondent rescheduled Complainant's test for a Wednesday. (Tr. 24, 82, 147-48)

7. Complainant conceded that Respondent accommodated his religious observances by scheduling his test for a Wednesday. (Tr. 83)

8. Respondent routinely accommodates the religious observances and requirements of its employees, including those of the Jewish faith. (Tr. 160-62)

Physical Qualifications for Bus Driver Position

9. Article 19-A of the New York Vehicle and Traffic Law ("Article 19-A") establishes physical qualifications for bus drivers and requires bus driver applicants to undergo pre-employment physical examinations to ensure they are physically capable of controlling and operating a bus in a safe manner. (Tr. 94, 142)

10. Bus drivers must be able to exert 55 pounds of pressure to pull or push the steering wheel when the automatic power steering on the bus is off or malfunctions. Power steering malfunctions occur on Respondent's buses more than a dozen times per year. (Respondent's Exh. 7; Tr. 164)

11. The ability to control a bus during a power steering malfunction is essential to safe operation of Respondent's buses, which weigh between 16 to 28 tons and carry between 55 to 100 customers. (Tr. 145, 164-65)

12. Respondent contracts with Dr. Elaine Tunaitis, M.D. to perform physical examinations and make determinations under Article 19-A. Respondent's employees do not make 19-A determinations. (Respondent's Exh. 1; Tr. 94-98, 143-44)

13. On or about November 7, 2008, Dr. Tunaitis physically examined Complainant pursuant to the requirements of Article 19-A. Dr. Tunaitis also reviewed medical evaluations from Complainant's physicians regarding his knee, neck and shoulder impairments and resulting permanent physical limitations. (Respondent's Exh. 3, 4, 5, 8; Tr. 99, 101-04)

14. Since at least March 2006, Complainant has suffered from knee, neck and shoulder impairments which have medically restricted him to performing only light duty work on a permanent basis. (ALJ's Exh. 2; Respondent's Exh's 2, 3, 4; Tr. 26, 84, 99-100)

15. Dr. Tunaitis concluded, in her informed medical opinion, that Complainant did not satisfy the requirements of Article 19-A. (Tr. 106-07, 114, 133-34)

16. Respondent's Chief Administrative Officer, Deborah Griffith, decided not to hire Complainant for the bus driver position based upon Dr. Tunaitis' informed medical opinion that Complainant did not satisfy the requirements of Article 19-A. Complainant's creed played no role in Griffith's decision not to hire Complainant. (Tr. 140, 160)

17. On January 15, 2009, more than two months after Complainant's physical examination by Dr. Tunaitis and one month after Complainant filed a complaint of discrimination with the Division of Human Rights, Dr. Kenneth Veenema of University Sports Medicine gave Complainant a note opining that Complainant could perform the duties of the bus driver position. (ALJ's Exh. 2; Complainant's Exh. 3; Tr. 37, 49-51)

OPINION AND DECISION

Complainant alleges that Respondent subjected him to unlawful discrimination on the bases of disability and creed. Human Rights Law § 296.1(a). To satisfy his prima facie burden on each claim, Complainant must demonstrate that: (1) he is a member of a protected class; (2) he applied for a position for which he was qualified; (3) he was denied the position; and (4) the circumstances of the adverse employment decision give rise to an inference of discrimination. *McCluskey v. County of Suffolk*, 9 Misc.3d 1106(A), 806 N.Y.S.2d 446 (2005); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382 (2004).

Disability Discrimination Claim

Complainant suffers from medically diagnosable physical impairments to his knee, neck and shoulder. Since at least March 2006, these impairments have permanently restricted Complainant to performing only light duty work.

In the fall of 2007, Complainant applied for a bus driver position. As part of the application process, Dr. Tunaitis physically examined Complainant and reviewed the medical evaluations from Complainant's physicians regarding his knee, neck and shoulder impairment. Based upon the examination and medical notes, Dr. Tunaitis concluded, in her informed medical opinion, that Complainant did not satisfy the requirements of Article 19-A. Therefore, Complainant was not qualified for the bus driver position.

The proof also establishes that Dr. Veenema's note, which opines that Complainant can perform the bus driver duties, was prepared more than two months after Dr. Tunaitis' examination of Complainant and one month after Complainant filed his complaint of discrimination. As such, Dr. Veenema's note falls outside the relevant time period, was not in

Respondent's possession at the time of the challenged employment decision, and is therefore not relevant to Complainant's discrimination complaint.

Because Complainant did not apply for a position for which he was qualified, he failed to satisfy his prima facie burden and his disability discrimination claim must be dismissed.

Religious Discrimination Claim

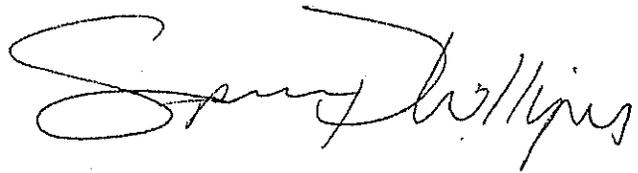
Complainant is an Orthodox Jew. As part of his religious observance, Complainant does not work on Saturdays. After Complainant submitted his application for a bus driver position, Respondent scheduled Complainant to take a video test on a Saturday. Complainant asked a friend to notify Respondent that Complainant could not take the video test on a Saturday for religious reasons. After learning of Complainant's objection to taking a video test on a Saturday, Respondent promptly accommodated Complainant's religious observances by rescheduling Complainant to take the video test on a Wednesday. Accordingly, Respondent gave Complainant the exact religious accommodation he requested – a non-Saturday testing date.

Respondent's actions in response to Complainant's testing-day objection were consistent with Respondent's practice and policy of accommodating the religious observances and requirements of all employees, including those of the Jewish faith. Furthermore, Griffith credibly testified that Complainant's creed was not a factor in Respondent's decision not to hire him into the bus driver position. Because Respondent accommodated Complainant's religious needs, and because Complainant failed to demonstrate that his creed played any role in Respondent's decision not to hire him as a bus driver, Complainant failed to satisfy his prima facie burden and his creed discrimination claim 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: December 31, 2009
Rochester, New York

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

Spencer D. Phillips
Administrative Law Judge