

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

JENNIFER L. BISHOP,

Complainant,

v.

ORCHARD PARK CENTRAL SCHOOL
DISTRICT,

Respondent.

NOTICE AND
FINAL ORDER

Case No. 10115235
10117318

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 May 19, 2008, by Rosalie Wohlstatter, 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.

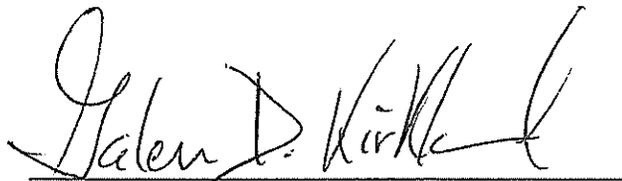
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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 31, 2008**
Bronx, New York

A handwritten signature in black ink, appearing to read "Galen D. Kirkland", written over a horizontal line.

GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
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on the Complaint of

JENNIFER L. BISHOP,

Complainant,

v.

**ORCHARD PARK CENTRAL SCHOOL
DISTRICT,**

Respondent.

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

Case Nos. **10115235 and
10117318**

SUMMARY

Complainant, who is African-American, alleged that Respondent discriminated against her based on her race and then retaliated against her when she filed an unlawful discrimination complaint. The race discrimination complaint is time-barred, and the retaliation complaint is not supported by the evidence. Both complaints are, therefore, dismissed.

PROCEEDINGS IN THE CASE

On December 13, 2006, and April 18, 2007, Complainant filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the case came on for hearing before Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on March 31, 2008 and April 1, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Lindy Korn, Esq. Respondent was represented by Brendan P. Kelleher, Esq.

Permission to file post-hearing briefs was granted. Both Complainant and Respondent filed timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant, an African-American woman, was first hired by Respondent as a substitute school bus driver in December of 1999. She became a permanent bus driver in March, 2000. (ALJ’s Exh. 3; Tr. 107-8)
2. To be a licensed school bus driver in New York State, a person must meet the requirements of Article 19-A of the Vehicle and Traffic Law. (Respondent’s 7; Tr. 23)
3. When Complainant was hired by Respondent, she was licensed as a school bus driver and had been so licensed since 1993. (Tr. 108)
4. Prior to the fall of 2004, Complainant’s performance evaluations were good although her supervisor, George Kales, did tell Complainant that her attendance was a problem. (Complainant’s Exh. 6; Tr. 115-6)
5. On June 17, 2004, Complainant was arrested. (Respondent’s Exh. 12; Tr. 119)
6. On June 18, 2004, Respondent received a letter from the State Department of Motor Vehicles (DMV) advising Respondent of Complainant’s arrest. The letter advised further that were Complainant to be convicted of the charge against her, she would no longer be

qualified to drive a school bus. Complainant received a copy of the letter from DMV. (Respondent's 7; Tr. 122).

7. After Kales received the letter from the DMV regarding Complainant's arrest, Kales spoke to Complainant about it. Complainant told him that she had been arrested for endangering the welfare of a child and that her domestic partner had made-up the charges against her. (Tr. 268-9)

8. Shortly after Complainant's arrest in June of 2004, the school year ended; Complainant was on break until September of that year. (Tr. 123-4)

9. By letter dated September 10, 2004, Respondent informed Complainant that she was to be on unpaid administrative leave until she provided evidence of a final disposition in her criminal case. This letter also referred to the June 18th letter from the DMV as a "directive" informing Respondent that Complainant was "disqualified" from driving a school bus until the case was resolved. (Respondent's Exh. 2)

10. In October of 2004, Complainant called Kales and asked whether she could come to work in some capacity other than that of bus driver. Kales said, "No." (Tr. 125)

11. Prior to this, three white drivers, who had been unable to drive, had been offered work that did not involve driving: Joanne Allen, Randy Smith and George Smeltzer. Ms. Allen and Mr. Smith had medical problems, which temporarily prevented them from driving school buses, and Mr. Smeltzer, who was close to retirement, had entered into an agreement with Respondent not to drive after he had been in some accidents. (Tr. 32-3, 92, 286)

12. Complainant called the DMV in October of 2004 and confirmed that her 19-A license was valid pending the outcome of her case. (Respondent's Exh. 13; Tr. 125-6)

13. On December 15, 2005, Complainant pleaded guilty to a misdemeanor of endangering the welfare of a child. In January of 2006, Complainant received a Certificate of Relief from Disabilities that permitted her to drive a school bus despite her conviction.

(Respondent's Exh. 12; Tr. 127-8)

14. On February 14, 2006, Complainant returned to work as a school bus driver for Respondent. (Tr. 132)

15. On December 13, 2006, Complainant filed a complaint against Respondent with the Division of Human Rights. (ALJ's Exh. 4)

16. Sometime in 2007, while Complainant was driving her school bus, she radioed to David Kennedy, Respondent's transportation supervisor, to inform him that cars were not stopping despite the flashing lights on her bus, which indicated that she was discharging passengers. His response was that he already knew that and that she did not have to tell him over the radio. (Tr. 41, 150)

17. Also in 2007, Kales called Complainant at home to tell her that he would have to remove her from her run because he had received a complaint from a parent or a child that she had yelled at a child on her bus. However, Complainant was never removed from her run. (Tr. 150-1)

18. In February 7, 2007, Kennedy told Complainant that she could not listen to radio stations WBLK and KISS on the bus. He suggested that Complainant listen to an AM station instead. When she did that, Kennedy told her that she could not listen to the radio at all.

(Respondent's Exh. 20; Tr. 152, 234)

OPINION AND DECISION

Statute of Limitations and Complainant's Discrimination Complaint

Respondent contends that the Complainant's race discrimination complaint is time-barred under Executive Law § 297.5, which mandates that complaints be filed within one year. This one-year period begins to run when Complainant acquires knowledge of the alleged discriminatory act. *Consolidated Edison Co. of New York, Inc. v. New York State Div. of Human Rights on Complaint of Easton*, 77 N.Y. 2d 411, 568 N.Y. S. 2d 569 (1991) The alleged discriminatory act in this case is the suspension of Complainant without pay after her arrest. Complainant learned that she was suspended as a school bus driver in September of 2004, and learned in October of 2004 that Respondent was not going to give her other paid duties. Thus, the statute of limitations expired in October of 2005. Complainant's race discrimination complaint was filed in December of 2006. This complaint is, therefore, time-barred.

Retaliation Complaint

To establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware that she had engaged in the protected activity, that Complainant suffered an adverse employment action, and that there was a causal connection between Complainant's engagement in the protected activity and the adverse employment action. *Pace v. Ogden Services, Corp.*, 257 A.D. 2d 101, 692 N.Y. S. 2d 220 (3rd Dept. 1999)

Complainant has failed to establish a prima facie case of retaliation. Complainant alleges that the following actions which took place after she filed her complaint with the Division of Human Rights constituted adverse employment actions: 1) she was advised not to listen to the radio while driving students on her bus; 2) she was advised that there had been a complaint by parents or students on her route and told that her route might be changed because of the complaint; 3)

she was not given a satisfactory response from her supervisor when she complained that vehicles, which were not under Respondent's control, were disregarding the flashing red lights on her bus.

For the purposes of proving retaliation, the standard to be used in evaluating whether an action constitutes an adverse employment action was enunciated in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). The [action] must be harmful to the point that [it] could well dissuade a reasonable worker from making...a charge of discrimination." *Id.* at 2409. The complained of actions by Respondent would not deter a reasonable person from bringing charges of discrimination. The retaliation claim must, therefore, 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 both complaints be, and the same hereby are, dismissed.

DATED: May 19, 2008
Bronx, New York



Rosalie Wohlstatter
Administrative Law Judge