

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JAMES E. BURVENICH,

Complainant,

v.

TOWN OF HUNTINGTON,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10121794

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 11, 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, 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 10 2009**

Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

TO:

Complainant

James E. Burvenich
258 East 17th Street
Huntington Station, NY 11746

Complainant Attorney

John G. Poli, III, P.C.
Attn: John G. Poli, III
200 Laurel Avenue, P.O. Box 59
Northport, NY 11768

Respondent

Town of Huntington
Attn: John J. Leo, Town Attorney
100 Main Street
Huntington, NY 11743

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Enforcement Unit
Sharon J. Field, Director of Prosecutions
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Christine Marbach Kellett
Chief Administrative Law Judge

Thomas S. Protano
Administrative Law Judge

Sara Toll East
Chief, Litigation and Appeals

Caroline J. Downey
General Counsel

Peter G. Buchenholz
Adjudication Counsel

Matthew Menes
Adjudication Counsel

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TOWN OF HUNTINGTON,

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

Case No. 10121794

SUMMARY

Complainant alleges that he was demoted because of a Driving While Impaired conviction and in retaliation for having filed a complaint alleging an unsafe work environment. The Division lacks jurisdiction over the conviction record allegations and Complainant fails to make out a prima facie case for retaliation.

PROCEEDINGS IN THE CASE

On November 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on September 22, 2008 and October 24, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by John G. Poli, III, Esq. Respondent was represented by John Leo, Esq.

Permission to file post-hearing briefs was granted. Both attorneys made timely post hearing submissions.

FINDINGS OF FACT

1. Complainant has been employed by Respondent since May of 2005. (Tr. 9) He was hired as a plumber, maintenance mechanic III, salary grade 13. (Tr. 10)
2. Complainant worked in Respondent’s General Services Department, of which Tom Cavanagh was the director. (Tr. 10) Complainant’s direct supervisors were Chuck Atkinson and Douglas Walters. (Tr. 22-23)
3. At the time of his hire, Complainant had a commercial driver’s license (CDL). When he was first hired, Complainant was assigned to drive a GS-508 van while at work. Complainant used the van to drive to and from his work locations to the Pulaski Road facility, where he reported to work. After about a year and a half, he was assigned a Grumman truck, similar to a postal vehicle or a bread delivery truck. He did not need a CDL to operate the GS-508 or the Grumman. (Tr. 23-25, 199)
4. Complainant worked with two other plumbers, John Phelan and John McCrickert. Neither Phelan nor McCrickert had a CDL. (Tr. 27)

5. In 2006, Andrew Brown was hired as an additional plumber. Brown did not have a CDL. (Tr. 28)
6. Phelan was a grade 14 plumber; McCrickert and Brown were grade 13. (Tr. 27-28)
7. In February of 2007, Complainant filed an internal complaint with Respondent alleging that his workplace was unsafe. He asserts that he was retaliated against for having filed the claim. He did not allege that any discrimination took place. (Tr. 39-40)
8. On April 28, 2007, Complainant was arrested and charged with driving while intoxicated. (Tr. 45) Complainant's driver's license was suspended as a result of the incident. (Tr. 47)
9. On May 18, 2007, Complainant pled guilty to driving while impaired. He received a conditional driver's license, which allowed Complainant "to drive to, from and for work." His CDL remained suspended for approximately one year. (Tr. 49)
10. From April 28, 2007 through May 18, 2007, Complainant used his accrued time and stayed away from work. (Tr. 50) On May 19, 2007, when he attempted to return to work, he was suspended for three days for failing to call in during his absence. (Tr. 51)
11. On or about May 23, 2007, Complainant returned to work. Upon his return to work, he was notified that he had been demoted from a grade 13 plumber to a grade 9 laborer because he no longer possessed a CDL. (Complainant's Exhibit 1; Tr. 53-54)
12. Respondent had learned about Complainant's conviction because they have a computer link with the New York State Department of Motor Vehicles, which notifies Respondent if there are any issues involving an employee's driver's license. (Tr. 128-29)
13. Complainant's CDL was restored on or about May 9, 2008. He has not been restored to his prior position and remains employed as a grade 9 laborer. (Tr. 49, 70)

14. Respondent has a policy under which “any general services blue collar employee grade 10 and above must possess and maintain a valid New York State Class ‘B’ CDL driver’s license...” (Respondent’s Exhibit 1) The requirement is not enforced, by Respondent’s own admission. (Tr. 143, 239) In fact, most of the grade 13, maintenance mechanics III who worked with Complainant, including plumbers, electricians and carpenters did not have CDLs. (Tr. 29-34)

15. Cavanagh, who made the decision to demote Complainant, said Complainant was hired, in part, because he had a CDL. Cavanagh wanted to enforce the policy by which all blue collar workers above grade 9 would have CDLs. However, not everyone Cavanagh hired during his tenure as director of general services had a CDL. (Tr. 197-98, 238, 265-68)

16. When Cavanagh learned that Complainant’s driver’s license had been suspended, he immediately sought to terminate Complainant’s employment. However, Complainant’s union representatives negotiated a demotion for Complainant, without Complainant’s knowledge. Thus, when Complainant’s driver’s license was conditionally restored, and Complainant sought to return to work, Cavanagh demoted Complainant. (Tr. 212-13, 217)

17. Complainant’s conditional license would have permitted Complainant to drive the vehicle he had been using as a Grade 13 plumber. (Tr. 254) In his current job, Complainant still drives one of Respondent’s pick up trucks “a couple of times a week” in order to pick up materials and supplies he needs to do his job. (Tr. 180-81)

OPINION AND DECISION

The Complainant alleges that the Respondent’s actions were based upon his conviction record. The evidence suggests that he is correct, given the fact that Respondent’s requirement

that all blue collar employees above grade 9 must possess a CDL seemingly applied only to Complainant. Unfortunately for Complainant, the Division lacks jurisdiction in this case with respect to the conviction record allegations.

Human Rights Law, at §296.15 provides that it “shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of good moral character which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law.” The Division takes the position that Article 23-A of the Correction Law only protects persons *previously* convicted of a criminal offense.¹ In the present case, the ex-offender statute does not apply because the Complainant was not convicted before he became employed by this Respondent; rather, his conviction occurred while he was employed by the Respondent. Therefore, because the Division lacks jurisdiction on this claim, it must be dismissed.

With respect to his allegations of retaliation, Complainant’s case also must fail. In order to establish a claim for retaliation, Complainant must make out a prima facie case by showing that (1) he engaged in activity protected by Human Rights Law § 296, (2) Respondent was aware that he participated in the protected activity, (3) he suffered from a disadvantageous employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999), *citing Dortz v City of New York*, 904 F Supp 127, 156 (1995).

¹ See, e.g., *Goodman v. Family Home Care, Inc.*, DHR Case No. 10121974 (dismissed by Division on November 6, 2008 during investigation).

The Complainant here cannot make out a prima facie case for retaliation. Although he did make a complaint to Respondent, his complaint was about workplace safety, not about unlawful discrimination. Therefore, he fails to allege that he engaged in activity protected by Human Rights Law § 296.

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: December 11, 2008
Bronx, New York

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

Thomas S. Protano
Administrative Law Judge