

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JOHN A. FIERMONTE, SR.,

Complainant,

v.

AUBURN ENLARGED CITY SCHOOL DISTRICT,
Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10122428

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 15, 2009, by Edward Luban, 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 08 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

State Division of Human Rights
Enforcement Unit
Sharon J. Field, Director of Prosecutions
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**AUBURN ENLARGED CITY SCHOOL
DISTRICT,**

Respondent.

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

Case No. 10122428

SUMMARY

Complainant alleged that Respondent unlawfully terminated his employment because of his age. Because Complainant failed to sustain his burden of proof, the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On December 31, 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 Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on March 17, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by William B. Rosbrook, Esq. and Melinda McElroy, Esq. Respondent was represented by Frank W. Miller, Esq.

At the public hearing, the complaint was amended to reflect Respondent's correct legal name. (Tr. 8)

Complainant and Respondent filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

FINDINGS OF FACT

1. Complainant was born on February 25, 1931. Complainant was 75 years old at the time his employment was terminated. (Tr. 11)

2. When Complainant was 57 years old, Respondent hired him as a part-time safety aide. Complainant's last job title was School Safety Officer ("SSO"). He worked at Auburn High School ("school"). (Tr. 13, 48)

3. Complainant's responsibilities included helping to supervise the student parking lot at dismissal time. One end of the parking lot empties into the bus driveway. When assigned to the parking lot, Complainant was to make sure that vehicles did not go in or out of that entrance and interfere with school buses. Complainant was also to make sure that vehicles did not drive from that entrance into the area where students were crossing from the building into the parking lot. (Tr. 57, 158-59, 187-89, 203)

4. Complainant was not trained in police pursuit of vehicles, he was not authorized or directed to pursue vehicles, and he was not authorized to use his personal vehicle for pursuit. Complainant was to report "all violations of law and school district policies to school

administration,” and he was to advise school officials “of any situation that may create potential harm to individuals or damage to or loss of property.” If Complainant observed a parking infraction, he was to report the license plate number of the vehicle in question to James Slayton, a police officer stationed at the school. (Tr. 69, 72, 158-60, 189-90, 211; Respondent’s Exh. 3)

5. On December 19, 2006, at approximately 2:20 p.m., Complainant was stationed in the student parking lot. Complainant placed five traffic cones between the bus driveway and the parking lot. After he did so, Complainant observed a vehicle drive through the cones into the parking lot. Complainant got into his own car and pursued the vehicle toward the south end of the lot, in order to get the vehicle’s license plate number. Complainant was driving slightly faster than normal in a parking lot. As he pursued the vehicle, he collided with a truck driven by John Tracy, a student. Complainant’s car and Tracy’s truck sustained minor damage. (Tr. 17-18, 56-59, 136-39, 145; Respondent’s Exh. 1, 2)

6. Complainant was the only SSO stationed in the parking lot at that time. When Complainant left his post and pursued the vehicle, no one was left to protect the entrance where the traffic cones were. (Tr. 68)

7. Complainant was equipped with a radio that he could have used to report the vehicle that had driven through the cones or to request assistance. Complainant did not report the vehicle or request assistance. After the collision with Tracy’s truck, he did use the radio to report the collision to Slayton. Slayton came to the scene and interviewed Complainant, Tracy, and Linda Bachman, a parent who witnessed the incident. Because the damage to the vehicles was minor, Slayton prepared an Accident Courtesy Report and gave copies to Complainant and Tracy. Slayton did not issue any traffic tickets. (Tr. 73, 76-78, 194, 196-97, 201; Respondent’s Exh. 2)

8. David Roth, the school principal, interviewed Tracy and three other students who were in the parking lot when the collision occurred. The students reported that Complainant was speeding, that he was rude, and that he used profanity toward students who were at the scene. Roth prepared summaries of the students' reports and turned them over to Joseph Pabis, Assistant Superintendent for Personnel, Finance and Operations. (Tr. 166, 170, 217; Respondent's Exh. 1)

9. A security camera is located on the southwest corner of the school facing the student parking lot. Slayton and Roth viewed a videotape taken from the camera at the time of the incident. The collision occurred outside the camera's view. However, Slayton observed that Complainant's vehicle was traveling faster than the vehicle he was pursuing and that several students "scurried out of the way" as Complainant drove by them before the collision. (Tr. 179-181, 198-99, 205; Respondent's Exh. 2)

10. On January 3, 2007, Pabis interviewed Complainant about the December 19 incident. Complainant became agitated and abusive, stood up, raised his voice, pointed his finger in Pabis' face, and said "you burnt my friggin' ass." Complainant also said that Pabis would fire him because Complainant was a senior and was Italian. (Tr. 85-89, 91, 218-19; Respondent's Exh. 5)

11. Pabis gave Complainant the option to resign or be suspended. Complainant responded with a vulgarity. (Tr. 223)

12. On January 12, 2007, John Plume, Superintendent of Schools, notified Complainant that he was suspended without pay pending action by the Board of Education ("Board"). Plume said that Complainant "acted in an unsafe manner that jeopardized students' well being and caused damage to a vehicle." On January 23, 2007, the Board approved the decision to terminate Complainant's employment. (Tr. 22; Complainant's Exhs. 1, 2)

13. Respondent terminated Complainant's employment primarily because he used poor judgment in the parking lot incident on December 19, 2006 and secondarily because he was insubordinate to Pabis. (Tr. 222, 243-44)

14. Respondent subsequently hired John Rourke, who was approximately 58 years old, to fill Complainant's position. (Tr. 49, 226-27)

15. As of early 2008, Respondent had 35 full-time employees and 23 non-instructional and instructional substitutes who were over 62 years of age. Thirteen employees were age 70 or older; six of these employees were between 76 and 80 years of age. (Tr. 214-16; Respondent's Exh. 4)

16. Helen Fiermonte, Complainant's wife, has been employed by Respondent for approximately eight years. Helen Fiermonte was approximately 69 years of age when Respondent hired her. (Tr. 48-49, 110-11)

17. At no time during his employment with Respondent did Complainant complain about age discrimination or complain that comments were made about his age. (Tr. 227-28)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discharge an employee on the basis of age. Human Rights Law § 296.1(a). Complainant has the initial burden to prove a prima facie case of discrimination. He must show that he is a member of a protected class, that he was qualified for his position, that he was actively or constructively discharged, and that the discharge occurred under circumstances giving rise to an inference of discrimination. *Ferrante v. American Lung Association*, 90 N.Y. 2d 623, 629, 665 N.Y.S. 2d 25, 29 (1997). If Complainant makes such a showing, the burden shifts to Respondent to present a legitimate, non-

discriminatory reason for its action. If Respondent does so, Complainant must show that the reason Respondent has presented was merely a pretext for discrimination. *Id.* The ultimate burden of proof always remains with Complainant. *Id.* at 630, 665 N.Y.S. 2d at 29.

Complainant is a member of a protected class, he was qualified for his position, which he held for many years, and he was discharged. Rourke, the person who replaced Complainant, was approximately 17 years younger. This age difference is sufficient to permit an inference of discrimination. Therefore, Complainant has established a prima facie case.

However, Respondent has presented legitimate, non-discriminatory reasons for discharging Complainant. Respondent determined that Complainant showed poor judgment and created a safety risk to students when he left his post and pursued a vehicle in the parking lot. Whether or not Complainant was speeding, and whether or not he was at fault for the subsequent collision, he had no authority to leave his post and pursue the vehicle. In addition, Complainant was insubordinate when Pabis met with him and tried to discuss the incident.

Complainant failed to prove that Respondent's explanation for his discharge was a pretext for discrimination. Complainant did not deny that he pursued the vehicle that ran through the traffic cones. Complainant also acknowledged that he raised his voice and used inappropriate language when he met with Pabis. In addition, Complainant offered no evidence of age discrimination. He never complained about age discrimination or that comments were made about his age. Finally, the record shows that Respondent employed a substantial number of people who were between 63 and 80 years old, including Complainant's own wife.

Complainant did not sustain his burden of proof. 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: May 15, 2009
Syracuse, New York

A handwritten signature in black ink, appearing to read 'Edward Luban', with a long horizontal flourish extending to the right.

Edward Luban
Administrative Law Judge