NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

RIYAD ISSA,

Complainant,

v.

CARRIER COACH, INC.,

Respondent.

NOTICE AND FINAL ORDER

Case No. 10117603

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 June 2, 2008, 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 2 8 2000
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

RIYAD ISSA,

Complainant,

v.

CARRIER COACH, INC.,

Respondent.

RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10117603**

SUMMARY

Complainant alleged that Respondent discriminated against him on the basis of national origin and/or race. Complainant failed to sustain his burden of proof, and the complaint should be dismissed.

PROCEEDINGS IN THE CASE

On May 2, 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 May 12, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq.. Respondent was represented by John M. Monahan, Esq. and Elizabeth Fox-Solomon, Esq.

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

FINDINGS OF FACT

1. Complainant is a person of Palestinian origin. (Tr. 8)

2. Respondent is a company that is engaged in transporting children and adults with disabilities to school, work programs, and medical appointments. (Tr. 96, 154)

3. Complainant alleged that Respondent discriminated against him by failing to address harassment by co-workers, by selectively enforcing policies against him, and by terminating him. (ALJ's Exh. 1)

4. Respondent denied Complainant's allegations. (ALJ's Exh. 3)

5. On November 8, 2006, Respondent hired Complainant as a bus driver. (Tr. 6-7, 103) Complainant worked out of Respondent's Niagara Falls base. (Tr. 14,147)

6. When Complainant was hired, Latricia Mulkey was his branch manager. (Tr. 59, 105, 148) Roy Woods was her assistant. (Tr. 60)

7. During the first month Complainant worked for Respondent, Woods joked to Complainant and Mulkey that if Complainant was going to bomb the office, to make sure he, Woods, was not there. (Tr. 9, 60)

8. On one occasion, "Bob," another driver for Respondent, called Complainant a "camel jockey." (Tr. 9-10, 33)

9. Complainant did not complain to Mulkey about these remarks. (Tr. 72, 92)

10. Mulkey heard several other employees make derogatory remarks about Complainant (Tr. 59, 64, 70, 82). They used the words "camel jockey," "bomber," "terrorist," and "Iranian." (Tr. 71, 84) These comments were made behind Complainant's back, not to him directly. (Tr. 72, 74)

11. Mulkey did not tell Complainant about these comments, and she did not report them to her superiors. (Tr. 72, 77, 82, 83, 92) She herself corrected the employees who made them. (Tr. 70)

12. On one occasion, Woods sent Complainant to pick up a bus at Respondent's Buffalo base and bring it back to Niagara Falls. (Tr. 14) Complainant went to Buffalo and drove the bus back, but he did not notice that the bus had a windshield sticker saying it was out of service. (Tr. 15-16, 41).

13. Respondent's drivers must complete a pre-trip inspection before every trip. (Respondent's Exh. 1; Tr. 15-16, 40-41, 99-100) Woods gave Complainant a warning for failing to inspect the bus before driving it. (Tr. 15)

14. On March 19, 2007, Mulkey left her position with Respondent. (Tr. 59) James Mason, Respondent's Vice-President and twenty-five percent owner, began to oversee the Niagara Falls base. (Tr. 107, 149).

15. Mason found that the majority of drivers at Niagara Falls were taking their bus keys home after their runs, in violation of Respondent's policy. (Tr. 85, 149-150) He directed Woods and Leslie Midzinski, the head dispatcher, to make sure drivers returned their keys. (Tr. 150-151)

16. Woods instructed Complainant to leave his keys in the office and not take them home. (Tr. 20-21) Complainant noticed that many other drivers were still taking the keys home. (Tr. 20-21) Woods said Respondent intended to enforce the rule but it would take time. (Tr. 45)

17. Mason also decided to eliminate the bus route Complainant was driving because it was not economical. (Tr. 151-152) This was not a unique decision; Respondent regularly eliminates and consolidates its routes. (Tr. 152-153)

18. After Complainant's route was eliminated, Midzinski assigned him to fill in on different routes and gave him wheelchair medical runs. (Tr. 18-19, 154). She also assigned him to work as a bus aide for two days. (Tr. 18, 42-43).

19. Complainant continued to receive the same pay after these changes. (Tr. 29, 57).

20. Mason subsequently learned that Complainant was upset about losing his route. (Tr. 155) He met with Complainant in the Niagara Falls office. (Tr. 155) Complainant said Midzinski and Woods eliminated his route and were prejudiced against him. (Tr. 38, 42, 155-56). He also brought up the issue of having to turn in his keys. (Tr. 156)

21. Mason explained that he, not the dispatchers, had decided to eliminate Complainant's route because it was not profitable. (Tr. 42, 155-56) He also explained Respondent's policy about turning in keys. (Tr. 156)

22. On April 14, 2007, Complainant was arrested for a traffic violation and possession of brass knuckles. (Tr. 7)

23. On April 16, 2007, Midzinski informed Charles Scanio, Respondent's Human Resources Director, that Complainant did not show up for work that day because he was incarcerated. (Tr. 110) Scanio obtained the details of Complainant's arrest from a newspaper website. (Tr. 110)

24. Scanio and Holly Miller, Respondent's Comptroller, recommended to Mason that Complainant be terminated. (Tr. 117, 163-64). Mason decided not to terminate Complainant because he had been arrested but not convicted. (Tr. 158). He felt bad for Complainant and decided to give him another chance. (Tr. 125, 163-164)

25. Respondent's Rules and Regulations provide that employees will be terminated for drug or alcohol convictions. (Respondent's Exh. 1; Tr. 132) Respondent has no policy regarding employees who are arrested on other charges; it is within Respondent's discretion whether or not to terminate such employees. (Tr. 133)

26. Respondent has terminated at least two other employees because they were arrested for conduct that occurred off the job. (Tr. 116-117) One employee was African-American and the other was Caucasian. (Tr. 131)

27. On April 16, 2007, Midzinski also told Scanio that Complainant had approached her and other female employees, asked for money in an aggressive manner, and made inappropriate sexual comments (Tr. 118-119). Scanio instructed Midzinski to speak with the employees involved and to document the incidents. (Tr. 119, 139).

28. On April 17, 2007, Midzinski faxed Scanio reports containing allegations against Complainant from herself and three other employees. (Tr. 120; Respondent's Exh. 5)

29. On April 17, 2007, Mason told Complainant he was making people uncomfortable by asking them for money and making sexual comments. (Tr. 160, 163). He told Complainant to stop this activity, and he believed Complainant agreed to do so. (Tr. 160-61)

30. Respondent subsequently learned that Complainant had tried to borrow money from one or two employees later that same evening. (Tr. 126, 161, 163). Mason instructed Scanio to terminate Complainant. (Tr. 161, 163-64).

31. Respondent terminated Complainant because he was arrested and because he asked other employees for money after he had been told not to do so. (Respondent's Exh. 6; Tr. 22-23, 47, 128, 163-64)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of national origin or race. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Complainant alleged that Respondent discriminated against him because it subjected him to a hostile work environment. To establish this claim, Complainant must show that his workplace was "permeated with discriminatory intimidation, ridicule, and insult that (was) sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Forrest v. Jewish Guild for the Blind,* 3 N.Y. 3d 295, 311, 786 N.Y.S. 2d 382, 394 (2004), *quoting Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993). Complainant has failed to satisfy this standard.

Complainant identified two derogatory remarks he heard from Respondent's employees, Woods' joke about a bomb and the "camel jockey" comment from Bob. These comments were clearly offensive. However, these two isolated comments during the course of Complainant's six months of employment were not sufficient to establish conduct that was "severe or pervasive." Moreover, there is no evidence that Respondent was aware of the offensive comments. Neither Complainant nor Mulkey reported them to their superiors. An employer cannot be held liable for discriminatory conduct of its employees unless it encouraged, condoned, or approved the discrimination. *Forrest,* 3 N.Y. 3d at 312, 786 N.Y.S. 2d at 395. Accordingly, Complainant has

failed to establish that he was subjected to a hostile work environment.

Complainant also alleged that Respondent subjected him to disparate treatment because of his national origin. 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 suffered an adverse employment action, and that the adverse action occurred in 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, 28 (1997).

Complainant's Palestinian background qualifies him as a member of a protected class. Complainant was also qualified for his position as a bus driver; Respondent considered him a good employee until he was arrested. However, Complainant failed to show that he suffered an adverse employment action in circumstances giving rise to an inference of discrimination. An adverse employment action requires "a materially adverse change in the terms and conditions of employment." *Forrest*, 3 N.Y. 3d at 306, 786 N.Y.S. 2d at 391. Such a change may be shown by "a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices . . . unique to a particular situation." *Id., quoting Galabya v. New York City Board of Education*, 202 F. 3d 636, 640 (2d Cir. 2000).

Complainant asserted that he suffered adverse employment actions both in his working conditions and in his termination. He alleged that he was unfairly disciplined for failing to make a pre-trip inspection when he drove the bus from Buffalo, that he was assigned different routes every day instead of a regular route, that he had to work as an aide for two days, and that he was not allowed to take keys home while other drivers did so. None of these actions rose to the level of an adverse employment action. Complainant was not demoted, neither his pay nor his hours

were reduced, his responsibilities were not significantly diminished, and he did not suffer any other material change in the terms or conditions of his employment.

Complainant did suffer an adverse employment action when he was terminated. However, he failed to show that he was terminated in circumstances giving rise to an inference of discrimination based on his national origin or race. The record shows that Complainant was terminated because he was arrested and because he continued to ask co-workers for money after he was told not to do so. Complainant did not show that he was treated differently from other similarly-situated employees, and he did not present any other facts about his termination from which an inference of discrimination can be drawn.

Because Complainant did not establish that he suffered an adverse employment action in circumstances that give rise to an inference of discrimination, he failed to meet his burden to establish a prima facie case of discrimination. Therefore, his 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: June 19, 2008
Syracuse, New York

Edward Luban
Administrative Law Judge