

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

TINA LAFRANCE FORMERLY KNOWN AS TINA
BOYD,

Complainant,

v.

NEW YORK STATE, DEPARTMENT OF
CORRECTIONAL SERVICES, FIRST TRANSIT
TRANSPORTATION, LLC.,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10113620

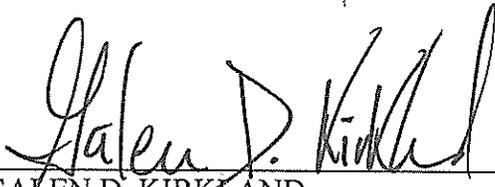
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"), issued on August 31, 2009, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was 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: **OCT 09 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**NEW YORK STATE, DEPARTMENT OF
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TRANSIT TRANSPORTATION, LLC.,**

Respondents.

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

Case No. 10113620

SUMMARY

Complainant alleged that Respondents retaliated against her for making a prior complaint of sexual harassment. Prior to hearing she settled her claim against First Transit Transportation, LLC and withdrew her claims against that Respondent. New York State, Department of Correctional Services was not an employer of Complainant and, as such, the claims against it must be dismissed.

PROCEEDINGS IN THE CASE

On September 11, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 May 6, 2009 and May 7, 2009.

Prior to hearing, Complainant settled her claims against Respondent First Transit Transportation, LLC ("First Transit") and, in accordance with that Agreement, Complainant agreed to withdraw her claims against First Transit (See, Complainant's Exhibit 1). Respondent Department of Correctional Services ("DOCS") made a motion to dismiss the complaint against it, asserting that it is not a proper party to this action in that it was not Complainant's employer. DOCS' motion was held in abeyance until after the public hearing.

Complainant and DOCS appeared at the hearing. The Division was represented by Lawrence J. Zyra, Esq. Respondent DOCS was represented by Benjamin H. Rondeau, Esq. First Transit did not participate in the hearing.

Permission to file post-hearing briefs was granted. The Division attorney filed a timely submission.

FINDINGS OF FACT

1. Complainant was employed by First Transit as a bus driver from 2003 until February 2008. (Tr. 13) From July 1, 2003 until April of 2006, Complainant drove a bus (also known as a DOCS coach) that carried inmates and Corrections Officers between correctional facilities. (Tr. 14-15, 19)

2. DOCS and First Transit have an agreement under which First Transit provides bus services for DOCS. (Complainant's Exhibit 6)

3. When Complainant began working for First Transit, she drove the bus route between Upstate Correctional Facility ("Upstate") and Mount McGregor Correctional Facility ("McGregor"). (Tr. 15)

4. Complainant's wages were paid by First Transit. At the end of the year, Complainant received W-2's issued by First Transit. (Complainant's Exhibit 2; Tr. 56)

5. Complainant's immediate supervisor was Sam Nichols, who was an employee of First Transit. (Tr. 23-24)

6. At the beginning of each work day, Complainant picked up her bus at the bus yard owned and operated by First Transit. (Tr. 55-56) The buses had DOCS stickers on them, but they were owned by First Transit. (Tr. 52)

7. The route Complainant drove was the same each day. Routes were specified in the agreement between DOCS and First Transit. DOCS personnel told Complainant where and when to make rest stops during her route. (Tr. 75-76)

8. DOCS' personnel have no supervisory authority over First Transit drivers. (Tr. 89)

9. On January 5, 2005, Complainant made a complaint of sexual harassment to Nichols at First Transit, alleging that DOCS employees were harassing her. (Tr. 24)

10. In response to that complaint, First Transit transferred Complainant from the bus run between Upstate and McGregor to the run between Clinton Correctional Facility and Washington Correctional Facility. The change in routes took Complainant away from her alleged harassers. Complainant took over the route that had been previously driven by John Mangum, who, in turn, took over Complainant's old route. (Tr. 15, 33)

11. Complainant's sexual harassment complaint was forwarded to DOCS and received by DOCS personnel. (Tr. 29-30)

12. In April of 2006, DOCS disqualified Complainant from driving DOCS coaches. (Tr. 36-37) Complainant was told that she was disqualified because on or about April 5, 2006, while at a rest stop, she encountered and entered another DOCS coach without authorization. (Tr. 38) Complainant entered the other coach in order to talk to Sergeant Gregory LaFrance, who is now her husband. (Tr. 39)

13. Complainant alleges that Respondent disqualified her in retaliation for her prior complaint of sexual harassment. (ALJ Exhibit 2)

14. Complainant was actually disqualified by DOCS after Mangum made a complaint about her. Mangum complained that on March 31, 2006, Complainant called his cell phone and spoke to Sgt. LaFrance. Complainant indicated that she had mechanical problems with her bus. Sgt. LaFrance told Mangum to slow down in order let Complainant's bus catch up with them. When Complainant's bus caught up with Mangum's bus, both buses pulled into a rest area. (Respondent's Exhibit 4)

15. Mangum also complained that Complainant often called his cell phone looking for Sgt. LaFrance. He stated that as a result of the frequent calls, Mangum began turning off his cell phone. Complainant and Sgt. LaFrance denied that Complainant called Mangum's cell phone looking for Sgt. LaFrance. (Respondent's Exhibit 3)

16. DOCS' Inspector General's office conducted an investigation into the matter. It was determined that no one had acted improperly and the allegations were unsubstantiated. (Respondent's Exhibit 3)

17. After she was removed from her DOCS coach, Complainant drove a school bus for First Transit. As a result of that change, Complainant's hours were reduced along with her hourly rate of pay. (Tr. 15-16, 51)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an individual for having made a complaint of discrimination. Human Rights Law §§ 296.1(e).

Respondent DOCS has asserted that it is not a proper party to this action in that it was not Complainant's employer. When two or more entities enter into a contract for the performance of services, and one company retains sufficient control over the terms and conditions of employment of the employees of the other entity, the two entities may be deemed joint employers. *State Division of Human Rights (Emrich) v. GTE Corp.*, 109 A.d.2d 1082, 1083, 487 N.Y.S. ed 234, 235 (4th Dept. 1985).

The Human Rights Law defines an "employer" in Section 292.5, by making reference only to the number of persons in its employ. It does not offer a definition that would give insight into whether an employer-employee relationship exists. Courts have held, however, that four elements should be considered in determining if such a relationship exists: (1) selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power of control over the servant's conduct. *Id.*, at 1083. The key element is the fourth element, in that an employer-employee relationship can be found based upon evidence that the employer exercised "control over the results produced or over the means used to achieve the

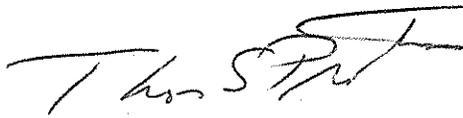
results.” *Scott v. Massachusetts Mutual Life Ins. Co.*, 86 N.Y.2d 429, 433, 633 N.Y.S.2d 754 (1995) (quoting *Matter of Ted is Back Corp.*, 64 N.Y.2d 725, 726, 485 N.Y.S.2d 742 (1984)).

Here, Complainant was clearly an employee of First Transit. She was not, however, an employee of DOCS for the purposes of the Human Rights Law. DOCS did not choose Complainant, nor did it pay her, nor did it have the power of dismissal over her (in fact, after DOCS disqualified Complainant, she continued to drive buses for First Transit). The amount of control DOCS had over her performance was, at most, minimal. The routes Complainant drove were set by the contract between First Transit and DOCS. DOCS employees had no supervisory authority over Complainant and the only control DOCS or its employees had over Complainant was the right to tell Complainant when and where to stop the buses, for security purposes. Complainant drove First Transit buses, which she picked up from First Transit’s yard. She made her discrimination complaints to her direct supervisor at First Transit and received her assignments from First Transit. Accordingly, the facts in this case do not establish that DOCS was Complainant’s employer under Human Rights Law. *See, Bello v. City of New York Human Resources Administration*, DHR Case No. 10117566 (July 27, 2009) and, *Sanchez v. City of New York Human Resources Administration*, DHR Case No. 10117569 (July 27, 2009).

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: August 31, 2009
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is stylized with a long horizontal line extending from the top of the "T".

Thomas S. Protano
Administrative Law Judge