NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DARREN D. MCMULLEN,

Complainant,

v.

BELLAVIA TRANSPORTATION,

Respondent.

NOTICE AND FINAL ORDER

Case No. 5753588

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 27, 2007, by Martin Erazo, Jr., 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 KUMIKI GIBSON, 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, this 9th day of October, 2007.

_____
KUMIKI GIBSON
COMMISSIONER

TO:

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **5753588**

SUMMARY

Complainant, who is African American, alleged that he was a victim of racial discrimination in employment. Complainant worked as a livery cab driver. Complainant charged that Respondent discriminated in the distribution of work assignments. Complainant also charged that Respondent retaliated by terminating his employment after he complained of racial discrimination. Complainant failed to meet his burden of proof. Dismissal of the complaint is recommended.

PROCEEDINGS IN THE CASE

On October 7, 2002, 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 an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on October 3-5, 2006.

Complainant and Respondent appeared at the hearing. Complainant was represented by Ralph G. Demasi, Esq. Respondent was represented by Gaetano L. Colozzi, Esq.

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

Parties

1. Complainant is African-American. He worked for Respondent as a livery cab driver in the City of Syracuse ("Syracuse"). (ALJ Exhibit I) Respondent was a Syracuse-based taxi cab company.

2. Complainant first worked for Respondent from September 16, 2000 until approximately October 2001. (Tr. 209, 210) Complainant returned to work for Respondent three months later for period of approximately three months: January 2002 to approximately March 2002. (Tr. 209, 210)

Allegations of Racial Bias

3. Complainant alleged racial bias based on the following: Respondent allegedly did not assign African–American drivers to the preferred location in Syracuse known as "Carrier Circle," which allegedly generated more fares. (Tr. 81, 82) Complainant alleged that he was assigned to the least favored Syracuse location of "State and James." (Tr. 93) Complainant allegedly did not receive "contract jobs" as compared with white cab drivers. (Tr. 147, Complainant's Exhibit 2) Contract jobs referred to standing agreements to provide various customers with routine cab service. Complainant alleged that Respondent did not allow him to use his personal vehicle as a taxi cab, and instead had to lease a vehicle from Respondent. (Tr.

167-69) Complainant argued in the post-hearing brief that he was subjected to a racially hostile environment based on testimony of other witnesses that the word "nigger" had been used in the workplace. (Tr. 358-59, 542-45)

Allegations of Retaliation

4. Complainant alleged that Respondent retaliated on two separate occasions by dismissing him after Complainant complained about racial bias. Respondent dismissed him in October 2001. Respondent rehired Complainant in January 2002, and dismissed him again in March 2002.

Respondent's Position

5. Respondent argued that Complainant was an independent contractor. (Tr. 549, 561) Respondent also denied discriminating against Complainant. (ALJ Exhibit IV) Respondent asserted that Complainant was fired in October 2001 because of disruptive behavior with Respondent's communication system and for picking up an unauthorized fare. (Tr. 58, 484, 495, 499) Respondent asserted that Complainant was fired in March 2002 because Complainant "stole" a job assignment given to another taxi cab driver. (Tr. 110-12, 503-04)

Employer

6. Respondent was Complainant's employer. Respondent set Complainant's work schedule, assigned the fares, and duty station. (Tr. 27-9, 558-60)

Complainant's Credibility

7. Complainant demonstrated an evasive demeanor at hearing. Complainant demonstrated a willingness to easily and quickly change his answers under oath. For example, Complainant admitted he had been convicted for "driving while impaired." (Tr. 214-15) Shortly thereafter, Complainant testified that he did not "drink and drive" and "never under the influence." (Tr.

215-16) In another instance, Complainant denied that he resigned from a previous employment because of a pending charge of illegal drug use while on the job. (Tr. 219) Complainant subsequently admitted to the circumstances of the resignation when presented with documentary evidence. (Tr. 308-11, Respondent's Exhibits 1, 4)

8. Complainant's testimony also raised serious credibility issues about Respondent's alleged racial bias. Complainant gave contradictory testimony concerning Respondent's alleged bias in job assignments, the distribution of contract jobs, the permission to use personal vehicles as a taxi cab, and the March 2002 dismissal.

Contract Jobs

9. Complainant's initial position was that he did not receive any contract jobs. (Tr. 147) Complainant submitted a list of Respondent's contract clients. (Complainant's Exhibit 2) Complainant compared himself with a white cab driver, Robert Burns ("Burns"). (Tr. 107-8) Complainant believed that Burns made more money because Burns was assigned contracts jobs that "I never received." (Tr. 108) However, Complainant subsequently admitted receiving, on a regular basis, a very large number of assignments from that same contract customer list. (Tr. 147-65)

Use of Personal Vehicle

10. Complainant alleged that Respondent's owner, Anthony Bellavia ("Bellavia"), prevented Complainant from placing a personal vehicle into taxi service because Complainant is black. Complainant leased a vehicle from Respondent. (Tr. 167-69) However, Complainant clearly demonstrated an evasive demeanor when asked if Complainant knew of any black taxi cab drivers working for Bellavia, "that own their own vehicles." (Tr. 170) Initially, Complainant refused to answer the question. (Tr. 169, 170) Complainant reluctantly admitted

that Complainant was aware of an African-American driver that used a personal vehicle as a taxi cab. Complainant identified this individual as Albert Outley. (Tr. 169-170)

11. Burns, the white driver with whom Complainant compared himself, also leased a vehicle from Bellavia. (Tr. 340)

Assignment of Location

12. Complainant alleged that Respondent gave him the least favored taxi cab location of State and James. Complainant alleged that this location did not provide him with many fares, as compared with white drivers. However, Burns, the white driver with whom Complainant compared himself, was also assigned the same location as Complainant. Burns found the State and James assignment to be a good "central location" for fares. (Tr. 335, 336)

13. Complainant admitted spending a great deal of time away from the assigned State and James location. Complainant's landlord, Michael Mutko ("Mutko"), testified that Complainant spent a substantial amount of work time at Mutko's apartment building. (Tr. 192, 193, 318) In comparison, Wilfred Anderson ("Anderson"), an African-American driver, remained near the assigned location in order to quickly respond to service calls on an ongoing basis. (Tr. 400 - 402) Burns physically remained stationed at the State and James location throughout his shift. (Tr. 350) Another white driver, James Burdick ("Burdick"), also remained stationed "near" the cab stands at State and James. (Tr. 384)

Fares

14. Complainant based his belief that he received lower fare totals based on the conversations he had with Burns. (Tr. 39, 40)

15. Both white and black drivers testified that they received similar treatment in the amounts of assignments and fare totals. (Tr. 344, 347, 393, 394, 410, 418) Documentary

evidence supported that during specific instances in 2002, Complainant and Anderson, both who are African-American, made more money than their white counterparts. (Respondent's Exhibit 5)

Retaliation and Dismissal

16. Bellavia admitted Complainant made several complaints about racial discrimination in the assignment of fares. (Tr. 457, 461) Bellavia credibly testified that he investigated most of Complainant's complaints and found that all drivers received similar assignments. (Tr. 458-61) Bellavia's observations were supported by the documentary evidence. (Respondent's Exhibit 5)

17. Bellavia dismissed Complainant in 2001 because Complainant picked up an unauthorized street fare and because Complainant often disrupted Respondent's radio transmissions. (Tr. 484, 495) Complainant was unable to pick up his assigned fare "at St. Joe's" when he took the time to pick up the street fare. (Tr. 484) Respondent had to dispatch another cab to pick up Complainant's assigned fare. (Tr. 484-91) In addition, Complainant was a livery driver and did not have the necessary "hack" or "tag" license to "pick people off the street." (Tr. 67-9, 400) A livery driver was limited to picking up passengers only assigned by Respondent's radio dispatcher. (Tr. 67-9)

18. Complainant also admitted to disruptive behavior over Respondent's radio by shouting "keep feeding them." (Tr. 58) Complainant admitted making the comments once or twice during every shift, as a protest against assignments given to other drivers. (Tr. 58) Complainant's radio disruptions included holding down the radio button in his taxi. This action blocked the radio dispatcher's ability to speak with all cab drivers. (Tr. 499)

19. When Bellavia dismissed Complainant in 2001, Complainant called Bellavia a "fucking dago" and told Bellavia to "suck his big black dick." (Tr. 501, 519)

20. Bellavia dismissed Complainant in 2002 because Complainant took a fare that was assigned to another driver. (Tr. 110-12, 503-04)

21. Complainant offered contradictory testimony on the circumstances surrounding his dismissal. Complainant admitted that he picked up the unassigned fare at a Kentucky Fried Chicken location ("KFC"). (Tr. 317) The radio dispatcher assigned the KFC fare to another driver. Complainant could hear the assignments to other drivers. (Tr. 319) Complainant picked up the KFC fare instead of his own assigned fare at the "Shoppingtown" location. (Tr. 323)

22. Complainant's explanation that he just happened to stop at KFC because he was hungry was not credible. Complainant admitted that he never purchased food while at KFC. (Tr. 323) Complainant admitted that it was the protocol for drivers to call the radio dispatcher when stopping for food. (Tr. 314, 315, 316) In this instance, Complainant did not find it necessary to call the dispatcher.

23. Bellavia dismissed one non-black cab driver for taking an unassigned fare and dismissed another non-black driver for not producing all the earned fare money at the end of a shift. (Tr. 491-95)

Racial Comments

24. Complainant made a post hearing claim of a racially hostile environment based on the testimony given by Burns and Bellavia during the hearing. (Complainant's Post Hearing Brief) Burns testified that the word "nigger" had been used at times among drivers. (Tr. 358-59) Bellavia witnessed African-American drivers use the word among themselves. (Tr. 542-45) However, Complainant never testified that he was a victim of a racially hostile environment because of any offensive name calling. Complainant never testified that he was called or heard use of the word "nigger." All of the African American drivers specifically testified that they

never heard the use of the word "nigger." (Tr. 397-99, 409-10) Other than Burns, none of the white drivers heard use of offensive language. (Tr. 378-79, 416, 423)

OPINION AND DECISION

Employer

Complainant was not an independent contractor. Respondent was Complainant's employer. There are several factors that may be considered to establish if there is an employer-employee relationship. Those factors include the selection and engagement of the servant; the payment of salary or wages; the power of dismissal; and the power of control of the servant's conduct. *State Division of Human Rights ex. rel. Emrich v. GTE Corp.,* 109 A.D.2d 1082, 487 N.Y.S.2d 234 (4th Dept. 1985). In this particular matter Respondent had the control. Respondent hired Complainant, set his job duties, controlled his schedule, and supervised Complainant's employment. Respondent made the final decisions that Complainant found discriminatory.

Race Discrimination

Complainant alleged that Respondent unlawfully discriminated against him in the assignments for cab service. Fewer fares meant less income, since cab drivers worked on commission.

It is an unlawful discriminatory practice for an employer to discriminate against an individual because of his race. Human Rights Law §296.1(a). Complainant has the burden of proof to establish a prima facie case of discrimination. Complainant must demonstrate that he is a member of a protected class, he was qualified for the position, he suffered an adverse employment action, and that the adverse employment action occurred under circumstances giving rise to an inference of racial discrimination. *Pace College v. Commission on Human Rights*, 38 N.Y.2d 28, 39-40, 377 N.Y.S.2d 471 (1975), *citing*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

If Complainant establishes a prima facie case of discrimination, then Respondent must produce evidence showing that its action was legitimate and non-discriminatory. *Ferrante v. American Lung Assoc.*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997), *citing*, *Miller Brewing Co. v. N.Y. State Div. of Human Rights*, 66 N.Y.2d 937, 498 N.Y.S.2d 776 (1985).

Complainant failed to establish a prima facie case of discrimination.

Complainant demonstrated that he is a member of a protected class. Complainant is African American. Complainant also demonstrated that he was qualified for the position of a livery cab driver. However, Complainant's own version of events failed to establish the remaining elements necessary for a prima facie case. Complainant did not establish that an adverse employment action occurred under circumstances giving rise to an inference of racial discrimination.

Complainant alleged that he was stationed in the least favored cab location of State and James because he is African American. However, Complainant's own testimony supported that white drivers were also assigned to the same State and James location that Complainant described as the least favored cab location. No inference of racial discrimination can be drawn from this allegation.

Complainant was under the belief that Respondent assigned white drivers more fares. However, Complainant admitted that he spent a great deal of time away from his assigned State and James location and spent work time at his apartment location. Both black and white cab drivers testified that they stationed themselves at or near the assigned work location in order to quickly respond to service calls on an ongoing basis. Both black and white drivers testified they received similar assignments and income. While Complainant complained about insufficient assignments, Complainant's own testimony supports he did not make himself available for work. No inference of racial discrimination can be drawn from this allegation.

Complainant also alleged that he did not receive the contract jobs given to white drivers.

However, Complainant clearly contradicted himself on this allegation. Complainant received a great deal of the contract assignments that he alleged only white drivers received. No inference of racial discrimination can be drawn from this allegation.

Complainant made the bare allegation that Respondent did not allow Complainant to bring a personal vehicle into service as a taxi cab because he is African American. However, Complainant contradicted his own testimony. Complainant testified that Respondent allowed another African American driver to use a personal vehicle as a taxi cab. No inference of racial discrimination can be drawn from this allegation.

Hostile Work Environment

Complainant argued in his post hearing brief that he was subjected to a hostile racial environment based on the testimony given by Burns and Bellavia. Burns testified that he had heard other drivers use the word "nigger." Bellavia testified that some African American drivers used the word among each other.

A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is 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, 786 N.Y.S.2d 382 (2004).

A complainant must subjectively view the conduct that creates a hostile environment as unwelcome. In addition, a reasonable person must objectively view the conduct as severe and pervasive enough to create an abusive environment. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, *716 N.Y.S.2d 533* (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford,*

Lincoln-Mercury, Inc., 175 Misc.2d 795, 669 N.Y.S.2d 122 (Sup.Ct. N.Y.Co. 1997), *aff'd in relevant part*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *lv. denied* 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999).

Complainant failed to prove the elements of a hostile work environment.

There is absolutely no evidence that Complainant ever heard or witnessed the use of the word "nigger" in the workplace. Complainant never alleged that he heard offensive racial language. Complainant cannot credibly establish that he was negatively impacted by racially offensive language that he never heard.

Complainant provided no evidence whatsoever to explain the degree or frequency of any racially offensive language that may have been used. Complainant did not provide any evidence on the issue of severity and pervasiveness. The only racial comments that Complainant was exposed to were the comments Complainant made to Bellavia at the time of Complainant's dismissal. Complainant called Bellavia a "fucking dago" and told Bellavia to "suck his big black dick."
In the instant case, Complainant provided no evidence any of the necessary elements to establish a claim of racial harassment. Since Complainant failed to meet his burden of proof, his claim of hostile work environment must be dismissed.

Retaliation

Complainant alleged that after he complained about racial discrimination, Respondent retaliated against him by terminating his employment in 2001, and again in 2002. Human Rights Law §296.7 states in pertinent part that "it shall be an unlawful discriminatory practice…for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he…has opposed any practices forbidden under this article or because he…has filed a complaint, testified or assisted in any proceeding under this article."

In order to establish a prima facie case of retaliation, Complainant must show that he engaged in protected activity, that Respondent was aware that he had engaged in the protected activity, that Complainant suffered an adverse employment action, and that there is a casual connection between Complainant's engagement in the protected activity and his adverse treatment by Respondent. *Pace v. Ogden Services Corp., 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3rd Dept. 1999).*

Complainant failed to establish a prima facie of retaliation.

Complainant demonstrated that he engaged in protected activity when he informed Respondent that assignments were allegedly given in a racially biased manner. Respondent admitted that Complainant complained about racial bias in assignments. Complainant established that after he complained, he suffered adverse employment actions. Respondent terminated his employment in 2001 and in 2002. However, Complainant did not establish that there was a casual connection between the adverse employment actions and opposing alleged discriminatory practices.

Complainant committed two offenses that caused his dismissal in 2001. Complainant ignored an assigned fare when Complainant chose to pick up an unauthorized fare "off the street." Respondent was forced to send another cab to the assigned location. Complainant was a livery driver without the necessary license to pick up street fares. Complainant also engaged in serious disruptive behavior in 2001 by shouting over the car radio communication system, "keep on feeding them" when Complainant did not approve of a radio dispatcher's assignment to another cab driver. All of the cab drivers could hear Complainant's words. Complainant also paralyzed Respondent's communication system at times, by depressing the taxi cab radio button. This act prevented Respondent's radio dispatcher from communicating with all drivers. There is no evidence that Complainant's 2001 dismissal was racially motivated.

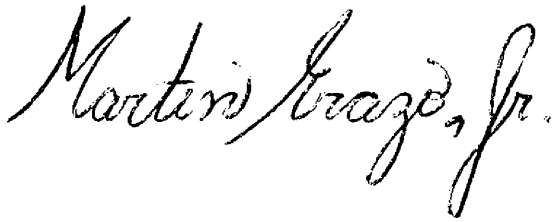
Complainant was dismissed in 2002 for taking a job assignment that had been given to another driver. Complainant admitted taking a fare that did not belong to him. The credible evidence supports that Respondent had dismissed a non-black driver for engaging in similar behavior. There is no evidence that Complainant's 2002 dismissal was racially motivated.

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:
Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge