

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CHARLES YACKLON,

Complainant,

v.

**EAST IRONDEQUOIT CENTRAL SCHOOL
DISTRICT,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10116979

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 29, 2008, by Spencer Phillips, 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 21 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10116979**

SUMMARY

Complainant alleges Respondent subjected him to unlawful discriminatory action based on his age when Respondent refused to authorize him to drive one of Respondent's school bus routes. Complainant has failed to demonstrate that Respondent was his employer and his complaint must be dismissed.

PROCEEDINGS IN THE CASE

On April 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 Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on May 28 and 29, 2008.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus. Respondent was represented by Miles G. Lawlor, Esq.

Permission to file post-hearing briefs was granted. A timely brief was received from Respondent; the Division did not submit a post-hearing brief.

FINDINGS OF FACT

1. Complainant was born on August 28, 1934, and was seventy years old or older at all times relevant to his complaint. (ALJ Exh. 1; Tr. 15)
2. In February, 2004, Complainant applied for a position as a school bus driver with Laidlaw Transit Co. (“Laidlaw”), one of the country’s largest providers of school transportation services. (Tr. 15, 101-02)
3. Laidlaw interviewed Complainant and eventually hired Complainant as a school bus driver. Complainant received, and continues to receive, his school bus driving assignments from Laidlaw dispatchers working in Laidlaw’s Ridge Road terminal. (Tr. 15, 101-03, 105)
4. Complainant receives his salary and benefits from Laidlaw, is supervised by Laidlaw supervisors, and is subject to discipline by Laidlaw management. (Tr. 106, 152)
5. The terms and conditions of Complainant’s employment, including route assignments, salary, benefits and grievance procedures, are governed by a collective bargaining agreement between Laidlaw and the union to which Complainant belongs. (Joint Exh. 6; Tr. 110-12)

6. Complainant did not submit an employment application to Respondent and was not interviewed by any individuals employed by Respondent. (Tr. 102-03)

7. Complainant is not, and has never been, employed by Respondent. (Tr. 105-06, 153-54, 191)

8. Respondent has no authority to hire, fire, pay, provide benefits to, discipline or assign driving routes for Laidlaw bus drivers, including Complainant. (Tr. 240-43)

9. At the time of public hearing, Complainant remained an active employee of Laidlaw and continued to receive bus route assignments, salary, and benefits from Laidlaw. (Tr. 93-94, 152-53)

OPINION AND DECISION

The Human Rights Law prohibits an employer from discriminating against an employee on the basis of age. N.Y. Executive Law § 296.1 (a). The Human Rights Law does not define the term “employer,” but merely provides that an employer must have at least “four persons in his employ” to be covered by the statute. N.Y. Exec. Law §292.5. *See Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 483 N.Y.S.2d 659 (N.Y. 1984).

An employer-employee relationship exists when the following four elements are present: (1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant’s conduct. *See State Division of Human Rights, on Complaint of Efronsini F. Emrich, Petitioner v. GTE Corporation, Respondent*, 109 A.D.2d 1082, 487 N.Y.S.2d 234 (4th Dep’t., 1985) (finding an employer-employee relationship where Respondent selected, hired, possessed and exercised control over, held power to dismiss, and indirectly paid wages to, Complainant). Of these four elements, the

essential factor is the control over the worker's conduct, including "selection, payment of wages and power of dismissal." See *Germakian v. Kenny International Corp.*, 151 A.D.2d 342, 543 N.Y.S.2d 66 (1st Dep't., 1989).

Respondent is not Complainant's employer. Respondent did not hire Complainant and has no authority to terminate his employment as a bus driver. Respondent provides no wages, benefits or other compensation to Complainant. Respondent has no power to direct Complainant as to which bus routes he will or will not drive. Furthermore, Complainant unequivocally admits, and so testified at the public hearing, that Respondent is not his employer. To the contrary, Complainant has been employed by Laidlaw as a school bus driver since 2004, and continued to be so employed at the time of public hearing.

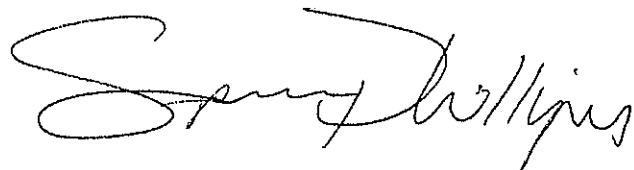
Because no employer-employee relationship exists between Respondent and Complainant, the proscription of "employment" discrimination contained in Human Rights Law is inapplicable. Therefore, the complaint should be dismissed for lack of jurisdiction.

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: August 29, 2008
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer Phillips". The signature is fluid and cursive, written in a professional style.

Spencer Phillips
Administrative Law Judge