STATE OF CONNECTICUT
Commission on Human Rights and Opportunities
OFFICE OF PUBLIC HEARINGS

Commission on Human Rights and Opportunities ex rel. Phillip Baroudjian, Complainant	**:**	**CASE NO. 0430505**
	:	**Fed No. 16aa401151**
v.		
North East Transportation Company, Inc., Respondent	**:**	**July 16, 2008**

MEMORANDUM OF DECISION

Preliminary Statement

The public hearing (or hearing) for the above-captioned matter was held January 28 through February 1, 2008, February 4 and 8, 2008, pursuant to the conference summary and order of the undersigned presiding human rights referee issued January 16, 2007. Attorney Christopher N. Parlato appeared on behalf of Phillip Baroudjian (complainant or Baroudjian) who resides at 5 Fairbanks Street, Waterbury, CT 06705. David L. Kent, Human Rights Attorney III, appeared on behalf of the commission on human rights and opportunities (commission) located at 21 Grand St., 4th Floor, Hartford, CT 06106. Attorney Kathleen M. Grover appeared on behalf of North East Transportation (respondent) located at 1717 Thomaston Avenue, Waterbury, CT 06704. The complainant and the commission filed joint briefs with Attorney Parlato's affidavit and supplemental affidavit of attorney's fees. The respondent filed its briefs and the record closed on April 25, 2008.

The issues addressed in this decision are: 1) whether the complainant proved by a preponderance of the evidence that the respondent discriminated against him on the basis of his race, color, national origin, ancestry (Arabic) and/or alienage in the terms and conditions of his employment when it suspended, warned, poorly evaluated and retaliated against him; and 2) if so, whether the complainant is entitled to any damages or other relief.

For the reasons set forth below, it is hereby determined that the commission and the complainant have not proven that the respondent discriminated against the complainant in violation of state or federal law. Judgment is entered in favor of the respondent and the complaint is dismissed.

Procedural History

On April 12, 2004, the complainant filed his complaint affidavit (complaint) with the commission alleging that the respondent discriminated against him when it altered the terms, conditions or privileges of his employment by having warned, poorly evaluated, suspended and retaliated against him because of his race (Arabic) in violation of General Statutes §§ 46a-58 (a) and 46a-60 (a) (1), Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e and the Civil Rights Act of 1991. During the hearing, the complainant submitted an amended complaint (Exhibit C-55) adding the allegations that he was discriminated against because of his color, national

[1] References made to the transcript pages are designated as "Tr." followed by the accompanying page numbers. References made to the exhibits are designated as either "Ex. C." for the complainant and the commission and "Ex. R." for the respondent followed by the accompanying exhibit numbers. References made to the findings of fact are designated as "FF" followed by the accompanying numbers and references made to the briefs are designated as "R. Brief" and "R. Reply Brief" for the respondent and "C. Brief" and "C. Reply Brief" for the commission and the complainant followed by the accompanying page numbers.

origin, ancestry and/or alienage as an “Arabic man” and that he incurred legal expenses.

The commission investigated the allegations of the complaint, found reasonable cause to believe that discrimination had occurred, and attempted to conciliate the matter. After conciliation failed, the complaint was certified to public hearing on December 13, 2006, in accordance with General Statutes § 46a-84 (a). On December 18, 2006, the office of public hearings issued to all parties of record the notice of public hearing along with a copy of the complaint. The respondent filed an answer to the complaint on January 8, 2007 and also submitted an amended answer (Exhibit R-17) during the public hearing. The hearing was held on January 28 through February 1, 2008, February 4 and 8, 2008. All statutory and procedural prerequisites to the public hearing were satisfied and this complaint is properly before the undersigned Presiding Referee for decision[1].

Findings of Fact

1. The complainant is employed with the respondent as a fixed route operator or bus driver and is qualified for that position. Tr. 10, 13.
2. A fixed route operator drives a regular fixed route, which consists of a set schedule of repetitive bus stops during a twelve-hour timeframe. A tripper route operator drives a tripper route, which does not have a set schedule for a twelve-hour timeframe. The tripper route operators drive to different locations during their shift and may relieve fixed route operators during their break-time. A spare board operator drives various routes for drivers who are on vacation or are absent for any reason. A paratransit operator drives a fifteen or less passenger vehicle, which provides service to disabled persons. Tr. 564, 575, 666, 670-72.

3. The complainant was born in Egypt, speaks Arabic and is of Arabic ancestry and national origin. Tr. 11-12, 416; Ex. C-55.
4. There were no other employees of Arabic ancestry and/or national origin employed by the respondent. Tr. 140.
5. On June 21, 2003, Peter Vaccarelli, the dispatch supervisor, spoke to the complainant about leaving the downtown location early and missing passengers for his connections. Vaccarelli told the complainant never to leave early again and issued the complainant a verbal warning. Ex. R3-D.
6. The respondent never informed the union or the complainant in writing about the June 21, 2003 infraction and verbal warning. Ex. R3-D; Tr. 345-46, 354.
7. On January 5, 2004, the complainant drove the Montoe/Bradley Route 16/36. Tr. 53.
8. Cemetery Road was an unauthorized road to travel on and was considered going "off-route." Tr. 80, 97; Ex. C-8.
9. The respondent required a driver to call in to the respondent company first before going off-route. Tr. 361, 539.
10. On January 5, 2004, the complainant drove his bus on Cemetery Road without calling the respondent for permission before doing so, he "left the line early" (left before the scheduled time to leave the location of departure for driving his route) and he arrived at Exchange Place eleven minutes early to take his lunch break. Tr. 100, 225-26, 233, 298, 311-12, 361-62, 404, 418-19, 539, 426-27, 468-69, 696-97.
11. The respondent's management was unaware of the inconsistent manner that bus drivers were performing Route 16/36 from 1:45 p.m. until 2:00 p.m., the time immediately preceding the lunch break. Tr. 514, 521, 589-90.
12. The respondent met with the complainant on January 29, 2004 to discuss the violations that occurred on January 5, 2004. Exs. R-6, R-7, C-8.
13. On February 4, 2004, the respondent issued the complainant a one-day suspension for the infractions it believed occurred on January 5, 2004 and placed it in his personnel file. He lost one day of pay. Tr. 15-16. The suspension was also based on the complainant's dishonesty about his reason

for using Cemetery Road and on a prior violation involving leaving the line early and missing passengers for connections. Ex. C-8, C-24; Tr. 894-95, 920-21.

14. On February 10, 2004, the complainant provided Dennis Raymond, his union representative, with a grievance for the respondent's actions against him including the suspension. Ex. C-11. The respondent did not receive the grievance until February 26, 2004. The respondent denied the complainant's grievance because it was untimely submitted by Dennis Raymond. Tr. 48, 917; Ex. C-17.
15. On February 24, 2004, the complainant sent the respondent an internal complaint of discrimination based on Vaccarelli allegedly making a racist comment toward him and on the negative treatment he received at the January 29, 2004 meeting. Ex. C-13.
16. On February 27, 2004, the respondent held a meeting to discuss the complainant's internal complaint of discrimination, primarily the racist remark. Ex. C-15; Tr. 333-36.
17. On March 23, 2004, the respondent held a meeting to discuss the complainant's internal complaint of discrimination, the grievance regarding his suspension and the complainant's damage to company property (a broken bulletin board). Exs. R-18-R-21; Tr. 862-64.
18. On March 23, 2004, the respondent rescinded the suspension of the complainant, reimbursed his one-day of lost pay and instead issued him a warning letter, which was placed in his personnel file. The respondent did this because the respondent acknowledged it had not informed the union or the complainant in writing of the prior verbal warning of June 21, 2003. The complainant did not agree with reducing his suspension to a warning. Tr. 318, 343, 864-65, 894-95, 921; Exs. C-7, R-19, R-20 and R-22.
19. The respondent conducted an investigation regarding the complainant's internal complaint of discrimination and subsequently closed the investigation because it could not confirm that any discrimination had occurred. The respondent counseled Vaccarelli regarding the respondent's policy against discrimination. Exs. R-18, R-19, R-21 and C-14.

20. Vaccarelli did not make a derogatory statement about the complainant's ancestry or national origin. Tr. 839, 841-42; Ex. R-16.
21. Joseph Spina, Jr., the equal employment opportunity (EEO) officer, and Vaccarelli were involved with and issued the discipline of Izbi Mamudi, Zefki Istrefi, James O'Toole, Jeanne Urbano/Taylor, Virginia Giordano, Angelo Pennella, Donald Ruland and the complainant. Exs. R-24, C-44 – C-50. They were all fixed route operators who were all subject to the same standards and policy for disciplinary actions for violations involving their duties as drivers. Exs. R-24, C-44, C-46 – 50; Tr. 566, 673, 675-76, 854, 907.
22. Anthony Sampieri, Melody Nelson and Tomor Tuda were paratransit and van drivers. Tr. 564, 885; Ex. C-56.
23. James Costante drove a tripper route. Tr. 670-71.
24. Keith Carroll was considered a tripper route driver. Tr. 671-72, 668-69.
25. Joseph Bergin was a spare board operator. Tr. 575.
26. Spina consulted Barbara Kalosky, the general manager, about disciplinary matters. Kalosky was not a party to the disciplinary meetings involving Mamudi, Istrefi, O'Toole, Urbano/Taylor, Giordano, Pennella and Ruland except for the meeting involving Mamudi's discipline of June 7, 2002. Tr. 638, 849, 856; Ex. R-23.
27. Verbal warnings are issued for going "off-route"; missing a passenger; being in an unauthorized area; attendance issues (e.g., tardiness); inappropriate conversations with passengers in person or on a telephone; not calling in when sick or late; not calling in when an incident occurs on the bus; and a disruptive interaction involving two employees. The discipline could be more severe depending upon the incident. Tr. 898-99.
28. Written warnings are issued for leaving the line early and having a "derogatory" conversation with a client who was missed; multiple infractions; multiple days off or multiple times coming to work late. Tr. 901-02.
29. Suspensions are issued for very bad accidents where there is a violation of law; multiple problems with attendance, accidents, missed passengers, missed turns on a bus route, untimely operation of a schedule, not allowing passengers to

make connections; leaving the bus unattended; having unauthorized passengers; fighting on company property; and progressive discipline after a warning. After a suspension, the discipline could progress to multiple day suspensions or a discharge depending on the violations. Tr. 903; Exs. R-23, R-24, C-48 – C-50.

30. Multiple day suspensions could be issued for insubordination. Tr. 902.
31. Automatic discharge is issued for insubordination, theft, a failed drug and alcohol test and reckless endangerment. Tr. 902, 904.
32. The respondent's discipline policy is utilized in conjunction with the union agreement, which states that an employee can be suspended without first being issued a warning in the event of dishonesty. Ex. C-1, p. 11, section 3.
33. On June 7, 2002, Mamudi received a seven-day suspension and a final warning, which was based on an accident where he failed to properly secure the bus causing the bus to roll away with passengers on board. When issuing the discipline, the respondent considered a prior verbal warning for a similar infraction and his dishonesty about reporting this accident. On February 4, 2004, he also received a two-day suspension and was re-issued a final warning for an accident cited by the police. The respondent considered his prior similar infractions of accidents when issuing this discipline. Exs. R-23, R-24; Tr. 681, 747-50.
34. On April 24, 2003, Istrefi received a one-day suspension for three accidents and several complaints by passengers involving missing passengers and missing designated turns. He caused damage to the bus and injury to passengers. The respondent considered his prior similar violations. Ex. C-48.
35. On December 15, 2003, Ruland received a warning for an accident and concerning his attendance record. Although, in the past, the respondent had discussed Ruland's attendance record with him, he had no prior warnings for similar violations or credibility issues with the respondent. Ex. C-47.
36. On March 1, 2004, Urbano/Taylor received a two-day suspension and a final warning concerning an accident, her driving record, operation of her schedule and her unsatisfactory attendance record. The respondent took into

consideration her prior similar infractions of accidents and poor attendance, and her dishonesty about not answering the telephone when respondent tried to contact her many times. Also, on January 6, 2004, Urbano/Taylor had received a one-day suspension because of an accident cited by the police department and her unsatisfactory attendance record. The respondent also considered her two other chargeable accidents for which she was suspended for two days and that she was warned in the past for similar infractions. Ex. C-50.

37. On March 1, 2004, O'Toole received a one-day suspension based on an accident cited by the police. He also was issued a written warning for failing to wear a seatbelt and failing to use signal lights. The respondent considered O'Toole's prior similar violations for accidents. Ex. C-49.
38. On April 2, 2004, the respondent issued Giordano a warning for leaving a passenger by not stopping at a designated bus stop and she admitted to going off-route because of traffic. She reimbursed that missed passenger's taxi fare. Ex. C-44; Tr. 870-71. Also, on May 13, 2004, she received a warning for failing to come to a complete stop, failing to follow railroad crossing procedures and transit procedures, and operating her bus behind schedule. The respondent considered that on both occasions Giordano had no history of similar violations or credibility issues with the respondent. Ex. C-44.
39. On May 4, 2004, Pennella received a warning for failure to arrive at Exchange Place on time. The respondent considered that Pennella had no prior similar violations or credibility issues with the respondent. Ex. C-46.
40. On January 17, 2001, Sampieri received a one-day suspension for an accident that resulted in police charges. He had no prior similar violations. Ex. C-56
41. On September 25, 2001, Nelson received a one-day suspension for picking up her clients late and writing incorrect entries in her driver's manifest. Nelson had prior similar infractions. Ex. C-51.
42. On April 19, 2005, Tuda received a two-day suspension for his driving habits. The respondent considered that he had prior similar infractions. Ex. C-52.

43. On October 24, 2003, Costante received a verbal warning for failing to pick up passengers. She had no prior similar infractions or credibility issues with the respondent. Ex. C-43.
44. On December 9, 2003, Carroll received a verbal warning for leaving Exchange Place late. He had no prior similar infractions and no credibility issues with the respondent. Ex. C-42.
45. On December 16, 2003, Bergin received a verbal warning based on a failure to follow his schedule correctly. He had no prior similar infractions or credibility issues with the respondent. Ex. C-41.

I

DISCUSSION

A

Federal Law

The complainant alleged that the respondent violated Title VII as enforced through General Statutes § 46a-58 (a) when it discriminated against him because of his race, color, national origin, ancestry and/or alienage. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) provides in relevant part: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (m) provides in relevant part: "an unlawful employment practice is established when the complaining party demonstrates that . . . national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-5 (g) (2) (B) provides in relevant part: "On a claim in which an individual proves a violation under section 2000e-2 (m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . .." 42 U.S.C. § 2000e-2 (m) pertains to cases analyzed under the mixed motive method for disparate treatment.

General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability." "General Statutes § 46a-58 (a) has expressly converted a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws." *Trimachi v. Connecticut Workers Compensation Committee*, 2000 WL 872451, 7 (Conn.Super.)

B

State Law

The respondent has been charged with violating § 46a-60 (a) (1) by discriminating against the complainant because of his race, color, national origin, ancestry and/or alienage. As set forth in § 46a-60 (a), "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, marital status, national origin, ancestry. . .."

It is well established that Connecticut's anti-discrimination statutes are coextensive with the federal law on this issue and, therefore, this case will be analyzed using both the prevailing Connecticut and federal law. See *Pik-Kwik Stores, Inc.* v. *Commission on Human Rights & Opportunities*, 170 Conn. 327, 331 (1976). State courts look to federal fair employment case law when interpreting Connecticut's anti-discrimination statutes, but federal law should be used as a guide and not the sole resource in interpreting state statutes. See *State of Connecticut* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 470 (1989); see also *Wroblewski* v. *Lexington Gardens, Inc.*, 188 Conn. 44, 53 (1982).

C

Legal Standards for Disparate Treatment

This case is a matter of alleged disparate treatment. "The principal inquiry of a disparate treatment case is whether the [complainant] was subjected to different treatment because of his or her protected class." *Levy* v. *Commission on Human Rights & Opportunities* 236 Conn. 96, 104 (1996). "Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate the burdens of proof: (1) the mixed-motive/*Price Waterhouse* model . . . and (2) the pretext/*McDonnell Douglas-Burdine* model. . . ." (Citations omitted.) Id., 104-05.

1

Mixed-Motive/*Price Waterhouse* Model

"A mixed-motive case exists when an employment decision is motivated by both legitimate and illegitimate reasons. In such instances, a [complainant] must demonstrate that the employer's decision was motivated by one or more prohibited statutory factors. Whether through direct evidence or circumstantial evidence, a [complainant] must submit enough evidence that if believed, could reasonably allow a fact finder to conclude the adverse employment consequences resulted because of an impermissible factor. . . . Under this model, [complainant's] prima facie case requires that the [complainant] prove by a preponderance of the evidence that [1)] he or she is within a protected class and [2)] that an impermissible factor played a motivating or substantial role in the employment decision. . . . Once the [complainant] establishes a

prima facie case, the burden of production and persuasion shifts to the [respondent]. The [respondent] may avoid a finding of liability [under state law] only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [impermissible factor] into account. . . ." (Citations omitted; internal quotation marks omitted.) *Taylor* v*. Dept. of Transportation*, 2001 WL 104350, 7 (Conn. Super.); See also *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 106-07; *Price Waterhouse* v*. Hopkins*, 490 U.S. 228 (1989).

Direct evidence of discrimination "may include evidence of actions or remarks of the employer that reflect a discriminatory attitude . . . or [c]omments [that] demonstrate a discriminatory animus in the decisional process." (Citations omitted.) *Levy* v*. Commission on Human Rights & Opportunities*, supra, 236 Conn. 110. Statements or comments that are undisputed constitute direct evidence. See *Price Waterhouse* v*. Hopkins*, supra, 490 U.S. 256 (where the statement was admitted); *Miko* v*. Commission on Human Rights & Opportunities*, 220 Conn. 192, 206 (1991) (where the statement was uncontroverted); *Tyler* v*. Bethlehem Steel Corp*., 958 F.2d 1176, 1185 (2nd Cir. 1992) (there was an unequivocal statement of intent constituting direct evidence of discriminatory motive ("I fired him because he was too old").) In *Levy* v*. Commission on Human Rights & Opportunities*, supra, 236 Conn. 101, the employer's statement that the complainant was transferred "because of his hearing disability" was considered to be direct evidence. Other examples of direct evidence include a company president's planning documents stating that the company's strengths included "young managers"; and a decision-maker's comment that he would not hire blacks if it were his company. See *Reiff* v*. Interim Personnel, Inc*., 906 F.Supp.1280, 1287-88 (D. Minn. 1995).

Circumstantial evidence requires the fact finder to take "certain inferential steps before the fact in question is proved." *Tyler* v*. Bethlehem Steel Corp*., supra, 958 F.2d 1183. For example, evidence consisting of a statement by a decision-maker "to the effect that older employees have problems adapting to new employment policies . . . this statement constitutes circumstantial evidence (in that it requires an inference from the statement proved to the conclusion intended) that a discriminatory motive played a motivating factor in the challenged employment decision." (Citations omitted; internal quotation marks omitted.) *Stacks* v*. Southwestern Bell Yellow Pages*, 996 F.2d 200, 202 n.1 (1993). Regardless of whether the evidence is direct or circumstantial, "the plaintiff must present evidence showing a specific link between discriminatory animus and the challenged decision." Id. Therefore, a complainant may establish a prima facie case under the mixed-motive analysis by presenting evidence that is either "direct" or "circumstantial."

"If the [complainant] is unable to produce evidence that directly reflects the use of an illegitimate criterion in the challenged decision, the employee may proceed under the now-familiar three-step analytical framework described in [*McDonnell Douglas Corp.* v*. Green*, 411 U.S. 792, 802 (1973).]" *Stacks* v*. Southwestern Bell Yellow Pages*, supra, 996 F.2d 202.

2

Pretext/*McDonnell Douglas-Burdine* Model

The pretext/*McDonnell Douglas-Burdine* model is used "when a [complainant] cannot prove directly the reasons that motivated an employment decision but

nevertheless may establish a prima facie case of discrimination through inference by presenting facts sufficient to remove the most likely bona fide reasons for an employment action." *Taylor* v*. Dept. of Transportation*, supra, 2001 WL 104350, 8; see also *McDonnell Douglas Corp.* v*. Green*, supra, 411 U.S. 802-04; *Texas Dept. of Community Affairs* v*. Burdine*, supra, 450 U.S. 252-56. The burden shifting scheme of *McDonnell Douglas-Burdine* applies to the Connecticut Fair Employment Practices Act (CFEPA) § 46a-51 et seq. See *Ann Howard's Apricots Restaurant, Inc.* v*. Commission on Human Rights & Opportunities*, 237 Conn. 209, 225 (1996). "From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons." *Taylor* v*. Dept. of Transportation*, supra, 2001 WL 104350, 8. Under the pretext model, the complainant must prove four elements to establish a prima facie case: 1) that he belongs to a protected class; 2) that he was qualified for the position; 3) that despite his qualifications, he suffered an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. See *Board of Education* v*. Commission on Human Rights & Opportunities*, 266 Conn. 492, 505 (2003). This standard is not rigid and has been modified to the present fact scenario. See *Levy* v*. Commission on Human Rights and Opportunities*, supra, 236 Conn. 108 n. 20. Once the complainant has established a prima facie case of discrimination, a presumption of discrimination is created.

Although under the *McDonnell Douglas-Burdine* model, the burden of persuasion remains with the complainant, once the complainant has established a prima facie case, the burden of production shifts to the respondent to rebut the presumption of

discrimination by articulating (not proving) a legitimate, non-discriminatory reason for the adverse employment action. See *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 108; see also *Taylor* v. *Dept. of Transportation*, supra, 2001 WL 104350, 8. Once the respondent articulates a legitimate, non-discriminatory reason, the complainant has an opportunity to prove by a preponderance of the evidence that the proffered reason is pretext for discrimination. See *Taylor* v. *Dept. of Transportation*, supra, 2001 WL 104350, 8. "The *McDonnell Douglas-Burdine* analysis keeps the doors of the courts open for persons who are unable initially to establish a discriminatory motive. If a [complainant], however, establishes a *Price Waterhouse* prima facie case, thereby proving that an impermissible reason motivated a [respondent's] employment decision, then the *McDonnell Douglas-Burdine* model does not apply, and the [complainant] should receive the benefit of the [respondent] bearing the burden of persuasion [as under the mixed-motive/*Price Waterhouse* method]." Id.

D

Mixed-Motive Analysis

In applying these legal standards to the facts of the present case, it is appropriate first to look to the mixed-motive/*Price Waterhouse* method of analysis. The complainant established the first element of his prima facie case that he is a member of a protected class. He alleged in his complaint and testified that his national origin and ancestry is Arabic since he was born in Egypt and he speaks Arabic. Tr. 11-12, 416; Ex. C-55. Although the respondent contended that it was not aware that the complainant was Arabic (R. Brief, pp. 12 and 21), the respondent's knowledge of the complainant's

ancestry or national origin is not required for the complainant to show he belongs to a protected class. Therefore, the complainant established that he is of Arabic origin and ancestry and thus belongs in a protected class. FF 3. Next, the complainant must establish that an impermissible factor played a 'motivating' or 'substantial' role in the respondent's decision to suspend him. See *Price Waterhouse* v*. Hopkins* , supra, 490 U.S. 246. The complainant alleged that he was suspended and received a warning because of his Arabic ancestry. He testified that two weeks before Christmas Day 2003, the respondent's dispatch supervisor, Vaccarelli, stated that "the solution to the problem in the middle east is to drop the big one and get rid of all the Arabs." Complaint; Tr. 21, 37-39; Ex. C-24. This allegedly occurred when the complainant was in the driver's room of the respondent company within hearing distance of Vaccarelli who was in the dispatch room. Tr. 23, Exs. C-2 - C-4. The complainant testified that Vaccarelli looked at him with hatred and that the statement was said with a "different tone of voice." Tr. 22, 39. Vaccarelli denied making this statement. Tr. 839, 841-42; Ex. R-16. Although the complainant testified that there were other drivers present when the statement was made, the complainant testified that he did not remember which drivers were in the room when the statement was made and, thus, did not provide names of witnesses who heard this statement. Tr. 21. When asked why he could not remember the names of the drivers who were in the room, he testified it was because he was "shocked" over the statement. Tr. 400.

The complainant did not provide any evidence as to which drivers worked that day and at that time in order to show who might have heard the derogatory statement for possible witnesses. Not only was there no corroboration that Vaccarelli made the

statement, the respondent's witness, Aviles, a non managerial employee, testified that Vaccarelli did not make the statement, but that Aviles made a statement regarding the war in Iraq. Tr. 771; Ex. C-15. This testimony further negated that Vaccarelli made the alleged derogatory remark. Spina, the operations manager and EEO officer, testified that the respondent interviewed Aviles during its investigation of the alleged remark because the complainant said Aviles was present when the comment was made. Tr. 652-53; Ex. C-14, C-15. However, the complainant testified that he did not provide the respondent with names of employees who may have been present. Tr. 334-35. Because there was no corroboration that Vaccarelli made the derogatory statement and because of the confusion over Aviles' involvement regarding the derogatory remark, I do not find that Vaccarelli made the derogatory statement. FF 20. Thus, no direct evidence of discrimination exists.

The complainant presented an abundant amount of circumstantial evidence. However, it was not sufficient to show a discriminatory motive. He argued that discrimination could be inferred from the respondent's actions in many situations in which he believed the respondent's motives were discriminatory. He alleged that the respondent accused him of several company violations that occurred on January 5, 2004. C. Brief, pp. 4-5. These were 1) driving at an unsafe speed, 2) not picking up passengers, 3) improper performance of his route, 4) traveling on an unauthorized road, 5) leaving the downtown location early resulting in missed passengers and not waiting for other buses, and 6) leaving for break ahead of schedule. Tr. 36. The complainant testified that the respondent rejected his grievance as being untimely. Tr. 48-49; Ex. C-17. The complainant also testified that Spina told him in a meeting that he should have

defecated behind a dumpster since he had a bathroom emergency. Tr. 62-63. He testified that the respondent forced him to meet with the respondent on his vacation days or off days.

The complainant testified that the respondent also did not send two disciplinary actions to the union representative as required. Exs. R3-B, R3-D, C-1; Tr. 41-42, 864. The complainant testified that the respondent documented his off-duty activities in his personnel file and it insinuated that he was a terrorist when the respondent told him to stop taking pictures on the buses for his personal investigation. Tr. 52-57; Ex. C-12. He testified that the respondent also accused him of being violent because he broke a company bulletin board. Tr. 150-52. Lastly, the complainant testified that Vaccarelli's tone of voice changed sounding like "hatred" toward him. Tr. 22, 39.

Even if found to be true, the above circumstantial evidence is too general to be considered discriminatory. I cannot infer from the respondent's actions stated above that it said or did the things alleged because of a discriminatory motive and that based on these actions it suspended the complainant because of his Arabic ancestry or national origin. The complainant did not present sound circumstantial evidence of discrimination based on his ancestry or national origin. Because I do not find that the derogatory statement was made and because the complainant has not provided evidence linking the discriminatory animus to the adverse action, he has not provided direct evidence or enough circumstantial evidence to support that the respondent was motivated by an impermissible reason when it suspended him and later replaced the suspension with a warning letter. FF 18. Therefore, the complainant has failed to

establish a prima facie case of discrimination under the mixed-motive/*Price Waterhouse* model. Thus, the complainant's claims fail under the mixed motive analysis.

E

Pretext Analysis

1

Prima Facie

Next, I look to the pretext/*McDonnell Douglas-Burdine* model. The complainant has established that he belongs to a protected class because of his ancestry and national origin, Arabic. FF 3. The parties stipulated that the complainant is qualified to work as a fixed route operator. FF 1. Although the respondent argued that the one-day suspension did not constitute an adverse action under the law (R. Brief, p,. 12-14, 22), the complainant also established the third element of his prima facie case by presenting evidence that he suffered an adverse employment action when the respondent suspended him without pay on February 4, 2008 and placed the suspension letter in his personnel file. FF 13. See *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223-24 (C.A.2 N.Y.2001).

An adverse employment action is a "materially adverse change in the terms, privileges, duration and conditions of employment." *Treglia v. Town of Manlius*, 313 F.3d 713, 720 (2nd cir. 2002). In *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, supra, 263 F.3d 208, the court held that "[a] jury could conclude that shortly thereafter the plaintiff was suspended without pay for a week. Even if the jury agrees with [the defendant] that

the plaintiff was later reimbursed, suspension without pay is sufficient to constitute an adverse employment action in this context. We have defined adverse employment action broadly to include 'discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand.' . . . We have also noted that lesser actions may be considered adverse employment actions, citing as examples 'negative evaluation letters, express accusations of lying, assignment of lunchroom duty, reduction of class preparation periods, failure to process teacher's insurance forms, transfer from library to classroom teaching as an alleged demotion, and assignment to classroom on fifth floor which aggravated teacher's physical disabilities.' . . . And we have held that adverse employment actions are not limited to 'pecuniary emoluments.' . . . The plaintiff was suspended for a week without pay. Thus, she lost wages. While a NOCO official testified that the plaintiff was reimbursed for her lost wages, the official admitted that the reimbursement occurred 'some time later.' The plaintiff, thus, may have at least suffered the loss of the use of her wages for a time. This would be sufficient to support a jury's finding that she suffered an adverse employment action." (Citations omitted.) Id., 223-24.

In *Johnson* v*. State of Connecticut, Department of Corrections,* 392 F.Supp.2d 326, 340, (D.Conn. 2005), the court held that "[m]ore serious, however, is the written reprimand that [the plaintiff] received in July 2001. According to Johnson, this reprimand precluded him from receiving promotions for the two years that it was in his file. It is not clear whether the reprimand acted formally or informally to preclude Johnson from promotion. If the reprimand did act to prevent Johnson from being promoted, it may constitute an adverse employment action. See, e.g., *Knight* v*. City of New York*, 303

F.Supp.2d 485, 497 (S.D.N.Y.2004) ('Disciplinary memoranda and evaluations are adverse employment actions only if they affect ultimate employment decisions such as promotions, wages or termination.')."

In the present case, a one-day suspension or the warning letter became part of the complainant's personnel file and would be considered by the respondent in the event of future discipline, which could then result in a multiple day suspension or termination. I find the one-day suspension that caused the complainant to lose one day of pay and the warning letter placed in his file did constitute adverse actions and the complainant has met this element of his prima facie case. FF 13, 18. Next, he must prove the fourth element that the suspension occurred under circumstances giving rise to an inference of discrimination.

"To meet the fourth prong of that prima facie showing, [the complainant] must establish that [he] was treated less favorably than comparable [non Arabic] employees in circumstances from which [a national origin or ancestry-based] motive could be inferred. In other words, the [complainant] must show that in all material respects, [he] was similarly situated to a [non Arabic] employee, but was treated differently on the basis of [his national origin and ancestry]. For example, [the complainant] could show that [he] and a [non Arabic] employee 'reported to the same supervisor ... [were] subject to the same standards governing performance evaluation and discipline, and ... engaged in [similar] conduct ... without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.' It is important to note, however, that being similarly situated in all material respects does not require one to demonstrate disparate treatment of an identically situated employee. Employees

need show only a situation sufficiently similar to [their own] to support at least a minimal inference that the difference of treatment may be attributable to discrimination." (Citations omitted; internal quotation marks omitted.) *United Technologies Corporation/Pratt and Whitney Aircraft Division* v*. Commission on Human Rights & Opportunities*, 72 Conn. App. 212, 225-26 (2002). Also, it is important to note that if the employer is not aware of similar violations by other employees whom the complainant uses to show disparate treatment then the complainant cannot demonstrate the employees were similarly situated. See *Shumway* v*. United Parcel Service, Inc.,* 118 F. 3d 60, 64 (2d cir. 1997).

The complainant argued that the respondent disciplined him more severely than other non-basis similarly situated employees for similar company violations. C. Reply Brief, pp. 4 and 9. The complainant compared himself to many employees who received varying degrees of discipline ranging from verbal warnings to multiple day suspensions. He presented evidence that other non-basis employees committed similar violations but were treated less severely. He argued that Urbano/Taylor, Mamudi, Ruland, O'Toole, Tuda, Sampiere, Costante, Giordano, Istrefi, Bergin, Carroll, Pennella and Nelson were similarly situated and all were of non-Arabic ancestry and national origin. C. Brief, pp. 2, 9-11. The respondent argued that the complainant failed to establish that these drivers were all "similarly situated with regard to type of run, nature of offenses, prior history and number of offenses in one incident, and whether the driver was found to be credible." R. Brief, pp. 28. The respondent cited to the differences of the drivers throughout its brief, in particular, it argued that Bergin and Constante were not similarly situated because they were not fixed route operators. R. Brief, p. 28-37.

The evidence revealed that the drivers identified by the complainant possessed variations in their duties and conduct. Nelson, Sampieri and Tuda were paratransit and van drivers. FF 22. Bergin was a spare board operator. FF 25. Carroll and Costante drove tripper routes as opposed to fixed routes. FF 23, 24. The complainant did not dispute the type of drivers that these employees were.

Because the complainant was a fixed route bus driver and there were numerous fixed route bus drivers employed by the respondent, these employees will be used as his comparables as opposed to the spare board, van and paratransit operators. Thus, Mamudi, O' Toole, Istrefi, Urbano/Taylor, Pennella, Ruland and Giordano were fixed route operators who were disciplined and/or supervised by Vaccarelli and/or Spina like the complainant. FF 21. Although, Spina consulted Kalosky for the discipline of employees, Kalosky was not a party to the meetings regarding the infractions of these employees, except for the one meeting regarding Mamudi's seven-day suspension, nor did she directly issue the initial disciplinary reports. FF 21, 26.

Viewing the complainant's evidence at face value, it appears that some of these comparable employees committed violations similar to or more severe than the complainant's violations but received less severe discipline. For example, On December 15, 2003, Ruland was issued a written warning for two bus accidents resulting in damage to both buses and for his attendance problems. FF 35. On April 2, 2004, Giordano was issued a warning for leaving a passenger by not stopping at a designated bus stop and she admitted to going off-route because of traffic. FF 38. Also, on May 13, 2004, Giordano was issued a warning for failing to come to a complete stop, failing to follow railroad crossing procedures and transit procedures, and operating her

bus behind schedule. FF 38. On May 4, 2004, Pennella was issued a warning for failing to arrive at Exchange Place on time. FF 39. The Complainant's burden of proving his prima facie case is not an onerous one, and it has been described as "de minimis." *Weinstock v. Columbia University*, 224 F.3d 33, 42 (2nd Cir. 2000); *Ann Howard's Apricots Restaurant v. Commission on Human Rights and Opportunitie*s, supra, 237 Conn. 225. Therefore, although differentiating or mitigating circumstances exist that distinguish these employees' conduct from the complainant's as is discussed later in this section, infra, p.33, for the sake of argument, I will assume the complainant has met the fourth element of his prima facie case by showing non-basis similarly situated employees were treated differently than him. See *Raskin* v*. Wyatt Co*., 125 F. 3d 55, 64 (2d Cir. 1997). Now that the complainant has satisfied a prima facie case, the burden of production shifts to the respondent to provide a legitimate business reason for the suspension. See *Cruz* v*. Coach Stores*, 202 F.3d 560, 567 (2d cir. 2000).

2

Proffered Legitimate Business Reason

The respondent proffered a legitimate business reason for suspending the complainant. The respondent argued that the complainant was suspended for multiple infractions occurring on January 5, 2004. He 1) left the line early, 2) traveled at an excessive rate of speed, 3) did not pick up passengers (missed passengers) 4) arrived eleven minutes early to Exchange Place to take his lunch break early and 5) traveled on an unauthorized road. Tr. 920-21; Exs. R-6 - R-8. When determining the discipline to issue, the respondent also considered that the complainant had one prior warning in his

file for leaving the line early and missing passengers, similar to one of the violations that occurred on January 5, 2004, and that it did not believe the complainant's excuse for traveling on Cemetery Road, that he had an "emergency," since he never called in to the company pursuant to the policy. FF 10, 13. On March 23, 2004, the respondent later substituted the suspension with a warning letter when it realized the complainant had never received a written copy of the June 21, 2003 verbal warning for leaving the line early that was in his file. FF 18. The respondent has met its burden.

3

Pretext for Discrimination

"Once the employer produces legitimate, nondiscriminatory reasons for its adverse employment action, the complainant then must prove, by a preponderance of the evidence, that the employer intentionally discriminated against him. . . . Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the [employer] intentionally discriminated against the [complainant] remains at all times with the [complainant]. . . . [I]n attempting to satisfy this burden, the [complainant]-once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision-must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination. . . ." (Citations omitted; internal quotation marks omitted.) *Board of Education of City of Norwalk v. Commission on Human Rights & Opportunities* 266 Conn. 492, 506-07 (2003).

"In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. . . . Thus, a [complainant's] prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Board of Education of City of Norwalk* v*. Commission on Human Rights & Opportunities*, supra, 266 Conn. 508-09.

The complainant must prove that the respondent's proffered reason is pretext for discrimination. First, the complainant argued that the respondent was wrong for accusing him of the January 5, 2004 violations and that the discipline issued was not justified. C. Brief, pp. 8-9. Next, he argued that even had he violated the policy, other similarly situated non-basis employees had also committed similar violations but were disciplined less severely. C. Brief, pp. 9-11.

a

Explanations for the Discipline Being Unwarranted

The complainant admitted to leaving the line early and that he arrived at Exchange Place at 1:49 p.m., eleven minutes early to leave for his lunch break. Tr. 78-79, 298. He also admitted that he missed two passengers but testified that he was not

required to pick up the passengers at the Stop and Shop Plaza. Tr. 67-68, 82-83, 203-05, 210. He testified that he was not speeding but was traveling the speed limit of 25 miles per hour. Tr. 64. He also testified that it is "mathematically" impossible to travel 50 miles per hour as Vaccarelli accused him of doing because he arrived downtown, 2.2 miles from his starting destination, within six minutes, which calculates to 22 miles per hour. Tr. 935-36. He argued that the distance divided by the time calculates the rate of speed. C. Brief, p. 12. The respondent argued that the complainant's calculation did not take into consideration that he may not have been driving at a constant speed. R. Reply Brief, p. 7. The complainant also argued that David Cota, the downtown supervisor, who reported that the complainant was speeding, could not have viewed him speeding because Cota was often found sleeping on duty and he initially, incorrectly reported the name of the route that the complainant was driving on in the route investigation-daily report. Tr. 52-54, 58; Ex. R-7. However, the allegation of Cota sleeping on duty was never corroborated and the daily report clearly showed the correction of the route name that was made. Ex. R-7. Thus, the name of the route was not corrected in a manner to deceive anyone.

The complainant testified that he did not skip bus stops but did Route 16/36 in the manner in which he was told to do it. Tr. 64. He also testified that he followed the break procedure that was in place. Tr. 68-78. His understanding was to leave Montoe/Bradley-point five on the map legend-at 1:45 p.m., preceding the lunch break, then drive downtown with the out of service sign in place and without picking up passengers. Tr. 64-65; Ex. C-39. Lucas Mullings, Deborah Desocio, Richard O'Loughlin and Denise Eastwood also all testified that while driving Route 16/36, they

would put the out of service sign on and would not pick up passengers. Tr. 505-10, 512-19, 932. However, Lori Chappele, a fixed route operator testified that she picked up passengers while doing Route 16/36. Tr. 606-08. Bergin, a spare board operator, while driving route 16/36, picked up passengers at times and other times did not. Tr. 575. He thought it was the tripper 18 bus driver's responsibility to pick up passengers, but he would pick up passengers as a courtesy because no one told him to pick up or not. Tr. 589-90. Bobby Gibbons testified that when he drove Route 16/36, he would pick up passengers as he drove downtown with the tripper 18 bus following his bus. Tr. 813-815.

Vaccarelli testified that he had driven routes, 16/36 and tripper 18. Vaccarelli said the buses travel downtown together and "piggy back", both picking up passengers and putting the out of service sign on when the bus reaches downtown. Tr. 831. The complainant testified that there are no passing lanes and, therefore, legally the tripper 18 bus and Route 16/36 bus could not alternate picking up passengers. Tr. 289-90, 845. However, the respondent agreed that it was a no passing zone and testified that alternating the picking up of passengers is possible because when the bus pulls over, cars and other buses can pass. Tr. 58, 813-15; 831-32, 845. As is evident, the drivers were performing Route 16/36 prior to the lunch break inconsistently, some were picking up passengers and some were not picking up passengers. DeSocio, who had been employed with the respondent for twenty-eight years, testified that supervisors never trained the drivers on driving Route 16/36 and that the respondent's management never told her the way to do Route 16/36. Tr. 520-21. Thus, management was not aware of this inconsistency. FF 11.

Vaccarelli testified that Cemetery Road is "off limits." Tr. 834. The complainant admitted that he used Cemetery Road because he had a bathroom emergency. Tr. 225-27. He testified that many other drivers used Cemetery Road with management's knowledge and that no one else was disciplined for using Cemetery Road. Tr. 87-89, 404, 423-27. Of these drivers, the complainant only presented Bobby Givens as a witness. Bobby Givens denied ever using Cemetery Road. Tr. 815**.** The complainant testified that he did not know whether management saw drivers use Cemetery Road. Tr. 424. The complainant presented no evidence to corroborate that other drivers used Cemetery Road with or without management's knowledge and that the employees had not been disciplined for its use. Tr. 404. In fact, Bobby Gibbons did not corroborate the complainant's assertion that he used Cemetery Road. Tr. 423-24, 427.

The complainant emphasized that he was never observed traveling on Cemetery Road as the respondent initially stated in its suspension letter. Exs. C-8, R-6; Tr. 97, 99-100. However, this issue is insubstantial because he admitted to traveling on Cemetery Road, which was his reason for arriving early to Exchange Place and taking his lunch break early. The complainant testified that he was given permission by Vaccarelli to use Cemetery Road in an emergency and, thus, he had permission to use it on January 5, 2004. Tr. 80-82. He testified that management was aware that he and other drivers had used Cemetery Road. Tr. 361-62, 427. The complainant admitted that the procedure is to call in to the respondent to determine which road to travel when an emergency occurs. Tr. 361-62. First, he said he used Cemetery Road and did not call the respondent because he was on his break. Tr. 311. Next, The complainant testified that he had an emergency but the situation was not that much of an emergency to call

in. Tr. 312. He testified, “It wasn’t that kind of emergency where I had to get [off] immediately.” Tr. 227. However, he did go off-route and did not call into the respondent to inform it of his emergency, as he was required to do. FF 10. The complainant’s reason for not calling the respondent was inconsistent and illogical and is what caused the respondent to disbelieve his reason for using Cemetery Road, which also was a factor in it issuing the complainant a one-day suspension. I do not find his testimony credible here. Because the complainant did not call the respondent to inform it of his emergency, as was the procedure, the complainant violated the respondent’s rules by going off-route onto Cemetery Road and by leaving early for his lunch break.

Vaccarelli testified that Giordano was disciplined with a written warning for going off-route and she should have called the respondent first before going off-route. Tr. 538-539; Ex. C-44. The policy is to call first if a driver wants to drive off-route. FF 9. Giordano admitted to driving off-route and, unlike the complainant, the respondent believed Giordano’s reason for traveling off-route. Ex. C- 44. The complainant did not present evidence of other drivers who committed a similar offense, traveling off-route without calling in, and who were not disciplined. No other drivers testified that they could take Cemetery Road or make route changes without permission from the company dispatcher.

The complainant agreed with the respondent that he committed violations on January 5, 2004. Tr. 208-11. Although the complainant may not have been speeding according to the law, the respondent believed he was traveling at an excess rate of speed. The respondent, however, did not sufficiently support its basis for this belief. Even if I find the complainant was not traveling at an excess rate of speed and that he

did not wrongfully miss passengers, he did commit at least three of the five other violations listed in the January 5, 2004 report: traveled down an unauthorized road without calling the respondent for permission and was not honest about his reason for doing that; left the line early; and arrived eleven minutes early to his destination, Exchange Place, resulting in taking lunch early. FF 10, 13. I find that Kalosky's testimony is credible and that the complainant's discipline on February 4, 2004 was based on his infractions of January 5, 2004, his June 21, 2003 infraction, which was similar to one of the January 5, 2004 infractions, and his lack of credibility with the respondent. Tr. 920-21.

The complainant testified that he never received the June 21, 2003 verbal warning about leaving two minutes early (leaving the line early) that was in his personnel file. Tr. 38, 354, 419. However, the complainant did not deny having committed the June 21, 2003 infraction and having discussed it with the respondent at the time of its occurrence. Tr. 346, 354, 414. This infraction was discussed initially at the January 29, 2004 meeting and then again at the March 23, 2004 meeting with the respondent. Tr. 37-42. The complainant testified that he did not remember whether the June incident was discussed during the March 23, 2004 meeting. However, he testified that the infraction was discussed at the January 29, 2004 meeting but he was never aware of it to grieve it. Tr. 414. The problem was that he had never received a written copy of it and was not aware that it was in his personnel file. The respondent offered to change the suspension to a warning during the March 23, 2004 meeting prior to the complainant's filing of his discrimination complaint. FF 18. Although the complainant did not agree with this change, the respondent reduced the suspension to a warning letter and reimbursed

the complainant for one day of lost pay. FF 18. The warning letter is consistent with discipline not based on prior similar infractions. FF 35, 38, 39.

b

Discipline of Similarly Situated Employees

Next, the complainant argued that he was disciplined more severely than non-basis similarly situated employees and he provided much evidence of other employees' conduct and discipline. However, "[e]mployees are not 'similarly situated' merely because their conduct might be analogized." *Mazzella* v. *RCA Global Communications*, Inc. 642 F.Supp. 1531 (S.D.N.Y.,1986). Although they have the same supervisor and are subject to the same standards, employees are not similarly situated if they engaged in similar conduct but had "differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it." Id., 1547. See also *Mitchell* v. *Toledo Hospital*, 964 F. 2d 577, 582-83 (to be similarly situated, employees must have same supervisor, same type of position, subject to the same standards, committed the same conduct without differentiating or mitigating circumstances.)

To determine whether the conduct was similar, I analyzed the types of conduct that are within each category of the disciplinary actions pursuant to the respondent's discipline policy. FF 27-32. Verbal warnings are issued for the following conduct: going off-route; missing a passenger; being in an unauthorized area; attendance issues (tardiness); inappropriate conversations with passengers in person or on a telephone; not calling in when sick or late; not calling in when an incident occurs on a bus; and

disruptive interaction involving two employees. FF 27. The discipline could be more severe depending on the incident. Written warnings are issued for the following conduct: leaving the line early and having a derogatory conversation with a client who was missed; multiple infractions; multiple days off or coming to work late. FF 28. Suspensions are issued for: very bad accidents where there's a violation of law; multiple problems with attendance; having an unauthorized passenger; fighting on company property; insubordination; and progressive discipline after a warning. FF 29. After a suspension, the discipline could progress to multiple day suspensions or a discharge depending on the violations. FF 29. Insubordination could warrant a multiple day suspension or a discharge. FF 30, 31. Automatic discharge occurs with insubordination, theft, a failed drug and alcohol test and reckless endangerment. FF 31. According to the union agreement, an employee can be suspended without having been previously warned because he or she was dishonest. FF 32. Kalosky testified that she considered dishonesty when issuing discipline. Tr. 856, 922.

Kalosky testified that the complainant was suspended for a multitude of reasons occurring on January 5, 2004: he 1) left the line early; 2) traveled at an excessive rate of speed; 3) missed a couple of passengers; 4) arrived eleven minutes early to Exchange Place taking his lunch break early; and 5) traveled on an unauthorized road. Tr. 920. The respondent also considered that the complainant had a prior warning in his file for a similar infraction to a current one and it did not believe the complainant's excuse for his conduct that he had an emergency because he never called in to the company as per policy. FF 10,13.

Under the respondent's unwritten disciplinary policy, a one-day suspension could be issued when there are multiple problems with an employee's attendance and other conduct. Tr. 900. Although Kalosky did not explain what other types of conduct would constitute a suspension, I can reasonably infer from the infractions issued to Mamudi, Urbano/Taylor, Istrefi and O'Toole that other types of conduct were multiple problems concerning accidents, missing passengers and/or not picking up passengers, missing designated turns on a bus route, failure to operate schedule in timely manner or arriving late to a destination, failure to allow passengers to make connecting buses and leaving a bus unattended. FF 33, 34, 36, 37. Based on its disciplinary policy, it is reasonable to deduce that multiple problems of leaving the line early (e.g., failure to operate schedule in a timely manner) or missing passengers for their connections could constitute a suspension. When it suspended the complainant for one day, the respondent considered the complainant's multiple problems of leaving the line early with the other infractions of January 5, 2004 and the complainant's lack of credibility of his excuse for his emergency. Tr. 856-57, 920-21.

In viewing the complainant's infractions, the discipline issued to him is consistent with the disciplinary policy. First, leaving the line early would warrant a written warning. Second, traveling at an excessive speed, alone, could warrant a verbal warning because it involves handling the bus in a way that is unacceptable by the respondent (e.g., going off-route or being in an unauthorized area) and could warrant a written warning because it would be coupled with leaving the line early, thus considered as multiple infractions. Third, missing passengers, alone, would constitute a verbal warning but joined with the other two infractions would warrant a written warning. Fourth,

traveling on an unauthorized road without calling in, alone, would constitute a verbal warning, but grouped with the other infractions would warrant a written warning. Lastly, arriving early to Exchange Place, missing passengers' connections and taking the lunch break early could reasonably be considered as "leaving the line early" and grouped with other infractions would constitute a written warning due to multiple infractions.

When considering only the infractions the complainant admitted to, leaving the line early, missing passengers (although he believed he did not have to pick them up), traveling on an unauthorized road and arriving early to Exchange Place, these infractions would warrant a written warning pursuant to the respondent's policy. When considering the written warning for those infractions with the facts that 1) the respondent believed the complainant was not honest in his explanation about his emergency for taking Cemetery Road and 2) the respondent believed the complainant possessed a prior similar warning in his file for leaving earlier than his scheduled departure time and failing to be aware of other connecting buses and passengers trying to transfer on his bus, the one-day suspension was justified. Tr. 856-57; Exs. C-8. R3-B, R3-D.

The complainant argued that he was not issued the same discipline as similarly situated employees for similar conduct. Some of the employees who the complainant compared himself to received verbal or written warnings and some were suspended for one or more days based on their current infraction, any existing prior similar infractions and honesty or lack thereof. The fixed route operators, Mamudi, Istrefi, O'Toole, Urbano/Taylor, Giordano, Pennella and Ruland who I used as comparables to the complainant, violated rules based on varying degrees of conduct and were disciplined pursuant to the disciplinary policy. FF 33-39.

On February 4, 2004, Mamudi was suspended for two days and re-issued a final warning because of an accident causing damage to two vehicles, which resulted in a citation by the police department. FF 33. When issuing the discipline, the respondent also considered Mamudi's three prior accidents. Also, on June 7, 2002, Mamudi received a seven-day suspension and was issued a final warning for an accident that involved his failure to secure the bus properly. The respondent considered a prior similar infraction and Mamudi's dishonesty about reporting the accident to the respondent. FF 33. These disciplinary actions were consistent with the respondent's policy.

On March 1, 2004, O'Toole received a one-day suspension because of an accident causing damage to the bus, which resulted in a citation by the police department and he was issued a written warning for failure to wear his seatbelt and failure to use signal lights. When issuing the discipline, the respondent considered O'Toole's two prior accidents for which he received written warnings. FF 37. This discipline also was consistent with the respondent's policy.

On April 24, 2003, Istrefi received a one-day suspension because of three accidents and several complaints by passengers. FF 34. He caused damage to the bus and injury to passengers. The respondent also discussed with Istrefi the passenger complaints about passing them or not picking them up and missing designated turns. He was verbally warned in the past regarding these type of violatons. Ex. C-48. This discipline was consistent with the respondent's policy.

On March 1, 2004, Urbano/Taylor received a two-day suspension and a final warning because of her driving record, the operation of her schedule and her

unsatisfactory attendance record. FF 36. She had an accident that caused damage to two vehicles. She had been warned in the past for arriving late, failing to allow her passengers to make connecting buses and leaving her bus unattended. Also, the respondent considered that Urbano/Taylor could not be contacted by telephone for several minutes and the respondent did not believe her explanation for not answering the telephone. FF 36. The respondent considered her prior suspensions for other chargeable (cited by the police) accidents and attendance problems. FF 36. This discipline was consistent with the respondent's policy. Additionally, on January 6, 2004, Urbano/Taylor had received a one-day suspension because of a bus accident and her unsatisfactory attendance record. FF 36. The police department cited the bus accident. For this discipline, the respondent also considered her two other chargeable accidents for which she was suspended for two days and a warning she received in the past for similar infractions. FF 36. This discipline was consistent with the respondent's policy.

On May 4, 2004, Pennella was issued a warning for failure to arrive at Exchange Place on time for his 2:30 p.m. trip. FF 39. He had no prior similar infractions. FF 39. This discipline was consistent with the policy.

On Janauary 6, 2004, Ruland received a written warning because of a two-bus accident causing damage to both vehicles and because of his attendance record. FF 35. The respondent had spoken to him about his attendance record in the past but there was no mention of him having been issued a prior warning for a similar infraction. FF 35. This discipline was consistent with the policy.

On April 2, 2004, Giordano was warned for missing passengers by not making a designated stop. Also she went off-route and admitted she did so because of traffic. FF 38. This discipline was consistent with the policy.

Also, on May 13, 2004, Giordano was issued a warning for failing to come to a complete stop, not following procedures for crossing railroad tracks, not following transit vehicle procedures and operating her bus behind schedule. FF 38. These infractions were not similar to the infractions that occurred on April 2, 2004. FF 38. The discipline was consistent with the policy.

Of the fixed route operators mentioned above that the complainant compared himself to, I find that the complainant was similarly situated to only Mamudi and Urbano/Taylor. The other fixed route operators that the complainant compared himself to had differentiating or mitigating circumstances that distinguished their conduct or the appropriate discipline for their conduct from the complainant's. Urbano/Taylor's actions on March 1, 2004 and Mamudi's actions on June 7, 2002 were similar to the complainant's actions on January 5, 2004. Mamudi and Urbano/Taylor were similarly situated to the complainant because their conduct fell under a similar discipline category for suspensions since they were dishonest with the respondent and they had multiple problems or prior similar violations. Mamudi received a seven-day suspension for his violation on June 7, 2002 and Urbano/Taylor received a two-day suspension for her violation on March 1, 2004. FF 33, 36. In comparison to Mamudi and Urbano/Taylor, the complainant's one-day suspension was not more severe discipline for similar conduct.

Mamudi, Istrefi, Urbano/Taylor and O'Toole appear to have committed more serious violations, however, they all received suspensions according to the discipline policy. FF 33, 34, 36, 37. Additionally, Istrefi and O'Toole did not have credibility issues with the respondent when their discipline was issued. Also, differentiating circumstances existed involving the complainant's conduct on January 5, 2004 versus Ruland, Giordano and Pennella's conduct. They did not receive suspensions for their infractions, unlike the complainant, because they did not have credibility issues or prior warnings for similar infractions, which the respondent took into consideration when issuing discipline of its employees. FF 35, 38, 39. In fact, Giordano admitted to her infraction of going off-route because of traffic and reimbursed the missed passenger's taxi fare. FF 38. The complainant made no such effort. Even non-fixed route operators or non-similarly situated employees, Tuda, Nelson and Sampieri were suspended for their infractions. FF 40-42. Also, Constante, Bergin and Carroll, other non-similarly situated employees, did not have prior warnings for similar violations or credibility issues and they received verbal warnings for their current infractions. FF 43-45. All of these employees were disciplined according to the disciplinary policy. The complainant did not prove that he received more severe discipline than other non-basis similarly situated employees for similar conduct.

c

Additional Claims of Pretext

The complainant also argued that discrimination could be inferred because he is the only Arabic person (driver or employee) working at respondent's employ. Tr. 140. The respondent did not rebut this. The complainant argued that the respondent

accused him of several company violations that occurred on January 5, 2004. C. Brief, pp. 4-5; Tr. 36. These violations were the basis for the respondent's disciplinary action against the complainant and were discussed previously under this section, supra, pages 25-31. The complainant testified that the respondent rejected his grievance as being untimely (Tr. 48-49), however, the respondent received the grievance late on February 26, 2004 due to Dennis Raymond, the union representative, not delivering it to the respondent in a timely manner. FF 14. Also, the complainant did not present evidence that the grievances of non-Arabic employees were accepted under the same circumstances. Tr. 45-46; Exs. C-1, C-11, C-17. Notwithstanding the late filing of the grievance, the respondent still met with the complainant and his union on March 23, 2004 to discuss the grievance in order to resolve it. FF 17 . As a result, the suspension was reduced to a warning letter. FF 18.

The complainant also testified that Spina told him in a meeting that he should have defecated behind a dumpster since he had a bathroom emergency. Tr. 62-63. Spina denied making this comment. Tr. 660-61. The complainant provided no corroborating evidence that the statement was made by Spina. Also, as discussed above, the complainant testified that Vaccarelli made a derogatory statement about "Arabs," which was unfounded, and that Vaccarelli's attitude shown through his body language toward the complainant was based on the status or progress of the pending case. Tr. 37-39, 385-86. The complainant claimed that the respondent retaliated against him for having reported on February 24, 2004 the alleged comment by Vaccarelli. Ex. C-13. However, the January 29, 2004 meeting to discuss the January 5,

2004 violations occurred before the complainant reported the alleged derogatory comment.

The complainant also testified that the respondent forced him to meet with them on his vacation days or off days and would send him letters on Thursdays and Fridays to "psychologically ruin [his] whole weekend" because at that time he had weekends off. Tr. 144-45. The respondent argued that the complainant's days off were Tuesdays and Sundays, and when checked with a calendar, none of the letters regarding the complainant were issued on a Friday. R. Reply Brief, p. 4. However, the February 27, 2004 meeting was held on a Friday and the March 23, 2004 meeting was held on a Tuesday. Ex. R3-F. Also, at least one of the letters sent by the respondent was sent on a Friday, e.g., Ex. R-21. Regardless, the complainant did not present evidence that under similar circumstances other employees were not required to meet with the respondent on similar days or did not receive correspondence on similar days and, therefore, this fact does not infer discrimination.

The complainant showed that the respondent never sent a disciplinary action to the union representative per the union contract. Exs. R3-B, R3-D, C-1; Tr. 42. The respondent admitted that it did not send copies of the June 21, 2003 disciplinary report to the complainant and, because of this, it revoked the complainant's suspension and issued a warning letter to him. FF 18. The complainant testified that the respondent wrongfully documented his off-duty activities in his personnel file. Tr. 57; Ex. C-12. He testified that the respondent implied he was a terrorist because during his off-duty time he was gathering information for his complaint by videotaping the activities of buses and drivers. Tr. 52-58. Although, he testified that no one called him a terrorist, and the

respondent testified that due to security concerns, the passengers were concerned about the complainant's activities and, thus, the respondent asked the complainant to stop videotaping. Tr. 390, 876-79. Also, the complainant testified that because he broke the bulletin board during a verbal altercation with Gibbons, the respondent accused him of being violent and required him to pay for the board. Tr. 150. The complainant also testified that no other employee was forced to pay for broken items. Tr. 412. The respondent testified that the complainant volunteered to pay for the bulletin board. Tr. 870. The complainant did not provide evidence that other employees broke company items and were not required to pay for those items.

Lastly, the complainant testified that the respondent did not follow its EEOC policy when he sent the respondent his internal complaint of discrimination about Vaccarell's alleged derogatory remark. Tr. 102, 104, 480-81; Exs. C-6, C-13. Conversely, the complainant testified that he did not report the alleged racial comment within thirty days pursuant to the EEOC policy. Tr. 156-60. Regardless, the respondent immediately investigated the complainant's report about Vaccarelli making a derogatory remark. Tr. 41, 101-02, 156-60, 874; Exs. C-6, C-15. The respondent held meetings with the complainant on February 27 and March 23, 2004 to discuss the complainant's internal discrimination complaint regarding the derogatory remark. FF 16, 17. After the respondent's investigation, the respondent could not substantiate that Vaccarelli made the derogatory remark and, thus, closed the matter. FF 19.

Even taking into consideration all the evidence the complainant presented to support an inference of discrimination combined with his prima facie case, he has not proven that the respondent's business reason for the suspension and/or the warning

letter to be pretext for discrimination, and he has not proven that the respondent's reason are false. Therefore, the complainant's claims fail under the pretext analysis.

II

CONCLUSION and ORDER

After fully considering the evidence in the record, I find that the complainant and the commission did not establish by a preponderance of the evidence that the complainant's suspension or warning letter was based on discrimination. The complainant and the commission have failed under both the mixed-motive/*Price Waterhouse* and pretext/*McDonnell Douglas-Burdine* models to establish discrimination based on disparate treatment due to the complainant's national origin or ancestry. Pursuant to General Statutes § 46a-86, the case is hereby DISMISSED.

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Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

c. Phillip Baroudjian
North East Transportation, Inc.
Attorney David Kent
Attorney Christopher Parlato
Attorney Kathleen M. Grover