



To be served by first class mail on the following parties and attorneys of record:

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and to be personally served on the following attorney of record:

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his resignation. Upon Judge Lange's resignation, ICRC maintained jurisdiction over this matter. (See Ind. Code § 22-9-1-6) On July 2, 2013, due to necessity, ICRC appointed Noell F. Allen as Administrative Law Judge to review the record of proceedings and issue proposed findings of fact and conclusions of law and order.<sup>1</sup>

Having carefully considered all of the foregoing and being duly advised in the premises, the undersigned ALJ now proposes that the ICRC enter the following findings of fact, conclusions of law, and order.

### **FINDINGS OF FACT**

1. Stevens and Driver-Hogue are African-American and were employees of MSD. Stevens worked as a bus monitor from 2001 until January 18, 2011. Driver-Hogue worked as a bus driver from August or September 2000 until January 18, 2011.

2. Stevens' and Driver-Hogue's immediate supervisor at all relevant times was Waites, Director of Transportation. Waites is Caucasian.

3. Dr. Smith, at all relevant times, supervised Waites and was responsible for personnel matters for the transportation department. Dr. Smith supervised the transportation department since 2008. Dr. Smith is African-American.

4. On January 14, 2011, Driver-Hogue and Stevens were responsible for transporting approximately five (5) special needs preschool students to Fishback Creek Elementary School.

5. A bus driver and a bus monitor were assigned to the route because the children needed extra assistance to board and disembark the bus. Driver-Hogue and Stevens were charged with such duty.

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<sup>1</sup> On February 4, 2013, MSD filed its RESPONDENT'S PARTIAL OBJECTION TO DECEMBER 26, 2012 NOTICE ("Objection") in response to Judge Lange's resignation. The motion was brought before the Commission on July 26, 2013 during its monthly Commission meeting. After weighing the arguments presented in MSD's Objection and the duties and authorities of the Commission against the public policy of the Commission and expediency, the board members overruled said objection.

6. Starting in August 2010 and up to the date of the incident on January 14, 2011, Stevens was assigned to travel with Driver-Hogue as a monitor throughout each work day to assist students on and off the bus, secure them in their seats while being transported and generally watch over them.

7. MSD has its MSD Pike Township Operations and Procedures Manual 2010-2011 ("Manual"). Stevens and Driver-Hogue each received a copy of the Manual and acknowledged and signed a document confirming receipt and would abide by its provisions.

8. The Manual requires the bus driver and monitor to check the bus at the conclusion of the route for students remaining on the bus.

9. The Manual also requires that "any incident, whether it is a student injury or damage to the bus or personal property, while using a company vehicle, must be reported immediately."

10. The Manual further requires that "AFTER EVERY ROUTE OR FIELD TRIP AND BEFORE LEAVING THE BUS, DRIVERS MUST WALK TO THE BACK OF THE BUS AND CHECK FOR STUDENTS WHO MIGHT HAVE HIDDEN OR FALLEN ASLEEP. Each school is a route. Before leaving each school each morning, check the bus for students or items left behind. Leaving the school with students will not be tolerated." (Emphasis in original)

11. The Manual provides that a school bus "monitor must adhere to the same rules and procedures as a Bus Driver including learning the route, no sleeping on any of the routes, helping with the discipline of students and daily cleaning of the bus." The Manual further directs the monitor to "Please read driver requirements and responsibilities and when appropriate, apply to monitor."

12. On January 14, 2011, Driver-Hogue and Stevens had a route to pick up preschoolers from their respective bus stops and transport to Fishback Creek Elementary School.

13. On this day, both Driver-Hogue and Stevens failed to check the bus for remaining students

before leaving Fishback Creek Elementary School and returning to the transportation base.

14. Driver-Hogue and Stevens dropped off four out of the five preschool students who were on the bus. A three-year-old, non-verbal, autistic child, Cha'nell Ormond ("Nellie") fell asleep and remained on the bus.

15. Driver-Hogue and Stevens returned to the transportation base. As Driver-Hogue and Stevens pulled into the base, Stevens discovered Nellie asleep on the bus.

16. A two-way radio exists on the buses. All drivers and transportation personnel can hear activity reported on the two-way radios.

17. Driver-Hogue did not notify anyone on the two-way radio to report Nellie was left on the bus. She also did not contact her supervisor, Waites, at the transportation base on the cellular phone.

18. Stevens did not report the incident on the two-way radio or on the cellular phone.

19. Upon arriving at the transportation base, Driver-Hogue parked the bus, entered the building, and used the restroom facilities. She then went to another area to sign her time card since it was the end of the pay period. Driver-Hogue did not report Nellie was left on the bus to anyone at the transportation base while in the building.

20. While Driver-Hogue was in the building, Stevens remained on the bus with Nellie. At no point during this time did Stevens make an attempt to contact anyone to report the incident.

21. After Driver-Hogue returned to the bus, Stevens also went inside the transportation base building to use the restroom facilities and sign her time card.

22. Stevens did not report the incident to anyone in the building while she was there.

23. While Stevens was in the transportation base building, Driver-Hogue received a call on her cellular phone from dispatcher, Danielle Taylor ("Taylor"). Taylor informed Driver-Hogue that the school contacted the transportation base inquiring about Nellie's whereabouts. Taylor asked if

Nellie was on the bus with Driver-Hogue. Driver-Hogue, in response, asked Taylor if Taylor called from a “private line.” After Taylor acknowledged it was a “private line”, Driver-Hogue informed Taylor that Nellie was, in fact, still on the bus.

24. When Stevens returned to the bus from the transportation base building, Driver-Hogue and Stevens left to return the Nellie back to Fishback Creek Elementary School.

25. Waites conducted a review of the incident, including viewing the GPS reports for the route, reviewing the video of the route. From this information, Waites prepared a report for Dr. Smith.

26. Dr. Smith reviewed the report and investigated the incident. From this, Dr. Smith determined that Driver-Hogue and Stevens should be terminated because they had not reported the incident to their supervisors pursuant to the Manual and had not demonstrated urgency to return Nellie to school.

27. Dr. Smith conferred with Superintendent Nathaniel Jones (“Jones”) as he was making his decision regarding termination. Jones is African-American.

28. Dr. Smith informed Waites of his decision to terminate both Driver-Hogue’s and Stevens’ employment.

29. On January 18, 2011, Dr. Smith, along with Waites and the Assistant Transportation Director, Fran Miller, met with Driver-Hogue and Stevens individually to inform them of their immediate termination for 1) their failure to “properly drop off a student” at a school, 2) their failure to check their bus before leaving the school, 3) their failure to notify their supervisor of what happened about the child still being on the bus, and 4) their failure to return the student to the school as a matter of urgency. Also included in both letters of termination was conclusion by Dr. Smith that Stevens’ and Driver-Hogue’s conduct put the student and MSD at risk.

30. Driver-Hogue and Stevens identified Donna Klar (“Klar”), a Caucasian employee, they

claim was treated more favorably.

31. Klar discovered a student left on her bus January 11, 2011. Klar did not have a monitor on her bus. Klar immediately reported the student to her supervisors at the transportation base and immediately returned the student. Dr. Smith made the personnel decision to not terminate Klar's employment.

32. To the extent that any of the foregoing findings of fact are conclusions of law, they are hereby incorporated below as additional conclusions of law.

### **CONCLUSIONS OF LAW**

1. ICRC has jurisdiction over the subject matter and parties.
2. Stevens and Driver-Hogue and MSD are each a "person" as defined in Ind. Code § 22-9-1-3(a).
3. MSD is an "employer". Ind. Code § 22-9-1-3(h).
4. "Discriminatory practice" is defined as "the exclusion of a person from equal opportunities because of race .... Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter." Ind. Code § 22-9-1-3(l).
5. Driver-Hogue's and Steven's claims are subject to adjudication in accordance with the provisions of the Indiana Civil Rights Law ("ICRL"). Ind. Code § 22-9-1-1 *et seq.*
6. Cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.* are entitled to great weight in construing the intent of the ICRL. *Ind. Civil Rights Comm'n v. Culver Educ. Found.*, 535 N.E.2d 112 (Ind. 1989).
7. In order to prevail on their claims that their termination was racially discriminatory, Driver-Hogue and Stevens must prove that MSD discriminated against them on the basis of race under

either the direct or indirect methods of proof. *Good v. Univ. of Chicago Med. Ctr.*, 673 F.3d 670, 672-73 (7<sup>th</sup> Cir. 2012). Driver-Hogue and Stevens did not meet such burden.

8. The ultimate burden of persuasion that MSD engaged in unlawful discrimination against Stevens and Driver-Hogue on the basis of race remains at all times with Stevens and Driver-Hogue. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

9. Under the direct method of proof, Driver-Hogue and Stevens must present “direct or circumstantial evidence that creates a convincing mosaic of discrimination on the basis of race.” *Good*, 673 F.3d at 674 (quoting *Winsley v. Cook County*, 563 F.3d 598, 604 (7<sup>th</sup> Cir. 2009)). The court further reasoned that the direct method of proof “requires evidence leading *directly* to the conclusion that an employer was illegally motivated, without reliance on speculation.” *Id.* at 676 (emphasis in original decision).

10. Alternatively, in a case where there is no direct evidence that the adverse action was taken for a prohibited reason, the order and allocation of proof is governed by the three stage process first set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, (1973). That formulation requires that the complainant make a *prima facie* case of unlawful discrimination, thereby creating a mandatory, but rebuttable, presumption of unlawful discrimination. The respondent may rebut that presumption by introducing evidence of (not proving) a legitimate business reason for the adverse action. The complainant may then prove by a preponderance of the evidence that the asserted reason is a pretext for unlawful discrimination.

11. Driver-Hogue and Stevens did not meet their burden of establishing a *prima facie* case by showing that (1) they are a member of a protected class; (2) they were meeting the employer’s legitimate performance expectations; (3) they suffered an adverse employment action; and (4) similarly situated employees were treated more favorably. It is concluded that Driver-Hogue and

Stevens are members of a protected class and suffered an adverse employment action. However, they were not meeting the employer's legitimate performance expectation and similarly situated employees were not treated more favorably.

12. Klar is not similarly situated to Driver-Hogue and Stevens.

“Regarding the direct method of proof, to determine whether a plaintiff's co-worker was similarly situated for purposes of this analysis, a court must make a ‘flexible, common-sense’ evaluation of the relevant factors. All things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination. The ‘similarly situated’ prong establishes whether all things are in fact equal. The purpose is to eliminate other possible explanatory variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable—discriminatory animus. Similarly situated employees must be “directly comparable” to the plaintiff ‘in all material respects,’ but they need not have identical employment files. So long as the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly situated requirement is satisfied. Which factors are material is a case-specific inquiry that depends on the specifics of the defendant's decision and the stated reason for it. The question is whether members of the comparison group are sufficiently comparable to the plaintiff to suggest that the plaintiff was singled out for worse treatment.” *Good*, 673 F.3d at 676 (internal citations omitted).

13. Similar to Driver-Hogue, Klar was a school bus driver for MSD. Similar to Driver-Hogue, Klar engaged in prohibited conduct by leaving a child on the bus. However, Klar did not have a monitor on her bus, in contrast to Stevens serving as monitor. Further, Klar *immediately* reported to supervision that the student was left on the bus as soon as Klar discovered the student. Klar immediately returned the student to the school. Driver-Hogue and Stevens, on the other hand, waited to report the incident until after they used the restroom facilities, signed their time card, and received a phone call from the dispatcher, Taylor.

14. Driver-Hogue and Stevens failed to show that MSD's decision to terminate their employment for 1) their failure to “properly drop off a student” at a school, 2) their failure to check their bus before leaving the school, 3) their failure to notify their supervisor of what happened about the child still being on the bus, and 4) their failure to return the student to the school as a matter of

urgency was motivated by racial animus.

15. Driver-Hogue and Stevens failed to establish a *prima facie* case of discrimination by a preponderance of the evidence because they have not demonstrated that they were meeting MSD's legitimate business expectations or that they were treated less favorably than other similarly-situated employees not of the protected class.

16. MSD did not terminate Driver-Hogue's and Stevens' employment because of race.

17. MSD did not commit an unlawful discriminatory practice against Driver-Hogue and Stevens.

18. If the ICRC finds that a person has not committed an unlawful discriminatory practice, it must dismiss the complaint as against that person. IC 22-9-1-3(m).

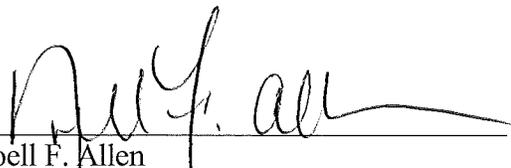
19. Administrative review of this proposed decision may be obtained by the filing of a writing identifying with reasonable particularity each basis of each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).

20. Any Findings of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

**ORDER**

1. Driver-Hogue's and Steven's complaints are **DISMISSED**, with prejudice.

Dated this 29<sup>th</sup> Day of July, 2013.

  
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Noell F. Allen  
Administrative Law Judge  
Indiana Civil Rights Commission

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