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**SUPREME COURT OF THE
STATE OF NEW YORK
Appellate Division, Fourth Judicial Department**

932

TP 21-00785

**PRESENT: CENTRA, J.P., LINDLEY, CURRAN,
TROUTMAN, AND DEJOSEPH, JJ.**

**IN THE MATTER OF
BERNICE CURRY-MALCOLM,
PETITIONER,**

v

ORDER

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS AND
ROCHESTER CITY SCHOOL
DISTRICT, RESPONDENTS.**

BERNICE CURRY-MALCOLM, PETITIONER PRO SE.

**CAROLINE J. DOWNEY, GENERAL COUNSEL,
BRONX (AARON M. WOSKOFF OF COUNSEL),
FOR RESPONDENT NEW YORK STATE DIVISION
OF HUMAN RIGHTS.**

**STEVEN G. CARLING, ACTING GENERAL
COUNSEL, ROCHESTER CITY SCHOOL
DISTRICT, ROCHESTER (ALISON K.L.
MOYER OF COUNSEL), FOR RESPONDENT
ROCHESTER CITY SCHOOL DISTRICT.**

(Filed Nov. 12, 2021)

Proceeding pursuant to CPLR article 78 and Executive Law § 298 (transferred to the Appellate Division

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of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered October 27, 2020) to review a determination of respondent New York State Division of Human Rights. The determination dismissed the complaints of petitioner.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: November 12, 2021

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, Ann Dillon Flynn, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

[SEAL] *IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this November 12, 2021.*

/s/ Ann Dillon Flynn
Clerk

**SUPREME COURT OF THE
STATE OF NEW YORK
Appellate Division, Fourth Judicial Department**

TP 21-00785

**IN THE MATTER OF BERNICE CURRY-MALCOLM,
PETITIONER,**

V

**NEW YORK STATE DIVISION OF HUMAN
RIGHTS AND ROCHESTER CITY SCHOOL
DISTRICT, RESPONDENTS.**

Index No: I2019004925

(Filed May 27, 2021)

The above-referenced proceeding has been transferred to this Court and has been scheduled for the term of Court commencing MONDAY, OCTOBER 18, 2021, which will be approximately 10 days in length. The matter is deemed submitted (*see* 22 NYCRR 1000.15[d][2][C]).

Petitioner shall file 5 copies of a brief, with proof of service of 1 copy, on or before JULY 1, 2021. If no brief, or motion to extend the time to file and serve a brief, is filed and served on or before JULY 1, 2021, this proceeding is deemed dismissed without further order (*see* 22 NYCRR 1000.12[b][1]).

Respondent shall file 5 copies of a brief, with proof of service of 1 copy, on or before AUGUST 6, 2021 (*see* 22 NYCRR 1000.12[b][2]). If no respondent's brief will be filed, counsel, or respondent if not represented by

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counsel, shall notify the Clerk's Office in writing within 30 days of service of petitioner's brief.

All papers filed and served in this matter shall bear the above-referenced Appellate Division docket number (see 22 NYCRR 1250.1[f]).

Failure to comply with any provision of the Court's Rules, including the failure to comply with applicable deadlines, may result in the imposition of sanctions (see 22 NYCRR 1250.1[h]). This scheduling order constitutes the order of the Court.

Entered: May 27, 2021

Mark W. Bennett
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, MARK W. BENNETT, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

[SEAL] *IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this May 27, 2021.*

/s/ Mark W. Bennett
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

In the Matter of the Application of

BERNICE CURRY-MALCOLM,
Petitioner-Plaintiff,

Index No.

For Judgment Pursuant to
Article 78 of the New York
Civil Practice Law and Rules,
and Judgment in the matter

I2019004925
ORDER

v.

NEW YORK STATE DIVISION OF
HUMAN RIGHTS and ROCHESTER
CITY SCHOOL DISTRICT,
Respondents-Defendants.

Hon. Ann Marie Taddeo, JSC

(Filed Oct. 27, 2020)

Petitioner brought the instant action seeking review of a final determination of the New York Division of Human Rights. Upon consideration of the papers submitted, this Court finds that, consistent with Executive Law §298, CPLR §7804(g) and 22 NYCRR §202.57, this Court lacks jurisdiction over the Petition.

In so ruling, the Court relies on the language of the relevant statutes:

"[W]here the order sought to be reviewed was made as a result of a public hearing held pursuant to

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paragraph a of subdivision four of section two hundred ninety-seven of this article, the court shall make an order directing that the proceeding be transferred for disposition to the appellate division of the supreme court in the judicial department embracing the county in which the proceeding was commenced.” N.Y. Exec. Law § 298.

“Where the petition seeks review of an order issued after a public hearing held pursuant to section 297(4)(a) of the Executive Law . . . the Supreme Court, upon the filing of the petition, shall make an order directing that the proceeding be transferred for disposition to the Appellate Division in the judicial department embracing the county in which the proceeding was commenced . . . ” 22 NYCRR § 202.57

“Where [a substantial evidence] issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. CPLR §7804.

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Accordingly, it is

ORDERED, that this matter is hereby transferred to the Appellate Division, Fourth Department for a determination of all issues.

Dated: Oct 27, 2020 /s/ Ann Marie Taddeo
Rochester, New York Hon. Ann Marie Taddeo, JSC

**SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department**

MOTION NO. 932/21

TP 21-00785

Present: WHALEN, P.J., CENTRA, LINDLEY, AND
CURRAN, JJ.

IN THE MATTER OF BERNICE CURRY-MALCOLM,
PETITIONER,

v

NEW YORK STATE DIVISION OF HUMAN
RIGHTS AND ROCHESTER CITY SCHOOL
DISTRICT, RESPONDENTS.

(Filed Mar. 11, 2022)

Petitioner having moved for leave to appeal to the
Court of Appeals from the order of this Court entered
November 12, 2021,

Now, upon reading and filing the papers with re-
spect to the motion, and due deliberation having been
had thereon,

It is hereby ORDERED that the motion is denied.

Entered: March 11, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, Ann Dillon Flynn, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

[SEAL] *IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this MAR 11, 2022*

/s/ Ann Dillon Flynn
Clerk

***State of New York
Court of Appeals***

*Decided and Entered on the
fourteenth day of June, 2022*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

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In the Matter of Bernice Curry-Malcolm,
Appellant,

v.

New York State Division of Human Rights et al.,
Respondents.

Appellant having appealed to the Court of Appeals
in the above title;

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is dismissed without
costs, by the Court *sua sponte*, upon the ground that no
appeal lies as of right from the unanimous judgment of
the Appellate Division absent direct involvement of a
substantial constitutional question (*see* CPLR 5601).

Judge Troutman took no part.

/s/

 Lisa LeCours
Lisa LeCours
Clerk of the Court

Constitutional, Statutory, and Regulatory Provisions Involved

The New York State Constitution provides in pertinent part:

ARTICLE I, BILL OF RIGHTS

Section 11: [Equal protection of laws; discrimination in civil rights prohibited]

§11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. (New. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 6, 2001.)

**NY Code – Article 15: HUMAN RIGHTS LAW,
SECTION 296** provides in pertinent part:

§ 290. Purposes of article.

1. This article shall be known as the “Human Rights Law”.
2. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights.
3. The legislature hereby finds and declares that the state has the responsibility to act to assure

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that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

§ 296. Unlawful discriminatory practices.

(1) It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sexual orientation, military

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status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

(6) It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so.

(7) It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or

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because he or she has filed a complaint, testified or assisted in any proceeding under this article.

42 U.S. Code § 2000e provides in pertinent part:

1. Definitions

For the purposes of this subchapter –

- (a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.
- (b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees.

42 U.S. CODE § 2000E-2 – UNLAWFUL EMPLOYMENT PRACTICES

(a) Employer practices

It shall be an unlawful employment practice for an employer –

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 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

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adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S. CODE § 2000E-3 – OTHER UNLAWFUL EMPLOYMENT PRACTICES provides in pertinent part:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on – the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964

Prohibits discrimination by employers against an individual on the basis of the individual's race, color, religion, sex (including pregnancy) and national origin. Title VII prohibits discrimination in connection with the hiring and discharge of an employee and "with respect to his compensation, terms, conditions or privileges of employment. Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

CIVIL RIGHTS – TITLE VII – DISPARATE TREATMENT

Title VII prohibits intentional discrimination based on race, color, religion, sex, or national origin and prohibits both "disparate treatment" and "disparate impact" discrimination. Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class.

Protected classes identified by state and/or federal law include:

Age – A person 40 years of age or older.

Color – Regarding the complexion or varying shades of a person's skin.

Race – A local geographic or global human population distinguished as more or less distinct group by genetically transmitted immutable characteristics (such as

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skin color, hair texture and certain facial features); any group of people united or classified together on the basis of common history, nationality, or geographical distribution; mankind as a whole. All people are allowed for the purposes of Title VII of 1964 Civil Rights Act to claim genealogy to one or more race and are, therefore, readily covered under this category.

Title VII prohibits sex discrimination in employment. Specifically, Title VII makes it illegal 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 [or her] compensation, terms, or privileges of employment, because of such individual’s . . . sex . . . ; or “2) to limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise affect [the individual’s] status as an employee, because of such individual’s . . . sex. . . .”

Title VII also prohibits sex discrimination in on-the-job and apprenticeship programs, retaliation against an employee for opposing a discriminatory employment practice, and sexually stereotyped advertisements for employment positions.

Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. Title VII prohibits the employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.

42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**Fifth Amendment To The
United States Constitution**

In part, No person shall be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V

In relevant part, nor be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. XIV, 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right,

privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

New York State Const., Art. 1, §11

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

**Title VII of the Civil Rights Act of 1964 –
Disparate Treatment**

Title VII makes it unlawful for an employer “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 natural origin.” 42 U.S.C. § 2000e-2(a)(1)

42 U.S.C. §1981

In pertinent part, All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal

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benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Education Law, § 3020-a

Education Law § 3020(1) governs the discipline of tenured teachers and provides that “[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause” and in accordance with statutory procedures”. This statute is the exclusive method of disciplining a tenured teacher in New York State.

CPLR, § Article 78

A petitioner must seek review of determination within four months after the determination to be reviewed becomes final and binding[.]” A determination becomes final and binding when it has an impact on the petitioner

Other Relevant Material References

Collective Bargaining Agreement(s) Between Rochester City School District and Association of Supervisors an Administrators of Rochester
