

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JAMES B. CORCORAN,**

Complainant,

v.

**CITIZENS TELECOMMUNICATIONS COMPANY  
OF NEW YORK, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10108268

**PLEASE TAKE NOTICE** that the attached is a true copy of the Alternative Proposed Order, issued on December 5, 2007, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Lilliana Estrella-Castillo, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Alternative Proposed Order, and all objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”), WITH THE FOLLOWING AMENDMENT:**

- The award of \$5,000 for mental anguish is not approved or adopted, so the total award shall be and is \$6,025, plus the interest as outlined in the Alternative Proposed Order.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in

the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED**, this 28th day of December, 2007.

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KUMIKI GIBSON  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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**JAMES B. CORCORAN,**

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**CITIZENS TELECOMMUNICATIONS COMPANY  
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Respondent.

**ALTERNATIVE  
PROPOSED ORDER**

Case No. **10108268**

Respondent discriminated against Complainant based upon his disability by failing to provide him with a reasonable accommodation. Complainant is awarded \$6,025 in back wages, plus interest, and \$5,000 in mental anguish damages, plus interest.

**PROCEEDINGS IN THE CASE**

On October 13, 2005, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art 15 (“Human Rights Law”).

After an investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division referred the case to public hearing.

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge (“ALJ”) with the Division. A public hearing was conducted on July 30, 2007.

Complainant and Respondent appeared at the hearing. Complainant was represented by Greenwald Law Offices, by John A. McHugh, Esq. Respondent was represented by Thomas E. Gausden, Esq., Associate General Counsel.

During the hearing, the ALJ amended the caption and complaint to reflect Respondent's correct legal name. (Tr. 4-5)

Respondent filed a timely post-hearing brief on September 12, 2007.

On October 11, 2007, ALJ Estrella-Castillo issued a recommended Findings of Fact, Opinion and Decision, and Order ("Recommended Order"). Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit by Complainant's counsel dated November 5, 2007.

#### **FINDINGS OF FACT**

1. Respondent, a telephone company, hired Complainant on February 16, 1970. (Tr. 15) During the period relevant to this complaint, Complainant was employed as a Communications Technician, also known as a cable splicer. (Joint Exhibit 5; Tr. 16, 20)

2. As a Communications Technician, Complainant's job duties included being able to lift tools and ladders; climb ladders and poles; work from a bucket; and work in confined spaces. The duties included being able to lift up to eighty pounds. (Joint Exhibit 5)

3. On June 8, 2004, Complainant was operating out of a bucket truck when the road gave way beneath the truck. The truck fell over with Complainant in the bucket. (Tr. 17, 19) Complainant sustained injuries, which included a fracture in his left ankle, a severe sprain in his right ankle, and a tear in the rotator cuff in his right shoulder. (ALJ's Exhibit I; Tr. 17-18)

4. As a result of his injuries, Complainant was unable to return to work until January of 2005.

5. Complainant's orthopedist, Dr. Charles Episalla, concluded that Complainant could be released for work with the following restrictions: no prolonged standing; no heavy lifting over twenty pounds; and no use of his upper extremities. These restrictions were for approximately three months. The doctor issued a note to that effect. (Joint Exhibit 1; Tr. 19-20)

6. Dr. Episalla provided Complainant with another note indicating that he could return to light-duty work as of January 31, 2005. (Joint Exhibit 2; Tr. 24-25)

7. Complainant provided both doctor's notes to his supervisor, and Respondent's Human Resources Manager acknowledged receiving both notes. (Joint Exhibit 2; Tr. 20, 24-25, 52-53, 58)

8. Complainant's immediate supervisor, Larry Dise, advised Complainant that work was available for him to perform. (Tr. 22, 55, 68-69) Thereafter, Dise informed Complainant that he could not return to work because the Human Resources Office indicated that there was no work available. (Tr. 23) Complainant was not returned to work in January 2005.

9. In March of 2005, Complainant underwent surgery to repair his torn rotator cuff. (Tr. 24) As a result, Complainant was unable to return to work until June of 2005, at which time his doctor provided him another note indicating he could return to work with the following restrictions: no lifting, pushing, pulling with the right arm; and only sedentary work, if available. (Joint Exhibit 3; Tr. 26-27)

10. While Complainant was out of work, he was told by Respondent's switch-room supervisor, James Schug, that work within his restrictions was available for him. (Tr. 29-30) Keith Hedberg, a contractor in Respondent's engineering office, also informed Complainant that work within his restrictions was available. (Tr. 30-31)

11. Complainant supplied the note to his supervisor. Respondent's Human Recourses Office advised Complainant that he could not return to work because the doctor's note did not specify when Complainant would be available to return to work full-duty, as required by Respondent's light-duty policy. (Tr. 28, 58)

12. Respondent had a light-duty work policy that provided light-duty work to its injured employees if "there is a prognosis that the person will be 100 percent capable of doing the essentially [*sic*] functions of the job at some future point in time," and that "work that fits the restrictions that are spelled out in the doctor's medical diagnosis" is available. (Tr. 55, 67-68)

13. Respondent never returned Complainant back to work because Complainant did not submit information as to when he would be 100% fit to return to his full duties. (Tr. 58, 62)

14. Complainant retired from Respondent in January of 2007. (Tr. 42)

15. The parties stipulated during the hearing that Complainant's lost wages equaled \$6,025. (Tr. 7-8)

### **OPINION AND DECISION**

Respondent discriminated against Complainant when it failed to provide him with a reasonable accommodation for his disability. The complaint is hereby sustained.

Human Rights Law § 296.3 prohibits an employer from refusing to provide a reasonable accommodation to a known disability of an employee in his job or occupation.

In the instant case, Complainant suffered from a disability: It is undisputed that he suffered injuries that restricted his ability to perform the functions of his job without a reasonable accommodation. It is also undisputed that Respondent had at least two positions available that Complainant could perform within his medical restrictions.

Under the Law, an employer must “move forward to consider accommodation once the need for accommodation is known or requested.” 9 NYCRR § 466.11(j)(k); *see also Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 218 (2d Cir. 2001) (“ADA envisions an ‘interactive process’ by which employers and employees work together to assess whether an employee’s disability can be reasonably accommodated”); *Hayes v. Estee Lauder Cos., Inc.*, 34 A.D.3d 735; 825 N.Y.S.2d 237 (2d Dept. 2006) (same as applied to Human Rights Law); *Pimentel v. Citibank, N.A.*, 29 A.D.3d 141; 811 N.Y.S.2d 381 (1st Dept. 2006) (same as applied to Human Rights Law).

Here, there is no evidence that Respondent considered how to accommodate Respondent or engaged in any interactive process with Complainant in order to attempt to do so, despite its knowledge that Complainant suffered from a disability. That decision was incomprehensible in light of the undisputed evidence that Respondent actually had work available that Complainant could have performed with his medical restrictions, and may have had other work that Complainant may have been able to perform with some accommodations. But, Complainant never received the benefit of that work because Respondent never fulfilled its duty to consider or discuss the matter with him.

Respondent proffers its light-duty policy as its defense to this charge of discrimination. Specifically, it contends that because Complainant did not provide it with a prognosis as to when he would be 100% fully functioning, as required by its light-duty policy, Respondent had no duty to employ Complainant with his disability. Respondent misunderstands the law. While Respondent may not have been required to provide Complainant with light-duty work per se (because Complainant may not have satisfied the requirements of that policy), Respondent was required to engage in an interactive process to determine if it could reasonably accommodate

Complainant's disability. Respondent's defense, if accepted, would require employers to try to accommodate only employees with temporary disabilities that would end on a date certain, and allow them to ignore those employees whose temporary disability could not be forecasted with certainty and those with permanent disabilities. Such a result would violate both the letter of the Law (which protects employees with permanent disabilities, as well as those with temporary disabilities, and imposes a duty to reasonably accommodate both) and the spirit of the Law (which is to ensure employment for people with disabilities to the fullest extent possible).

In short, Respondent violated the Law by refusing to reasonably accommodate Complainant's disability. Accordingly, Respondent is liable to Complainant.

As a result of Respondent's violation, Complainant is entitled to lost wages for the period of time he was able to work with restrictions and was not returned to work. *See* Human Rights Law § 297.4(c). The parties stipulated this loss to be \$6,025. Thus, Complainant is entitled to lost wages in that amount, plus interest at a rate of nine percent per annum from January 1, 2006, a reasonable intermediate date, until the date payment is made.

Complainant is further entitled to recovery for any mental anguish he suffered as a result of Respondent's discriminatory actions. *See Id.* Though Complainant did not testify to mental anguish, "[s]uch distress follows such bias and exclusion as night follows day." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 184 (1978). In consideration of the severity of Respondent's discriminatory conduct and the fact that after working for Respondent for thirty five years, Complainant was never returned to work after he suffered an on-the-job injury, Complainant is entitled to \$5,000 in mental anguish damages.

## **ORDER**

Based on the foregoing, and pursuant to the provisions of the Human Rights Law and the Rules of Practice of the Division, it is

**ORDERED**, that Respondent, and his agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices against the disabled; and it is further

**ORDERED**, that Respondent shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty days of the date of the final Order, Respondent shall promulgate a written disability policy that articulates a lawful means for providing its employees reasonable accommodations for their disabilities. Said policy shall be immediately posted in prominent places in Respondent's office spaces where employees may view it, and it shall immediately be distributed to all of Respondent's employees.

2. Within sixty days of the date of the final Order, Respondent shall prominently post the Division of Human Rights' poster (available from the Division's offices and on its website at [www.dhr.state.ny.us](http://www.dhr.state.ny.us) under the homepage heading, "NYS Division of Human Rights Is...") in places in Respondent's office spaces where employees may view it.

3. Within sixty days of the date of the final Order, Respondent shall pay to Complainant the sum of \$6,025 for lost wages. Interest shall accrue on the lost wages at a rate of nine percent per annum from January 31, 2006, a reasonable intermediate date, until the date payment is made.

4. Within sixty days of the receipt of the final Order, Respondent shall pay to Complainant the sum of \$5,000 as compensation for the mental anguish he suffered as a result of

Respondent's discriminatory conduct. Interest shall accrue on the award at a rate of nine percent per annum from the date of this Order until the date payment is made.

5. Payment shall be made by Respondent in the form of two certified checks made payable to the order of Complainant, James B. Corcoran, and delivered by certified mail, return receipt requested to his attorney John A. McHugh, Esq., Greenwald Law Offices, 99 Brookside Avenue, Chester, New York 10918.

6. Respondent shall simultaneously furnish written proof of its compliance with the directives contained in this Order to Caroline J. Downey, General Counsel of the New York State Division of Human Rights, at her office address at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.

7. Respondent shall cooperate with the representatives of the Division during any investigation into the compliance with the directives contained within this Order.

DATED:  
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

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PETER G. BUCHENHOLZ  
Adjudication Counsel