NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of JOSEPH G. FRANCESCO, Complainant, v. VERIZON NEW YORK, INC., Respondent.	NOTICE AND FINAL ORDER Case No. 1250112

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on December 24, 2007, by Peter G. Buchenholz , Adjudication Counsel, after a hearing held before David W. Bowden, 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"). 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 16th day of January, 2008.

KUMIKI GIBSON
COMMISSIONER

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of JOSEPH G. FRANCESCO, Complainant, v. VERIZON NEW YORK, INC., Respondent.	**ALTERNATIVE PROPOSED ORDER** Case No. **1250112**

Respondent discriminated against Complainant when it withdrew its offer of employment based on Complainant's disability.

PROCEEDINGS IN THE CASE

After Complainant filed a complaint with the New York State Division of Human Rights ("Division"), charging Respondent with discriminatory practices relating to employment in violation of N.Y. Exec. Law, art 15 ("Human Rights Law"), the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent engaged in unlawful discriminatory practices. Three separate hearings were conducted in this matter, and the parties have had several opportunities to submit evidence, brief issues, and file objections. Throughout the proceedings, Complainant was represented by the law firm of Swetnick, Mozer & Burns, by Robert N. Swetnick, of counsel, and Respondent was represented by the law firm of Jones, Day, Reavus & Pogue, by Aaron L. Agendroad, of counsel.

A review of the testimony, briefs, objections, and all of the evidence accumulated results in this Alternative Proposed Order.

FINDINGS OF FACT

1. Complainant was born with monocular vision. (Tr. A[1] 105-106)

2. On November 17, 1990, Complainant applied to Respondent, a telephone company, for the position of field technician. (Complainant's Exhibit 1; Tr. A 28) The field technician title included three separate positions: installer/repairman, lineman, and cable splicer. (Tr. A 12) The application was for positions statewide. (Tr. A 28-29) In his application, Complainant expressed a first and second preference for a position in Yonkers and in Westchester, respectively. (Complainant's Exhibit 1) Complainant was open to be placed in other areas, as well. (Tr. A 97)

3. Complainant passed the requisite test for installer/repairman, and, was hired for a temporary position, which was viable for up to one year in Respondent's Yonkers garage. (Complainant's Exhibit 2; Tr. A 12-13, 22-25, 27, 64, 96, 117)

4. Thereafter, on December 28, 1990, Complainant underwent a medical examination wherein Respondent became aware of Complainant's monocular vision. (Complainant's Exhibit 3; Tr. A 13)

5. After the medical examination, Respondent determined that it could not hire Complainant as an installer/repairman. In its view, it was prohibited from doing so by U.S. Department of Transportation ("DoT") regulations that required drivers of "commercial vehicles," as defined by DoT, to possess binocular vision. (Complainant's Exhibit AA; Tr. A 14) DoT regulations defined "commercial vehicles" as those weighing over 10,000 pounds and involved in interstate commerce. (Complainant's Exhibit AA)

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[1] "Tr. A" refers to the transcript dated September 9, 2002, and "Tr. B" refers to the transcript dated April 30, 2007.

6. On January 25, 1991, Respondent rescinded its job offer to Complainant because of his impaired vision. (Tr. A 94)

7. John Walker was Respondent's Staffing Specialist during the relevant period. His duties included recruiting and staffing for Respondent. (Tr. A 9-10)

8. Walker testified that Respondent "is governed by the [DoT] guidelines for medicals for any kind of driving job and the DoT medical states that you must have vision in both eyes." (Tr. A 13)

9. He also testified that all of Respondent's technicians were required to have drivers' licenses "because at any point they can be transferred or asked for a transfer to another location and would have to drive." (Tr. A 17) Walker admitted, however, that a commercial driver's license was not required for its technicians. (Tr. A 44)

10. It is undisputed that Complainant possessed a valid, non-commercial driver's license. (Complainant's Exhibits 6, 7; Tr. A 43-44, 104)

11. Walker maintained that DoT regulations required binocular vision in order to drive "[a]ny company vehicle. That's a van, bucket truck or the big rigs, the tractor trailers." (Tr. A 45)

12. Complainant admitted that pursuant to the DoT regulations, he was prohibited from driving a bucket truck, presumably because of its weight. He testified, however, that individuals in the Yonkers field office drove Dodge Ram vans, which were similar to the type of personal vehicle he drove at the time. (Tr. A 121) Respondent did not dispute this.

13. Furthermore, Clifford W. Parks testified on behalf of Respondent that not all installers/repairmen from each of Respondent's fifteen garages in Westchester were required to drive interstate. (Tr. B 44, 59) Respondent offered no evidence clarifying from which garages

installers/repairmen were required to travel interstate, other than from its Portchester garages. (Tr. B 50-51)

14. Joseph A. Barca, an official from the local union that represented installers/repairmen, confirmed that Respondent's employees would travel to Connecticut on a regular basis from the Portchester garages. (Tr. B 57-58, 62-64) Barca testified that an installer/repairman hired to work in White Plains, however, would only travel to Connecticut on rare occasions. (Tr. B 68-69, 96, 99) Of the approximately 1,200 field technicians Respondent employed in Westchester in 1990, only 200 to 225 traveled to Connecticut. (Tr. B 76) He also testified that field technicians in 1990 primarily drove vans, and that those vans weighed less than 10,001 pounds. (Tr. B 82-83, 86-87) Respondent did not dispute any of Barca's testimony.

15. By letter dated April 12, 2005, Complainant's counsel submitted a document, based on records provided by Respondent, calculating the wages Complainant would have earned had he not been terminated on January 25, 1991. In 1991, Complainant would have earned $45,197. (Commissioner's Exhibit 1) This figure was not disputed by Respondent.

16. Complainant credibly testified that after Respondent terminated his employment, he actively sought employment elsewhere through advertisements, agencies, and personal contacts. He applied to over 100 positions. (Tr. A 134-35) Complainant's total earnings in 1991 were $20,841. Specifically, Complainant presented evidence that he earned $15,603 in wages from employment in various companies in 1991. In 1991, he was hired by Sunbeam Precision Measurement, where he earned $14,237. His position at Sunbeam was eventually eliminated. Thereafter, he accepted a temporary position at Pentech International, Inc., where he earned $309. Complainant left Pentech because he was seeking a permanent position. Complainant then worked for Ferrero Foods Incorporated, where he earned $1,057.

Complainant received unemployment insurance in 1991, but his testimony does not reveal the amount. Complainant's counsel's April 2005 letter detailed the above-listed amounts and includes $5,238 in additional income which is presumed to be from unemployment insurance. (Commissioner's Exhibit 1; Complainant's Exhibit 9; Tr. A 113, 125-27) Thus, Complainant's total earnings in 1991, $20,841, subtracted from $45,197, the amount he would have earned from Respondent had he not been terminated on January 25, 1991, leaves Complainant with total lost wages in the amount of $24,356.

OPINION AND DECISION

Respondent discriminated against Complainant when it withdrew its offer of employment after discovering Complainant's disability.

The Human Rights Law prohibits an employer from barring, discharging, or refusing to hire or employ an individual because he has a disability. *See* Human Rights Law § 296.1(a).

There is no dispute that Complainant is disabled within the meaning of the Human Rights Law, and Respondent admits that it withdrew its employment offer from Complainant because of his visual impairment. Respondent contends, however, that it was compelled to do so under its policy that required field technicians to be medically acceptable under the DoT regulations. Respondent, however, failed to show that this discriminatory policy was legitimate and, thus, lawful.

Where there is a policy that is discriminatory on its face (as the policy that Respondent claims was at issue here), Respondent bears the burden of proving that the policy is justified. *See New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League*, 36 A.D.2d 364, 320 N.Y.S.2d 788 (4th Dept. 1971) (burden of proof is on the employer to prove a bona fide occupational qualification exception to the Human Rights Law); *see also*

Bates v. UPS, 465 F.3d 1069, 1080 (9th Cir. 2006) ("UPS's use of the [DoT] standard is 'discrimination' under [the ADA] 'unless the standard . . . is shown to be job-related for the position in question and is consistent with business necessity.'"). And, it must do so by a preponderance of the evidence. *See EEOC v. American Airlines*, 48 F.3d 164, 170 (5th Cir. 1995); *EEOC v. Boeing Co.*, 843 F.2d 1213, 1214 (9th Cir. 1988). Here, Respondent does not meet its burden.

Respondent's argument that it was "governed by the Department of Transportation guidelines for medicals for any kind of driving job," *see* Respondent's November 8, 2002, Post-Hearing Brief ("Brief"), at 2, 4, is belied by a plain reading of the DoT regulations at issue, which apply only to commercial vehicles as defined by DoT.

Similarly, Respondent's assertion in its Brief that in New York City, "the driving requirements and DOT regulations . . . apply to all technicians as even technicians assigned to a single building may be called upon to work in other areas and drive Company bucket trucks," is not supported by the record. The testimony Respondent relies upon makes no mention of company bucket trucks (which may or may not have been commercial vehicles). The evidence proffered at trial merely establishes that installers/repairmen were required to drive -- not that they were required to drive bucket trucks. And, Complainant clearly was licensed to and knew how to drive.

In short, Respondent failed to meet its burden of proving that its discriminatory policy was legitimate or necessary for all of its field technicians, including the position for which Complainant applied and was hired. Indeed, the evidence proffered by Complainant strongly suggests otherwise: Complainant submitted evidence that in 1990, field technicians primarily drove vans that were not commercial vehicles as defined by DoT; that only a small percentage of

Respondent's field technicians actually drove interstate so to trigger the DoT regulations; and that the small percentage of field technicians that did drive interstate predominantly came from Respondent's Portchester garages. Complainant was licensed to drive a non-commercial van, did know how to drive a non-commercial van, and was hired for the Yonkers garage

In light of the foregoing, the Division concludes that Respondent discriminated against Complainant in violation of the Human Rights Law, and that Complainant is entitled to compensatory damages for the lost wages he suffered after the unlawful termination. *See* Human Rights Law § 297.4(c).

Complainant credibly testified that after Respondent terminated his employment on January 25, 1991, he actively sought employment elsewhere through advertisements, agencies and personal contacts. He applied to over 100 positions. By the end of 1991, Complainant had worked several jobs and collected unemployment insurance, and his earnings and unemployment totaled $20,841. In short, Complainant demonstrated that he made diligent efforts to mitigate his damages, and Respondent has failed to prove otherwise. *See Walter Motor Truck Co. v. New York State Human Rights Appeal Bd.*, 72 A.D.2d 635, 421 N.Y.S.2d 131 (3rd Dept. 1979) (burden is on Respondent to prove Complainant's lack of diligent efforts to mitigate damages); *see also New York State Div. of Human Rights v. Wackenhut Corp.*, 248 A.D.2d 926, 670 N.Y.S.2d 134 (4th Dept. 1998), *appeal denied*, 92 N.Y.2d 812 (1998) (same).

Had Respondent not unlawfully discriminated against Complainant, Complainant would have earned $45,197 in his year as an installer/repairman. Because Complainant mitigated his damages to the amount of $20,841, he is entitled to $24,356 in lost wages, plus interest.

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 people with disabilities; 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 pay to Complainant the sum of $24,356 for lost wages. Interest shall accrue on the lost wages at a rate of nine percent per annum from June 15, 1991, a reasonable intermediate date, until the date payment is made.

2. Payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Joseph G. Francesco, and delivered by certified mail, return receipt requested to his attorney Robert N. Swetnick, Esq., 217 Broadway, New York, New York 10007..

3. 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, 4th Floor, Bronx, New York 10458.

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

DATED: DEC 24 2007
Bronx, New York

NYS DIVISION OF HUMAN RIGHTS

PETER G. BUCHENHOLZ
Adjudication Counsel