UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -X

THE UNITED STATES OF AMERICA,

Plaintiff,

- against -

Civil Action No.
CV-96-2935 (ARR)

THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES; THE NEW YORK STATE DEPARTMENT OF EDUCATION; and the THREE VILLAGE CENTRAL SCHOOL DISTRICT,

Defendants.

- - - - - - - - - - - - - - - - - -X

MEMORANDUM OF LAW IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Plaintiff, the United States of America ("United States"), submits this memorandum in support of its motion for summary judgment. This action, brought under Section 107 of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 11217, alleges that the defendants, the New York State Department of Motor Vehicles ("DMV"), the New York State Department of Education ("SED") and the Three Village Central School District ("the District"), violated Title I of the ADA by implementing New York State statutes and regulations that prohibited the employment as school bus drivers of certain persons who were missing a foot, a leg, an arm or a hand. In Equal Employment Opportunity Commission v. Amboy Bus Company, Inc., CV-96-5451 (ARR), an action deemed a case related to this action, this Court recently held liable under the ADA a common carrier that, in

accordance with the State's statutes and regulations, refused to employ as a bus driver Theodore Bacalakis, an individual whose leg had been amputated. See Memorandum Opinion and Order, dated August 19, 1998 ("Slip. op."). By this motion, the United States seeks an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, determining that DMV, SED and the District have violated and are liable under the ADA for unlawful discrimination and awarding back pay with pre-judgment interest on behalf of Theodore Bacalakis.

STATEMENT OF FACTS[1]

A. New York State's Regulatory Scheme for the Employment of School Bus Drivers

New York State laws and regulations promulgated under them provide a comprehensive system regulating the employment of bus drivers and, in particular, school bus drivers. The hiring and continued employment by a private common carrier of every bus driver is subject to the rules, and ultimate approval, of DMV. When the common carrier provides transportation to elementary and secondary students, state laws and regulations also vest SED and the chief operating officer of the school district with the power to determine whom the common carrier may employ as a driver.

The New York Vehicle and Traffic Law vests the Commissioner

---

[1]In connection with this motion, Plaintiff submits its Statement Pursuant to Local Civil Rule 56.1; the Deposition of Theodore Bacalakis, dated March 20, 1997; the Deposition of Joseph LoGelfo, dated March 25, 1997; the Deposition of Eileen McCarthy, dated April 11, 1997; and the Declaration of Sanford M. Cohen, dated March 25, 1999, and the exhibits annexed thereto.

of Transportation with comprehensive regulatory authority over the employment of bus drivers by common carriers. Section 509-d provides that before hiring a new bus driver, a common carrier must require the bus driver to pass a medical examination established by the Commissioner under 509-g of the law; obtain the applicant's driving record; investigate the applicant's employment record; and initiate a check of the applicant's criminal record, which can be disqualifying. The hiring of a bus driver is temporary and conditional upon the Commissioner's approval. N.Y. Vehicle and Traffic Law § 509-h. The carrier must regularly require the driver to meet numerous DOT standards, including those of a biennial medical examination, behind the wheel driving tests, and written and oral rules of the road tests. § 509-g. Motor carriers are required to comply with the provisions of the law and to submit to DMV annual affidavits attesting to such compliance. A failure to comply or a false statement of compliance can be sanctioned with a civil penalty or a revocation of vehicle registration. § 509-j.

Pursuant to its authority under N.Y. Vehicle and Traffic Law § 509-g, in 1979, DMV promulgated regulations setting forth physical standards that bus drivers were required to meet at the time of hiring, see § 509-d, and at biennial medical examinations. In particular, it promulgated a regulation prohibiting the employment of certain persons who were missing a limb. The regulation, which was rescinded following the

commencement of this action[2], provided that:

> A person is physically qualified to drive a bus if he or she has no loss of a foot, a leg, a hand or an arm, except that if a person has been employed by a motor carrier and has suffered a loss of a foot, leg, hand or an arm prior to the biennial physical examination of July of 1978 and he or she has demonstrated an ability to safely operate a bus, he or she may be deemed to be physically qualified in spite of such loss.

15 N.Y.C.R.R. § 6.11(b)(1).

The New York Education Law similarly empowers the New York Commissioner of Education to limit the access of school bus drivers to employment opportunities, providing that the Commissioner of Education "shall determine and define the qualifications of drivers and shall make the rules and regulations governing the operation of all transportation facilities used by pupils. . . ." N.Y. Educ. Law § 3624. The Education Law permits but does not require school districts to enter into contracts with common carriers to provide transportation to students. If a district determines to contract with a common carrier to provide transportation, however, state law makes those contracts subject to the final approval by the Commissioner of Education, N.Y. Educ. Law § 3625(2), and provides that "[n]o transportation aid or other public moneys shall be apportioned and paid . . . to any district furnishing transportation for pupils until the contract for transportation

---

[2]The successor regulation is now set forth at 15 N.Y.C.R.R. § 6.10.

shall also have been approved by the commissioner." N.Y. Educ. Law § 3625(4).

The Education Law provides that a school district shall be responsible for approving the employment of school bus drivers by a common carrier that contracts with the district to provide transportation to the district's students. First, it provides that:

> Every contract for transportation of school children shall be in writing, and before such contract is executed, the same shall be submitted for approval to the superintendent of schools of said district and such contract shall not become effective until approved by such superintendent who shall first investigate the same with particular reference to . . . the character and ability of the driver . . .

N.Y. Educ. Law § 3625(1). As noted in the statutory language above, even after the superintendent's approval, a contract for student transportation must be approved by the Commissioner of Education for final approval.

Second, the Education Law requires the school district's chief administrator to approve the employment of every person whom the contract common carrier seeks to employ as a school bus driver:

> The employment of each driver shall be approved by the chief school administrator of a school district for each school bus operated within his district. For the purpose of determining his physical fitness, each driver may be examined on order of the chief school administrator by a duly licensed physician within two weeks prior to the beginning of service in each school year as a school bus driver. The report of the

> physician, in writing, shall be considered by the chief school administrator in determining the fitness of the driver to operate or continue to operate any transportation facilities used by pupils.

N.Y. Educ. Law § 3624.

Pursuant to the authority provided by the Education Law, the SED promulgated a regulation prohibiting the employment as school bus drivers of persons with missing limbs. It provided:

> Physical fitness. (1) Each driver of a school transportation conveyance shall meet the requirements of § 6.11 of the regulations of the Commissioner of Motor Vehicles and the following basic minimum physical requirements:
>
> * * * * * * * * *
>
> (ii) shall have all limbs, hands and feet, including sufficient digits on each hand and the use thereof to enable the driver to control and safely operate the vehicle [.]

8 N.Y.C.R.R. § 156.3(c).[3] That regulation was in effect at the time of the events that gave rise to this action.

---

[3]By letter dated January 24, 1996, plaintiff notified SED of its intent to commence an action alleging that 8 N.Y.C.R.R. § 156.3(c) as then in effect violated the ADA. (Declaration of Sanford M. Cohen, dated March 25, 1999 ("Cohen Decl.")Exh. R). SED thereafter promulgated an amended § 156.3(c), effective May 3, 1999, which did not categorically prohibit the employment as a bus driver of a person missing a limb, but which the United States alleged in its complaint violated the ADA. Following commencement of this action, SED promulgated another amended version of § 156.3(c), effective September 1, 1997. The United States has not amended its complaint to challenge § 156.3(c) as it has existed since September 1, 1997.

B. Defendants' Discriminatory Employment Actions against Theodore Bacalakis

The District is a public school district in Suffolk County, New York. Since at least the 1986, it has contracted with Amboy Bus Company, Inc. ("Amboy") for school bus transportation of District pupils to eight public and seven parochial schools. (Deposition of Eileen McCarthy ("McCarthy Dep.") at 10 - 20 and Exhs. 1 and 2).

The contract between Amboy and the District was subject to approval and was approved by SED when it was first entered into and when it was renewed. (McCarthy Dep. at 16 - 17). In fact, the contract specifically provides that it would not become "binding until . . . the contract is approved by . . . the Commissioner of Education." (McCarthy Dep., Exh. 1 at p. 29, ¶ VIII(G))(emphasis in original).

Section IV, paragraph (G) of the contract between the District and Amboy stated:

> The names of all prospective Drivers, whom the Contractor expects may operate a Bus with student passengers under the terms of this contract, must be submitted to the District by the Contractor for District approval. The District shall withhold or withdraw approval of any Driver who does not comply with any provision of this contract. The District may, in the prudent exercise of its sound discretion, withhold or withdraw approval for any other reason. At no time shall any Bus carrying student passengers under this contract be operated other than by an approved Driver.

(McCarthy Dep., Exh. 1 at p. 21, ¶ IV(G)). It also required that each school bus driver be examined by a physician for

physical fitness in accordance with requirements promulgated by the Commissioners of DMV and SED. (McCarthy Dep., Exh. 1 at p. 17, ¶ IV(A)).

According to the District's transportation coordinator, Eileen McCarthy, pursuant to the contract between the District and Amboy, every school year the District reviews the qualifications of every person whom Amboy intends to employ as a school bus driver of District students. (McCarthy Dep. at 20 - 47). For each driver, Amboy supplies to the District an application package containing an SED bus driver application form approved and supplied to the District by SED (Id. at 22 - 23 and Exh. 3), and a medical examination form supplied to Amboy by DMV (Id. at 24 - 29 and Exh. 4). According to Joseph LoGelfo, the manager of Amboy's Setauket bus depot, which serves the District, for every driver the application package, consisting of an application form, a certification that the prospective driver has passed a road test, a physician's report of a DMV required medical exam, and a CDL license, is provided by Amboy for approval by the District. (Deposition of Joseph LoGelfo ("LoGelfo Dep.") at 14 - 19). In addition, pursuant to DMV requirements, every year Amboy submits an affidavit to DMV that its drivers are qualified to operate a school bus in New York State. (Id. at 24).

Under the District's review procedures, the "superintendent has to eventually approve [the driver's] employment as transporting our District children." (McCarthy Dep. at 31). Ms. McCarthy reviews "every line of every page [of

the package], making sure, as my position dictates, that they are conforming with what is specified by the State," prior to submission of the packages and approval by the Superintendent. (Id. at 34). The District's approval process involves its determination of whether the bus driver applicant is "physically and medically qualified" under the regulations of the New York Commissioners of Education and Motor Vehicles. (Id. at 35).

Theodore Bacalakis was employed by Amboy as a school bus driver for District pupils from October 10, 1985 to August 9, 1991. In August 1991, while off-duty and exiting his car, Mr. Bacalakis was struck by a car driven by drunk driver. During the accident, his left leg was crushed, requiring an amputation of the left leg below the knee. (Deposition of Theodore Bacalakis ("Bacalakis Dep.") at 10.) In the course of the following months, Mr. Bacalakis received rehabilitative therapy and was fitted with a prosthesis. By May 1993, he was physically capable of driving a school bus and otherwise able to perform the duties of a school bus driver. (Id. at 12 - 13).

In May 1993, Mr. Bacalakis went to the Amboy depot and told Joseph LoGelfo that he was prepared to return to work. (Id. at 13). Mr. LoGelfo suggested that Mr. Bacalakis take a drive in a school bus and accompanied Mr. Bacalakis on a drive around the District. (Id.; LoGelfo Dep. at 31 - 35). At the conclusion of the ride, Mr. LoGelfo told Mr. Bacalakis that he had no problem with Mr. Bacalakis's returning to work as a bus driver. (Bacalakis Dep. at 14). According to Mr. LoGelfo, the only

reason that Amboy did not rehire Mr. Bacalakis at that time was that State regulations would not permit his employment because Mr. Bacalakis was missing a limb. (LoGelfo Dep. at 36).

Mr. LoGelfo referred Mr. Bacalakis to the Bus Driver Certification Unit of DMV to inquire whether Mr. Bacalakis was permitted to drive a school bus under State laws. (Bacalakis Dep. at 15 - 17; LoGelfo Dep. 37). On or about June 29, 1993, Mr. Bacalakis wrote a letter to Thomas W. Fullington, Assistant Director of the Bus Driver Certification Unit of DMV. (Bacalakis Dep. at 16). In his letter, Mr. Bacalakis stated that he had lost the lower part of his left leg, had completed 22 months of rehabilitation, and was ready to return to work. He advised Mr. Fullington that Mr. LoGelfo had requested him to inquire of DMV to advise him as to "any requirements . . . necessary to expedite my return to work." (Cohen Decl., Exh. D).

By letter dated July 8, 1993, Mr. Fullington advised Mr. Bacalakis of the provisions of 15 N.Y.C.R.R. § 6.11(b)(1) then in effect. He further stated that, in view of Mr. Bacalakis’s loss of part of his leg, under DMV and SED regulations, Mr. Bacalakis could "not be considered physically qualified to drive any vehicle defined as a bus[.]" (Answer of Defendants DMV and SED, ¶ 17; Cohen Decl., Exh. E).

In or about October 1993, Mr. Bacalakis spoke again with Mr. LoGelfo about returning to work. Mr. LoGelfo told him that, in view of the DMV and SED regulations, "[t]here is nothing else I can do for you." (Bacalakis Dep. at 23). Mr. LoGelfo

referred him to Eileen McCarthy, the District's Transportation Coordinator. (Id.).

Mr. Bacalakis met with Ms. McCarthy in or about December 1993. (Bacalakis Dep. at 23; McCarthy Dep. at 49 - 50). Mr. Bacalakis advised Ms. McCarthy that he wanted to be re-employed to drive students in the district. (McCarthy Dep. at 57). In Mr. Bacalakis's presence, Ms. McCarthy made a telephone call to Lee Comeau, SED's transportation supervisor. (Id. at 57 - 62). Ms. McCarthy asked Mr. Comeau whether Mr. Bacalakis could be qualified by a physician to drive a bus, or whether an exception to the State regulations could be made. (Id. at 61). According to Ms. McCarthy, Mr. Comeau gave an "angry" and "heated" response. (Id. at 59, 61). Mr. Comeau said:

> Absolutely not can you make an exception to what is the law, and you as a School District are required to follow the law. If you were to do otherwise, your entire district and you represent them, Eileen, would be legally liable.

(Id. at 61). Mr. Comeau told Ms. McCarthy that there could be no exception from the law prohibiting Mr. Bacalakis from being employed as a school bus driver. (Id. at 61 - 62).

Ms. McCarthy did not advise Mr. Bacalakis to complete an application to be re-employed because she "knew that he wasn't going to pass the physical examination." (Id. at 68). She did not ask Amboy to reinstate Mr. Bacalakis as a driver because he could not have been employed under State requirements. (Id. at 70).

On or about December 15, 1993, Mr. Bacalakis filed a charge with the U.S. Equal Employment Opportunity Commission ("EEOC"), alleging unlawful discrimination by Amboy under the ADA. (Cohen Decl., Exh. F) On or about March 3, 1994, Mr. Bacalakis filed charges with the EEOC alleging unlawful discrimination by DMV, SED and the District under the ADA. (Cohen Decl., Exhs. G, H and I)

All three defendants and Amboy disavowed any legal liability for the non-hiring of Mr. Bacalakis. By letter dated May 5, 1994, Van Holland, Director of Affirmative Action Programs for DMV, advised the EEOC that, in view of the amputation of his leg, Mr. Bacalakis was "not qualified" to operate a bus in New York State under the Motor Vehicles Commissioners' regulations. (Cohen Decl., Exh. K) In a letter dated June 17, 1994, Kathleen Surgalla, Assistant Counsel to SED, advised the EEOC that Mr. Bacalakis was ineligible to drive a school bus under the then existing 8 N.Y.C.R.R. § 156.3(c)(1). The letter further stated that SED was "currently reviewing §156.3(c)(1) to incorporate specific functional performance standards." (Cohen Decl., Exh. I) By letter dated March 23, 1994, the District advised EEOC that it did not consider itself to be Mr. Bacalakis's employer, and provided excerpts of DMV and SED regulations "that explain why Mr. Bacalakis was removed from his position as a bus driver." (Cohen Decl., Exh. J) Amboy took the position that Mr. Bacalakis was not qualified for employment as a school bus driver because he did not meet the requirements set forth in DMV and SED

regulations.

On September 28, 1994, the EEOC issued reasonable cause determinations that DMV, SED, the District and Amboy had violated the ADA. (Cohen Decl., Exhs. M, N, O and P) The EEOC found that DMV and SED, through their regulations, caused Mr. Bacalakis to be subjected to discrimination on the basis of his disability. (Cohen Decl., Exhs. M and N) It found that the District, through its contractual relationship with Amboy, discriminated against Mr. Bacalakis when did not permit Amboy to re-employ Mr. Bacalakis because he did not meet DMV and SED requirements, and that the District "was in a position to influence" Mr. Bacalakis's rehire. (Cohen Decl., Exh. O) Finally, the EEOC found that Amboy discriminated against Mr. Bacalakis on the basis of disability by refusing to rehire him in adherence to the DMV and SED regulations. (Cohen Decl., Exh. P)

The EEOC thereafter attempted to resolve the dispute through negotiation and conciliation. At a conciliation meeting on January 24, 1995, however, representatives of DMV and SED advised the EEOC that a gubernatorial memorandum precluded any changes in the state regulations at that time. (Cohen Decl., Exh Q (Affidavit of Elizabeth Singletary, EEOC Investigator, in EEOC v. Amboy Bus Company, dated January 17, 1997) at p.2, ¶ 8) In fact, by Executive Order No. 2, dated January 5, 1995, the Governor of the State of New York had established a moratorium on the adoption of any rule or regulation by any New York State department or agency over which he had executive power. See 9

N.Y.C.R.R. § 5.2.

Upon the failure of conciliation, the EEOC referred the probable cause determinations with respect to DMV, SED and the District to the United States Department of Justice for further action. See 42 U.S.C. § 2000e-5. By letter dated January 10, 1996, Plaintiff notified the Governor and Attorney General of the State of New York of the intent to commence an action under the ADA to redress the disability discrimination caused by the DMV and SED regulations and to obtain redress for Mr. Bacalakis. The letter further invited DMV and SED to attempt to resolve the contemplated action in advance of the filing of a complaint. (Cohen Decl., Exh. R). Similarly, by letter dated January 24, 1996, Plaintiff notified the District of the intent to commence an action under the ADA to redress the disability discrimination caused by the DMV and SED regulations and to obtain redress for Mr. Bacalakis and invited the District to attempt to resolve the contemplated action in advance of the filing of a complaint. (Cohen Decl., Exh. S)

Plaintiff and DMV and SED thereupon entered into discussions and negotiations in an attempt to reach a complete resolution of the dispute and eliminate their discriminatory practices. (Complaint ¶ 22; Answer of Defendants DMV and SED, ¶ 22; Answer of Defendant District, ¶ 22). The efforts were unsuccessful. For example, the defendants maintained that they are not liable for Mr. Bacalakis’s lost wages or damages incurred as a consequence of their rules, regulations and actions.

Accordingly, on June 13, 1996, Plaintiff commenced this action.

The pre-filing negotiations did result in some relevant changes in defendants' practices. On May 3, 1996, SED adopted an amended 8 N.Y.C.R.R. § 156.3(c). (Complaint ¶ 12; Answer of Defendants DMV and SED ¶ 12). The new regulation, which was in effect until September 1, 1997, did not prohibit a person missing a limb from driving a school bus. In addition, following commencement of this action, on August 28, 1996, DMV adopted an amended 15 N.Y.C.R.R. § 6.11, which does not contain a provision prohibiting the driving of a bus by a person who is missing a limb.

In or about September 1996, Amboy rehired Theodore Bacalakis as a school bus driver of students in the District. (Bacalakis Dep. at 72). Between 1993, when Mr. Bacalakis first requested that he be reinstated as a school bus driver of District students until his rehire, he lost wages in the amount of $68,723. In addition, he lost Amboy's share of health insurance payments in the amount of $4,095. (Bacalakis Dep. at 36 - 38 and Exhs. A and B) The defendants have not made Mr. Bacalakis whole for the losses he incurred during the period when his re-employment was blocked.

C. The Instant Motion

In its complaint, the United States sought comprehensive injunctive relief against the DMV and SED regulations then in effect and the District's implementation of them. In the interim, a substantial change in circumstances

consistent with the equitable relief sought by the United States, may render the Court's issuance of an injunction unnecessary. As set forth above, following commencement of this action, DMV adopted an amended 15 N.Y.C.R.R. § 6.11, effective August 28, 1996, that eliminated the categorical disqualification of a person missing a limb from employment as a bus driver.

Similarly, SED adopted an amended 8 N.Y.C.R.R. § 156.3(c), effective May 3, 1996, that eliminated the categorical disqualification of a person missing a limb from employment as a school bus driver. The United States alleged that the amended version of § 156.3(c) also violated the ADA because, inter alia, it would have subjected a school bus driver applicant with a disability to a pre-employment physical performance test not required of an applicants without a disability. Following commencement of this action, however, SED adopted a second amendment to § 156.3(c), effective September 1, 1997, and the United States has not amended its complaint to challenge the current regulation.

In short, much of the change which the United States sought in the demand in its complaint for injunctive relief has been accomplished. Although voluntary abandonment of an unlawful practice does not defeat a demand for injunctive relief, upon proper assurances by DMV and SED that they will not re-adopt the prohibitions contained in versions of 15 N.Y.C.R.R. § 6.11 and 8 N.Y.C.R.R. § 156.3(c) in effect at the time this action was commenced, there may be no need for issuance of an injunction.

Accordingly, this motion focuses on defendants' liability for the consequences of the implementation of the regulations and the compensation for Mr. Bacalakis's lost wages and benefits. Plaintiff does not presently maintain that there are no genuine issues of material fact as to the amount of compensation that should be awarded to Mr. Bacalakis's for his non-pecuniary losses resulting from defendants' actions, which will therefore be subject to calculation by a jury.

ARGUMENT

POINT I

DEFENDANTS VIOLATED THE AMERICANS WITH DISABILITIES ACT OF 1990

Title I of the ADA prohibits discrimination in employment on the basis of disability. Section 102(a) of the ADA provides that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. 12112(a).

In order to establish a claim of unlawful discrimination under the employment title of the ADA, a plaintiff must show (1) that the aggrieved person has a disability within the meaning of the ADA; (2) is a "qualified person with a disability," that is, that he can perform the essential functions

of the job with or without reasonable accommodation; and (3) has suffered discrimination, i.e, an adverse employment action; and (4) that the party responsible for the adverse employment action is a "covered entity." See Reeves v. Johnson Controls World Services, Inc., 140 F.3d 144, 149-50 (2d Cir. 1998)(citing Ryan v. Grae & Rybicki,P.C,, 135 F.3d 867, 869-70 (2d Cir. 1998)). All four elements of a claim under Section 102(a) are present here. Indeed, defendants do not appear to raise any serious dispute as to the existence of those elements except as to whether they are covered entities within the meaning of the ADA.

A. A Missing Limb is a Disability Within the Meaning of the ADA

This Court correctly concluded in EEOC v. Amboy Bus Company that Mr. Bacalakis's condition, the loss of his left leg below the knee, is a disability within the meaning of the ADA. (Slip op. at 7 n.7). As the Supreme Court recently explained in Bragdon v. Abbott, U.S. , 118 S.Ct. 2196, 2022 (1998), the analysis of whether a person has a disability under the ADA proceeds in three steps: (1) whether the person suffers from a physical or mental impairment; (2) whether the activity identified as being limited by the impairment "constitutes a major life activity under the ADA;" and (3) whether the impairment "substantially limited" the identified major life activity. See Colwell v. Suffolk County Police Department, 158 F.3d 635, 641 (2d Cir. 1998).

The ADA defines "disability" as "a physical or mental

impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2). The amputation of part of leg is plainly a "physical impairment" under regulations promulgated by the EEOC, where that term is defined, in pertinent part, as an "anatomical loss" affecting the "musculoskeletal" system. 29 C.F.R. § 1630.2(h)(1).[4]

That impairment surely limits a major life activity, the ability to walk. See 29 C.F.R. § 1630.2(I)(defining "walking" as a major life activity); Reeves v. Johnson Controls, 140 F.3d at 152 (walking is treated by the EEOC regulations and "by our own precedents" as a major life activity "per se").

In addition, the amputation of part of a leg "substantially limits" the ability to walk. The EEOC's regulations define the term "substantially limits" to mean that because of the impairment, a person is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(j)(1). Because Mr. Bacalakis's loss of his leg is a severe impairment, is a permanent condition, and will

---

[4]"[G]reat deference" is accorded the EEOC's interpretation of the ADA "since it is charged with administering the statute." Francis v. City of Meriden, 129 F.3d 281, 283 n.1 (2d Cir. 1997)(internal quotation marks and citation omitted).

permanently restrict his ability to walk as compared to the manner in which persons in the general population can walk, as a matter of law it "substantially limits" a major life activity under the ADA. See 29 C.F.R. § 1630.2(j)(2); Colwell, 158 F.3d at 643-44; Ryan, 135 F.3d at 870.

B. Mr. Bacalakis is a "qualified individual with a disability"

The Court also correctly concluded in EEOC v. Amboy Bus Company that Mr. Bacalakis is a "qualified individual with a disability." (Slip op. at 7 - 11). Under the ADA, "the term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 11211(8); See Damico v. City of New York, 132 F.3d 145, 151 (2d Cir. 1998); Borkowski v. Valley Central School District, 63 F.3d 131, 135 (2d Cir. 1995). As the Supreme Court stated in a related context, a disabled individual is qualified if he "is able to meet all of a [position's] requirements in spite of his handicap." School Board of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987)

None of the defendants can contend that Mr. Bacalakis was unable to perform the essential functions of the job as a school bus driver with or without reasonable accommodation during the three years that employment was withheld from him. Amboy's manager, Joseph LoGelfo, was satisfied at that time that Mr. Bacalakis could perform the essential functions of the job.

According to Mr. LoGelfo, the only reason that Amboy did not rehire Mr. Bacalakis at that time was that State regulations would not permit his employment because Mr. Bacalakis was missing a limb. (LoGelfo Dep. at 36). As this Court observed, moreover, the fact that Mr. Bacalakis was rehired upon the rescission of the state regulatory prohibitions against employing a person missing a limb as a bus driver demonstrates that he was able to perform the essential functions of the job. (Slip op. at 7 - 8). And, as the Court also noted, the DMV regulation itself recognized that a person missing a limb can perform the essential functions of the job, since it permitted at least some persons missing limbs -- those certified as bus drivers before 1978 -- to continue to drive buses. (Slip op. at 8 - 9).

C. Defendants Unlawfully Discriminated Against Mr. Bacalakis

There can be no dispute that as a result of the promulgation and implementation by defendants of the DMV and SED regulations, Mr. Bacalakis suffered an adverse employment action: he was not rehired to the job for which he was qualified. As set forth in the Complaint, ¶ 23, defendants' actions discriminated against Mr. Bacalakis and violated the ADA in at least three respects. By enforcing their regulations and preventing Mr. Bacalakis's employment, defendants:

(1) limited and classified a person seeking employment in a way that adversely affected his opportunity because of his disability, in violation of 42 U.S.C. § 12112(b)(1);

(2) utilized standards, criteria, or methods of administration that had the effect of discrimination on the basis of disability, in violation of 42 U.S.C. § 12112(b)(3); and

(3) used a qualification standard that screens out a class of individuals with disabilities when the standard is not job-related and is not consistent with business necessity, in violation of 42 U.S.C. § 12112(b)(6).

The ADA codifies the rule first set forth in Arline that a requirement that operates to prohibit the employment of a person because of his disability must be job-related. In order for such a requirement to be job-related, there must be a showing that it identifies the essential functions of the desired job. Thus, when confronted with a defense to a claim that a defendant has used a qualification standard that screens out a class of individuals with disabilities when the standard is not job-related and is not consistent with business necessity, a court must look behind the standard to determine if it is related to an essential function of the job. "Such an inquiry is essential if [the ADA] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear . . ." Arline, 480 U.S. at 287. In other words, "defendants cannot merely mechanically invoke any set of requirements and pronounce the [disabled] applicant or prospective employee not otherwise qualified." Pandazides v. Virginia Board of Education, 946 F.2d 345, 349 (4th Cir. 1991).

As noted above, and as the Court has found, there is no

basis for concluding that the defunct DMV and SED regulations embraced a job-related that was consistent with business necessity. Indeed, the regulations constitute per se violations of the ADA because, by incorporating a blanket exclusion from employment as a bus driver of every person missing part or all of a limb, they did not permit the individualized assessment of qualification for the job that is required by the statute. See Hutchinson v. United Parcel Service, Inc., 883 F.Supp. 379, 396-98 (N.D. Iowa 1995); Stillwell v. Kansas City, Mo., Board of Police Commissioners, 872 F.Supp. 682, 686-88 (W.D. Mo. 1995)(blanket exclusion of one-handed applicants from licensing as police officers was a per se violation of Title II of ADA); Bombrys v. City of Toledo, 849 F.Supp. 1210, 1216-19 (N.D. Ohio 1993)(irrebuttable presumption that applicant cannot perform the essential functions of the job because of a disability violates the ADA); Sarsycki v. United Parcel Service, 862 F.Supp. 336, 341(W.D.Okl. 1994)(under the ADA, an "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices.") Thus, DMV's, SED's and the District's applications of the regulations constituted discrimination under Title I of the ADA.

D. Defendants are "Covered Entities" under the ADA

Section 102(a) of the ADA, 42 U.S.C. § 11212(a) prohibits discrimination by a "covered entity." Under Section

101 of the ADA, the term "'covered entity' means an employer, employment agency, labor organization or joint labor-management committee." 42 U.S.C. § 11211(2). Although DMV, SED and the District are not employers with respect to Mr. Bacalakis within the common law meaning of that term, they fall well within the meaning of the term "employer" as it has long been applied under federal employment discrimination statutes. In this Circuit, the term employer is "sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities[.]" Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1240 (2d Cir. 1995)(quoting Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2d Cir. 1982, vacated and remanded on other grounds, 463 U.S. 1223 (1983)). Under that test, each of the three defendants is a covered entity under the ADA.

Numerous cases have recognized that an entity can be an "employer" subject to suit under federal anti-discrimination laws even when it has no direct employment relationship with the aggrieved individual. E.g., Cook v. Arrowsmith Shelburne, 69 F.3d at 140 (parent company of subsidiary is employer with respect to subsidiary's employee); Carparts Distribution Center, Inc. v. Automotive Wholesaler's Association of New England, Inc., 37 F.3d 12 (1st Cir. 1994)(under ADA, trade association and trust could be held liable as an employer for alleged disability discrimination against member's employees); Doe on behalf of Doe v. St. Joseph's Hospital of Fort Wayne, 788 F.2d 411, 424 (7th

Cir. 1986)(hospital can be employer under Title VII with respect to independent contractor physician whose staff privileges it revoked); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973)(hospital can be Title VII employer with respect to independent contractor private-duty nurse to whom it refused to refer patients; "[c]ontrol over access to the job market" and "power . . . to foreclose . . . access by any individual to employment opportunities" are the key criteria in determining potential Title VII liability of employers); Diana v. Schlosser, 20 F.Supp.2d 348, 352 (D.Conn. 1998)(radio station may be employer under Title VII of reporter hired by another company under contract with radio station to supply on-air traffic reports; radio station "had significant control over [reporter's] ability to maintain a substantial employment opportunity, even though she was not an employee" of the radio station); Goyette v. DCA Advertising Inc., 830 F.Supp. 737, 744 (S.D.N.Y. 1993)(Japanese parent corporation is a Title VII employer where policy of requiring approval of parent corporation for subsidiary's termination of Japanese nationals alleged to have contributed to discharge of American citizens during downsizing of company); Alie v. NYNEX Corporation, 158 F.R.D. 239, 246-47 (E.D.N.Y. 1994)(granting leave to amend complaint to plead adequately that parent corporation is "employer" within meaning of Title VII); Matthews v. New York Life Insurance Company, 780 F.Supp. 1019, 1023-24(S.D.N.Y. 1992)(insurance company is Title VII employer of the employee of the company's independent

contractor).

The leading case in the Second Circuit is Spirt v. Teachers Insurance and Annuity Association. There, a Title VII plaintiff sued entities established to manage retirement annuity funds for using sex-discriminatory mortality tables in determining retirement benefits. Although the plaintiff, a professor, had a direct employment relationship with a university, and not with the fund managers, the Court of Appeals held that the fund managers were "employers" for Title VII purposes. It "recognized 'that the term "employer," as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has been defined at common law.'" Id., 691 F.2d at 1063 (quoting Vanguard Justice Society, Inc. V. Hughes, 471 F. Supp. 670, 696 (D.Md. 1979)); see also Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996)(citing Spirt with approval).

Several courts have held that state or local governments that enact or implement discriminatory employment standards are employers under anti-discrimination laws, even though they have no direct employment relationship with the plaintiff. In United States v. State of Illinois, 3 A.D. Cases 1157, 1994 WL 562180 (N.D. Ill. 1994), the State enacted a statute which permitted an annuity fund to exclude municipal police officers and firefighters who were sufficiently fit to

hold their positions from participation in the retirement plan because of the existence of disability. Even though the State did not directly employ the aggrieved persons, the court held that the State is a covered entity under the ADA as "an employer . . . which affects the relevant employees, compensation or terms, conditions, or privileges of employment." 1994 WL 562180 at *3. Similarly, in United States Equal Employment Opportunity Commission v. City of Evanston, 854 F. Supp 534, 537-38 (N.D. Ill. 1994), the court held that the State was an "employer" within the meaning of the Age Discrimination in Employment Act of 1967 because, in enacting and enforcing a statute that denied firefighters hired after they attained the age of thirty-five from participation in a pension plan maintained by a municipality, the State "interfered with Evanston firefighters' access to employment benefits." See also Baranek v. Kelly, 630 F. Supp. 1107, 1113 (D.Mass. 1986) (state home care agency that had "the 'means and authority' to control discriminatory employment practices" of regional employers was an "employer" under Title VII because it "exercise[d] significant control over an employment situation"); Barone v. Hackett, 602 F. Supp. 481, 483 (D.R.I. 1984) (director of State agency that administered disability benefits for State employees liable under Title VII even though the agency did not employ the plaintiffs, stating "Title VII liability is not limited to the entity which issues pay checks to the employee").

Under these principles, DMV and SED are "employers'

and, therefore, "covered entities" under Title I. As set forth in detail at pp. 2 to 6 ante, DMV and SED exercise significant control over the access of individuals to employment as bus drivers in general, and school bus drivers, in particular. As demonstrated in this case, that control is not merely a matter of their promulgation of standards, but also includes frequent, routine and detailed review of the common carrier's and a school district's adherence to regulatory requirements. Failure by the carrier to comply with DMV regulations subjects the carrier to fines and loss of its license. The school district's non-compliance could result in SED's withholding of reimbursement for transportation services provided by the district. It is plain that under the test of Spirt and the other cases cited above, DMV, SED and the District exercise sufficient control over bus drivers' access to employment to make them employers under the ADA.

Although it is not necessary to demonstrate the specific involvement of DMV and SED in the denial of employment to Mr. Bacalakis to establish their liability, it is the case that their actions involved more than the usual intensive control over access to bus driver employment that those agencies routinely exercise. All three governmental defendants, along with Amboy, were involved in the decision to deny Mr. Bacalakis employment. In his letter to DMV's Bus Driver Certification Unit, Mr. Bacalakis unsuccessfully petitioned DMV to relieve him and Amboy from the restrictions of a plainly unlawful regulation.

He also unsuccessfully approached the District's transportation coordinator who, in turn, sought directly from SED relief from its illegal regulation. When the State agencies refused to relent, the District too closed the door on Mr. Bacalakis. For the next three years, even after he filed EEOC charges against them and Plaintiff notified them of its intent to sue, the defendants refused to modify their position and continued to block Mr. Bacalakis's employment.

The decision in Equal Employment Opportunity Commission v. State of Illinois, 69 F.3d 167 (7th Cir. 1995)(Posner, J.) is not in conflict with a determination that DMV and SED are liable under the ADA. There, the district court found that the State was an employer for purposes of the Age Discrimination in Employment Act where a state statute enacted prior to the amendment to the ADEA that extended protection to persons over 70 years of age, prohibited local school districts from awarding tenure to public school teachers over 70 years old. The Seventh Circuit reversed. Noting that the State did not take any action to enforce its statute by, for example, terminating funding to school districts that did not enforce it, the court held that the State's failure affirmatively to notify subdivisions that the statute was invalid under the Supremacy Clause of the Constitution was insufficient to hold it liable as an "employer." Id. at 171.

The instant case is different. Here, the State actively enforced its regulation. Indeed, as noted above, when

the District called SED, SED advised the District that under State regulations Mr. Bacalakis could not be rehired. DMV refused to modify its position when, at Amboy's suggestion, Mr. Bacalakis approached the agency. The District and Amboy complied with state directives. In fact, the Seventh Circuit's opinion suggests that, under the facts of this case, it would hold the State liable. Explaining its rejection of the argument for the State's liability, it stated:

> Were the state pulling the strings in the background -- telling the local school districts whom to hire and fire and how much to pay them -- a point would soon be reached at which the state was the de facto employer and the local school districts merely its agents. That point was not reached here. There is no suggestion that the state knew about these two teachers or wanted them to resign. The provision of the school code requiring retirement at age 70 cannot be treated as a firing directive by the state, because the provision was invalid and there is not evidence that the state made any effort to enforce it.

Id. In this case, the "point . . . at which the state was the de facto employer" was reached.

The District is also an employer under the rule of Spirt and its progeny. In fact, two cases involving New York State bus drivers have applied Spirt principles in circumstances nearly identical to the circumstances of this case to hold boards of education liable for adverse employment actions taken against bus drivers hired by common carriers. In Hill v. New York City Board of Education, 808 F. Supp. 141 (E.D.N.Y. 1992), the Board of Education, under a contract with Amboy Bus Company, retained

power to certify the competency of a school bus driver employed by Amboy. In an action challenging the Board's decertification of a driver, which led to his discharge, as racially-discriminatory, Judge Glasser held that the Board was an employer for Title VII purposes, even though the driver was directly employed by Amboy. 808 F.Supp. at 148 ("[T]he Board 'significantly affect[ed] access of [the plaintiff] to employment opportunities . . .' As such, the Board constituted an 'employer' of the plaintiff for Title VII purposes.")

In Equal Employment Opportunity Commission v. KDM School Bus Company, 612 F.Supp. 369 (S.D.N.Y. 1985), the EEOC sued a common carrier, the school district with which it was under contract to provide transportation to district students, and the New York State Education Department, alleging claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. The EEOC brought the suit for injunctive relief and damages to redress the discharge of school bus drivers who were forced to retire under an SED regulation mandating retirement at age of 65. The school district moved to dismiss, arguing that, since it had no direct employment relationship with the school bus drivers, it could not be held responsible for their termination.

Judge Weinfeld rejected the school district's motion in terms that are equally applicable here. He observed that "[s]tatutory employers 'who are neither actual nor potential direct employers of particular complainants, but who control

access to such employment and who deny such access by reference to invidious criteria' may be held liable for violations of the ADEA." Id., 612 F.Supp. at 372-73 (quoting Sibley Memorial Hospital v. Wilson, 488 F.2d at 1342). He continued:

> There is no dispute that the bus drivers are directly employed by the companies with which the School District contracts for bus services. The initial responsibility for the bus transportation of children between the ages five to twenty-one is that of the School District. However, it has delegated this responsibility to the defendant KDM School Bus Company, under a contract which requires the bus company to comply with the State regulation which plaintiff contends is in violation of the ADEA. Assuming that the regulation in fact violates the ADEA, the School District may be held liable for interfering with the bus drivers' employment opportunities based upon impermissible age-related criteria. To hold otherwise would be to condone indirect exploitation of age-based factors which would be impermissible if applied to persons directly employed by the School District.

Id., 612 F.Supp at 373.

Accordingly, DMV, SED and the District are employers and covered entities under the ADA. Because their actions constituted unlawful discrimination, they should be held liable for violating Section 102(a) of the statute.

POINT II

THE COURT SHOULD ORDER DMV, SED AND THE DISTRICT TO PAY BACK WAGES AND BENEFITS

Three years after he was able and willing to return to his position, Mr. Bacalakis was rehired. The wait was directly caused by DMV's and SED's unlawful discriminatory regulations,

and the joint implementation of them by those agencies, the District and Amboy. In that period, Mr. Bacalakis lost wages in the amount of $68,723 and benefits in the amount of $4,095. (Bacalakis Dep. at 36 - 38 and Exhs. A and B.) The Court should enter a remedial order directing DMV, SED and the District to pay those amounts to Mr. Bacalakis with pre-judgment interest.

Section 107(a) of the ADA, 42 U.S.C. § 12117(a), explicitly incorporates into the ADA the powers, remedies and procedures set forth in Title VII of the Civil Rights Act of 1964. See Colwell v. Suffolk County Police Dept., 967 F.Supp. 1419, 1431 (E.D.N.Y. 1997). When framing a remedial order under these powers, "the court must, as nearly as possible, recreate the conditions and relationships that would have been in existence in the absence of unlawful discrimination." Franks v. Bowman Transportation Co., 424 U.S. 747, 769 (1976); Rios v. Enterprise Association Steamfitters Local No. 638, 860 F.2d 1168, 1175 (2d Cir. 1988). That principle applies to the award of back pay to the victims of unlawful discrimination. As the Supreme Court has explained, "when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury [and] the injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed." Albemarle Paper Company v. Moody, 422 U.S. 405, 418-19 (1975) (internal quotation marks and citations omitted). See Saulpaugh v. Monroe Community Hospital, 4 F.3d 134, 145 (2d Cir. 1993)("The purpose of back pay is to ‘completely redress the

economic injury the plaintiff has suffered as a result of discrimination.'")(quoting Gutzwiller v. Fenik, 860 F.2d 1317, 1333 (6th Cir. 1988)). "It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albemarle, 422 U.S. at 421.

An employee is entitled to back pay from the date of the discriminatory employment action until the discrimination is rectified. Clarke v. Frank, 960 F.2d 1146, 1151 (2d Cir. 1992). In refusal to hire cases, the back pay period commences on the date the employee is rejected for employment. Sands v. Runyon, 28 F.3d 1323, 1327 (2d Cir. 1994). In general, the back pay period will terminate whenever the victim no longer suffers the economic effects of discrimination. Clarke v. Frank, 960 F.2d at 1151. When a case involves employment of indefinite duration, courts presume that economic injury continued until reinstatement because "in the absence of evidence to the contrary, no reason exists to assume that employment for an indefinite term would not have lasted indefinitely." Walker v. Ford Motor Company, 684 F.2d 1355, 1361 (11th Cir. 1982).

It is well established that Title VII authorizes the award of prejudgment interest as part of a back pay remedy. The Supreme Court has observed that "the back pay award authorized by

§ 706 of Title VII . . . is a manifestation of Congress' intent to make 'persons whole for injuries suffered through past discrimination.'" Loeffler v. Frank, 486 U.S. 549, 558 (1988)(quoting Albemarle Paper Co. v. Moody, 422 U.S. at 421). It has also made clear that "prejudgment interest . . . is an element of complete compensation." Id.(quoting West Virginia v. United States, 479 U.S. 305, 310 (1987)).

Similarly, the Court of Appeals has observed that "[p]re-judgment interest . . . serves the compensatory purpose by making up for the delay in receiving the money, during which time the employees were denied its use, and by partially offsetting the reduction in the value of the delayed wages caused by inflation." Donovan v. Sovereign Security, Ltd., 726 F.2d 55, 58 (2d Cir. 1984). Thus, it has not hesitated to reverse district court judgments that fail to include prejudgment interest as a component of back pay. See, e.g., Reed v. A.W. Lawrence & Co., Inc., 95 F.3d 1170, 1183 (2d Cir. 1996); Sands v. Runyon, 28 F.3d 1327-28; Saulpaugh v. Monroe Community Hospital, 4 F.3d at 145. Indeed, "'it is ordinarily an abuse of discretion not to include pre-judgment interest in a back-pay award.'" Saulpaugh v. Monroe Community Hospital, 4 F.3d at 145 (quoting Clarke v. Frank, 960 F.2d at 1154); see also EEOC v. County of Erie, 751 F.2d 79, 81 (2d Cir. 1984); Donovan v. Sovereign Security, Ltd., 726 F.2d at 58.

No circumstances exist here that would favor the Court's exercise of discretion to deny either back pay or

prejudgment interest. Providing such relief would be in accord with the congressional objective of eradicating employment discrimination on the basis of disability from the national economy. Accordingly, the United States respectfully submits that an order awarding back pay with interest in an amount that will make Theodore Bacalakis whole should be entered.[5]

CONCLUSION

For the foregoing reasons, the United States respectfully submits that its motion for summary judgment should be granted and order should be entered determining that DMV, SED and the District are liable under the ADA for unlawful employment discrimination and directing them to pay back pay with prejudgment interest to compensate Theodore Bacalakis.

Dated: Brooklyn, New York
March 25, 1999

Respectfully submitted

ZACHARY W. CARTER
United States Attorney,
Eastern District of New York
One Pierrepont Plaza
Brooklyn, New York 11201

By: _____
SANFORD M. COHEN (SC-6601)
Assistant U. S. Attorney
(718) 254-6249

[5]At an appropriate time, when the Court so directs, plaintiff will submit calculations setting forth the interest on the back pay that will have accrued from the time of defendant's initial refusal to hire until the date a judgment would be entered.