UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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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.

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MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff, the United States of America ("United States"), submits this memorandum in reply to the opposition of defendants New York State Department of Motor Vehicles ("DMV"), New York State Department of Education ("SED") and the Three Village Central School District ("the District") to the United States' motion for summary judgment, and in opposition to defendants' cross-motions for summary judgment.

This is an action brought pursuant to Section 107 of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 11217, and Section 707(a) of Title VII of the Civil Rights Act of 1964, alleging that defendants engaged in a pattern or practice of resistance to rights secured by the ADA by excluding from employment as bus drivers persons who were missing a foot, leg, hand or arm because of their disability. In conformity with

their openly declared policy of excluding from employment as bus drivers persons who were missing a limb -- at least those who lost a limb in July 1978 or later -- defendants blocked the restoration to his job of Theodore Bacalakis, a school bus driver whose leg was amputated following an off-duty accident. Although defendants rescinded their policy following plaintiff's commencement of this action, and Mr. Bacalakis was restored to his position, his lost earnings and benefits remain unpaid, and his personal damages have not been fully compensated.

In its opening memorandum, plaintiff demonstrated that Mr. Bacalakis is a "qualified person with a disability" within the meaning of the ADA, Memorandum of Law in Support of the United States' Motion for Summary Judgment ("Plaintiff's Mem."), at 18-21, that he suffered an adverse employment action as a consequence of the defendants' enforcement of their policy, id. at 21-23, that defendants are covered entities for purposes of liability under the statute, id. at 23-32, and that Mr. Bacalakis is entitled to back-pay. Id. at 32-36. None of the defendants disputes that Mr. Bacalakis was a qualified person with a disability during the period that his restoration to employment was barred, or that the refusal of his direct employer, Amboy Bus Company, to rehire him resulted from defendants' policy prohibiting the employment of amputees as bus drivers.

The state defendants, DMV and SED, do not dispute that their policy, expressed in regulations, proscribed Mr. Bacalakis's employment. They contend, however, that their

regulations cannot be the reason that Mr. Bacalakis's employment was barred because the regulations were in conflict with and pre-empted by the ADA, and therefore a legal nullity. Memorandum of Law in Support of the State Defendants' Cross-Motion for Summary Judgment ("State Deft's Mem."), at 6-8. In addition, advancing a doctrine never adopted by the Court of Appeals for the Second Circuit, they contend that their interference with Mr. Bacalakis's employment relation with Amboy is beyond the reach of Title I of the ADA because it was an exercise of the State's "police power." Id. at 8-14. In a similar vein, the District disavows any responsibility for Amboy's refusal to rehire Mr. Bacalakis, even though Amboy acted in conformity with the obligations imposed by the contract with the District, because the District never declared that it had invoked the obligation -- enjoined upon it by law -- to bar the employment of amputees. Memorandum of Law in Support of Cross Motion for Summary Judgment on behalf of Defendant Three Village Central School District and in Opposition to Plaintiff's Motion for Summary Judgment ("District's Mem."), at 2-22. All defendants assert that, even if they are liable under the ADA, Mr. Bacalakis should be denied back-pay and compensation because he did not make diligent efforts to obtain comparable work during the period they prohibited his rehiring. State Deft's Mem. at 14-21; District's Mem. at 23.

Plaintiff shows below that defendants' arguments are incorrect and that summary judgment should be granted in

plaintiff's favor finding them liable and awarding back-pay to Mr. Bacalakis.

ARGUMENT

POINT I

DEFENDANTS VIOLATED THE AMERICANS WITH DISABILITIES ACT OF 1990

A. The Fact that the ADA Pre-empted the State Regulations Does Not Relieve the State Defendants of Liability

The State defendants concede that the "regulations in question [15 N.Y.C.R.R. § 6.11(b)(1) and 8 N.Y.C.R.R. § 156.3(c)] were inconsistent with, and pre-empted by, the ADA, as this Court has already held. EEOC v. Amboy Bus Co., 96 CV 5451 (ARR)(August 19, 1998), at pp. 9-11." State Deft's Mem. at 6. From that concession, however, they leap dramatically to the conclusion that the State defendants cannot be held liable for the consequences of their discriminatory policy. They state:

> [T]he very act of asserting that a state regulation violates the ADA necessarily presupposes that the ADA pre-empts the state regulations in question as a matter of law. Accordingly, the State regulations in question did not prevent Mr. Bacalakis from resuming his work as a bus driver. Insofar as State and federal law were inconsistent, federal law clearly controlled. Therefore, had Amboy and the District followed the dictates of federal law, Mr. Bacalakis would have been reinstated.

Id. at 7-8. The State defendants' argument is bizarre. It may represent the singular occasion that any defendants have argued that they should be insulated from liability not because their actions were lawful, but because their policy and conduct so

violated federal law that those subject to them -- the District and Amboy – should have ignored them.

What occurred in this case is far different from the circumstances of EEOC v. State of Illinois, 69 F.3d 167 (7th Cir. 1995), upon which the State defendants rely. In that case, the state statute that conflicted with a federal law, the Age Discrimination in Employment act, laid in desuetude for two years until the state legislature rescinded it. The court found no evidence and refused to "indulg[e] . . . an assumption" that "local school districts . . . risked losing state funding" if they did not comply with the discriminatory state law. Id. at 169. The Seventh Circuit thus described the issue, as whether, in the absence of evidence of any affirmative act by the State to enforce its policy, the State was liable under the ADEA for failing to notify school districts that the state law was a nullity. It found that the mere failure of the State to make that notification was insufficient to establish a violation of federal law. Id. at 170("[I]t might be a good thing for the state to take steps to minimize the likelihood of an inadvertent violation of law by its subdivisions. But the failure to do so is not our idea of aiding and abetting a violation.")

But the Seventh Circuit recognized, notwithstanding the pre-emption doctrine, that the result would be different if the State played an affirmative role in implementing discriminatory state rules:

> 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. at 171.

Here, there is abundant evidence that the State defendants did not deem the regulations in question pre-empted, and that they actively enforced the discriminatory requirements of the regulations. Plaintiff has already set out in detail the comprehensive scheme of statutes and regulations that provide extensive control to DMV and SED over the employment of bus drivers, a scheme that is fortified, in the case of DMV, with the threat that a non-complying common carrier will suffer fines and license revocation, and, in the case of non-complying school districts, that they will lose state transportation aid. Plaintiff's Mem. at 2-6; see also Affidavit of Eileen McCarthy, dated June 2, 1999, at ¶¶ 15, 16 ("The Three Village Central School District is a public school district subject to the supervision and control of the Commissioner of Education and as such its officers could be removed from office or have state funds withheld for failure to follow directives, decisions, orders, rules or regulations of the Commissioner.")

The State agencies, moreover, were explicit in Mr.

Bacalakis's case, that they did not deem their regulations pre-empted and that they intended to enforce them. Thus, when Mr. Bacalakis, at the urging of Amboy's depot manager, wrote a letter to Thomas W. Fullington, Assistant Director of the Bus Driver Certification Unit of DMV, in an effort to be re-employed, Fullington replied by reciting the provisions of 15 N.Y.C.R.R. § 6.11(b)(1) and advising Mr. Bacalakis that, 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). Similarly, when the District's transportation coordinator, Ms. McCarthy, inquired of SED's transportation director, Mr. Comeau, whether Mr. Bacalakis could be qualified to drive a bus, or whether an exception to the State regulations could be made, Mr. Comeau gave an angry response:

> 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.

(McCarthy Dep. 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).

After Mr. Bacalakis filed charges against the State defendants with the EEOC, the State defendants continued affirmatively to advance the legitimacy of their regulations. 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). (Cohen Decl., Exh. I)

Indeed, even after the EEOC issued probable cause determinations against DMV and SED, the agencies refused to abandon their position that the regulations were legitimate. Further, representatives of DMV and SED advised the EEOC that a gubernatorial memorandum precluded any changes in the state regulations at that time. (See Cohen Decl., Exh Q (Affidavit of Elizabeth Singletary, EEOC Investigator, in EEOC v. Amboy Bus Company, dated January 17, 1997) at p.2, ¶ 8; Executive Order No. 2, dated January 5, 1995;9 N.Y.C.R.R. § 5.2 (establishing a moratorium on the adoption of any rule or regulation by any New York State department or agency).

The State Defendants do not refute any of that. Yet, even now, they argue that SED's insistence that the District and Amboy comply with its regulations, backed by the threat of withholding State aid, should not lead to a judgment holding it liable under the ADA for discrimination against Mr. Bacalakis because "a competently counseled school district [or bus company] would have told the state to go fly a kite." State Deft's Mem. at 7 (quoting EEOC v. State of Illinois, 69 F.3d at 170).

This Court properly found Amboy liable for not taking action to challenge defendants discriminatory policy in the face of superceding contrary federal law. Nothing in the Court's decision, however, suggests that the government defendants, which required Amboy to violate the ADA, should be absolved of responsibility. Given the State defendants' determination to enforce the discriminatory policy for three years after receiving notice of a challenge to it, they are liable as well. It simply cannot be the law that the State defendants are insulated from responsibility for injury to Mr. Bacalakis because the District and Amboy lacked the desire or will to challenge the State's unlawful rules and conduct.

B. DMV and SED are Covered Entities under the ADA

The State agencies further contend that they cannot be held liable for Mr. Bacalakis's lost income and other injuries because they are not "covered entities" under 42 U.S.C. §§ 11212(a) and 11211(2). DMV and SED do not dispute that they interfered with Amboy's rehiring of Mr. Bacalakis through their regulations." State Deft's Mem. at 10. They argue, however, that the definition of the term "employer," one of the defined covered entities under the ADA, "does not extend to a state acting in a regulatory capacity under its police power, even if the state's regulations significantly affect one's access to the job market." Id. at 9.

The Second Circuit, however, when explaining the interference theory of "employer" under the antidiscrimination

laws, has never embraced the doctrine advanced by defendants which purportedly distinguishes between the state acting in its proprietary capacity and under its police powers. To the contrary, when it first articulated the interference theory in Spirt v. Teachers Insurance and Annuity Association, 691 F.2d 1054 (2d Cir. 1982), the Court of Appeals specifically relied on cases in which a state or other governmental entity was deemed an employer under Title VII where it interfered with employment relationships by exercising its regulatory authority:

> [I]t is generally 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 generally been defined at common law." Vanguard Justice Society, Inc. v. Hughes, 471 F.Supp. 670, 696 (D.Md.1979). See also Baker v. Stuart Broadcasting Co., 560 F.2d 389, 391 (8th Cir. 1977); Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C.Cir.1973); EEOC v. Wooster Brush Co., 523 F.Supp. 1256, 1261-62 (N.D. Ohio 1981); Puntolillo v. New Hampshire Racing Commission, 375 F.Supp. 1089 (D.N.H.1974).

691 F.2d at 1063. The Circuit's citations to Vanguard Justice Society and Puntolillo are particularly significant. Both are cases in which a governmental entity was found to be an employer for purposes of Title VII, even though it was not the direct employer of the aggrieved individual, and even though the challenged conduct involved the government's interference in the employment relationship between the plaintiff and a third party

through its exercise of regulatory authority pursuant to police powers.

In Vanguard Justice Society, the plaintiffs alleged claims of race and sex discrimination in the hiring of police officers by the Baltimore Police Department. Under the state and municipal statutory scheme, hiring decisions were within the sole province of the Police Commissioner, who had the exclusive authority "[t]o appoint, promote, reduce in rank, grade or position, reassign, reclassify, retire and discharge all members of the Department in the manner prescribed by law. 471 F.Supp. at 690. The City Charter gave the Baltimore Civil Service Commission only the limited authority in the hiring process to "ascertain the relative qualifications for all candidates for appointment at the entrance level to the department and for promotional appointment within the department by competitive examinations and such other tests as in its judgment may be necessary." Id. at 692. Nevertheless, the City of Baltimore was found to be an employer for purposes of Title VII, notwithstanding the "concededly limited role in the hiring process" of the Baltimore City Civil Service Commission, because the Commission "exercised substantial authority and discretion in the area of testing of applicants for entry level positions with the Department." Id. at 696. In other words, the Civil Service Commission was deemed an employer because it established qualifications for the hiring police officers that interfered with the potential employment relationship between applicants and

a third party, the Police Department. In the same way, DMV and SED establish the qualifications for the employment of school bus drivers, and using invidious criteria to preclude the hiring of persons missing limbs, interfered in the relationship between Mr. Bacalakis and Amboy. See also United States v. City of Yonkers, 592 F.Supp. 570, 591 (S.D.N.Y. 1980)(State Civil Service Commission, which provided to municipality entry test for police officers, was employer for purposes of Title VII with respect to municipality's hiring of officers).

Similarly, in Puntolillo, the plaintiff, a harness horse driver-trainer brought suit under Title VII against a state agency, the New Hampshire Racing Commission, alleging that it had denied him a license because of his national origin, and thereby prevented him from obtaining employment with harness horse owners, who "hire and fire and pay the driver-trainers and, as a practical matter, stand in the shoes of the employer vis-a-vis the driver-trainers." 375 F.Supp at 1090. Relying on Sibley Memorial Hospital v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) and other cases, the district court found that the Commission was an employer under Title VII.

Indeed, though the State defendants assert that the "[c]ourts in this Circuit have long recognized that government agencies do not become 'employers' simply by regulating," they cite in support of that contention only two, twenty-year-old, district court opinions. State Deft's Mem. at 11-13 (citing National Organization for Women, New York Chapter, v. Waterfront

Commission of New York Harbor, 468 F.Supp. 317 (S.D.N.Y. 1979) and Lavender-Cabellero v. Department of Consumer Affairs, 458 F.Supp. 213 (S.D.N.Y. 1978). Both of those cases were decided long before the decision of the Court of Appeals in Spirt. Yet while the Circuit cited Puntolillo in support of its holding, the district court in National Organization for Women opined that Puntolillo was wrongly decided. 468 F.Supp. at 320 (Puntolillo rests "on a misapplication of the District of Columbia Circuit's opinion in Sibley Memorial Hospital v. Wilson.")[1] Similarly, cases from other circuits cited by the State defendants do not mention Sibley at all, another case on which the Spirt court relied heavily. See State Deft's Mem. at 13 (citing United States v. Board of Education, 911 F.2d 882, 891 (3d Cir. 1990); Haddock v. Board of Dental Examiners, 777 F.2d 462 (9th Cir. 1985); Woodward v. Virginia Board of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975).[2]

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[1]Lavender-Cabellero, in contrast, simply misinterpreted the facts of Puntolillo, erroneously asserting that the plaintiff-defendant relationship was primarily one of employment, rather than licensing. 458 F.Supp. at 215.

[2]One court, commenting on the effort of the Lavender-Cabellero court to distinguish Sibley on the ground that boards that issue licenses perform what amounts to a "policing function of public importance," noted:

> That is not at all a convincing rationale. If Title VII bars a party from placing a discriminatory impediment between an individual and his or her employment relationship with a third party, it is certainly inconsistent to conclude that because the function of a licensing board is

In short, the most authoritative source of what is the law in the Second Circuit, the Court of Appeals, has eschewed the "police power" distinction on which the State defendants rely. Instead, it has cited with approval cases where governmental agencies, acting under their regulatory authority, were deemed to be employers under the interference doctrine.

Moreover, Lavender-Cabellero, National Organization for Women, and the licensing board cases cited by the State defendants all involved the abstract question whether the plaintiff would be granted permission to practice a profession or trade rather than whether the board's actions barred the plaintiff from obtaining a specific job with a third party. In contrast, the state laws and regulations in this case are designed precisely to allow the State defendants to interfere with an identified employment relationship between the aggrieved individual and a specific employer. See e.g. N.Y. Vehicle & Traffic Law § 509-g(1)("Before employing a new bus driver a motor carrier shall: (i) require such person to pass a medical examination to drive a bus as provided in section five hundred nine-g of this article")(emphasis added); N.Y. Education Law § 3624 ("The employment of each driver shall be approved by the chief school administrator of a school district for each school

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> to impose restrictions for the public good it should not be held liable for doing so in a discriminatory manner.

Morrison v. American Board of Psychiatry and Neurology, Inc., 908 F.Supp. 582, 585 n.11 (N.D.Ill. 1996).

bus operated within his district")(emphasis added). That is precisely what occurred in this case. Through the implementation and enforcement of their invidiously discriminatory regulations, the State defendants interfered with the employment relationship between Mr. Bacalakis and Amboy. Under the law of this Circuit, they are covered entities and are liable under the ADA.

There is also an alternative ground under which DMV and SED are liable in this case. Plaintiff brought this action under the "pattern or practice" provision of section 707 of Title VII, 42 U.S.C. § 2000e-6, which is incorporated as an enforcement mechanism under the ADA. See 42 U.S.C. § 11217.[3] Under that section, "[o]ne need not be the employer of the employees whose

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[3]Section 707(a) of Title VII provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

42 U.S.C. § 2000e-6(a).

Title VII rights are endangered in order to be liable . . . , but the Attorney General must demonstrate the existence of a "pattern or practice[.]" United States v. Board of Education, 911 F.2d at 892. In order to establish the defendants' liability under Section 707, the United States must establish that the "discrimination was the defendant's standard operating procedure--the regular rather than the unusual practice." International Bd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). That burden is met where, as here, the discrimination at issue is "openly declared" by the defendant, through, for example, publication by the State in its regulations. Id.; see also United States v. Gregory, 871 F.2d 1239, 1243 (4th Cir.1989) ("[I]f admissions [as to existence of a policy] are credited, the Title VII violation had been proven.").

It is apparent that DMV and SED were engaged in a pattern or practice of resistance to the full enjoyment of rights secured by the ADA. Their regulations openly declared that a person missing a limb could not be employed as a bus driver, a policy which this Court found -- and defendants concede -- was in violation of the ADA. Accordingly, relief against the State defendants, including an award of back-pay and other damages, may be awarded pursuant to Section 707.

C. The District Interfered with the Employment Relationship Between Mr. Bacalakis and Amboy and is Liable under the ADA

The District's argument that it is not liable under the ADA for employment discrimination against Mr. Bacalakis, though couched in terms of the requirements of a prima facie case under

McDonnell-Douglas v. Green, 411 U.S. 792 (1973) and its progeny, resolves to two main points: (1) that the District is not a covered entity because it did not control the hiring of Amboy bus drivers who provided District transportation services, and (2) that the District did not take any action that amounted to a denial of Mr. Bacalakis's request to be restored to employment. However, in its affidavit in support of its cross-motion, its extended discussions of the theoretical underpinnings of the various bases under which an entity may be considered an employer under the antidiscrimination laws, and its recounting of the specific events of this case, the District assiduously avoids any mention of critical facts: that Amboy acted pursuant to and in conformity with the specific discriminatory employment standards in its contract with the District when it refused to restore Mr. Bacalakis's employment.[4]

Under the contract, consistent with the requirements of N.Y. Education Law §§ 3624 and 3625, the District retains substantial control over the hiring of bus drivers for the district. For example, Section IV(G) of the contract with Amboy provides that:

> 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.

[4]The contract is set forth at Exhibit 1 to the Deposition of Eileen McCarthy.

> 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 by other than an approved Driver.

McCarthy Dep., Exh. 1, p.21 (emphasis in original). Section IV(A) of the contract requires drivers to obtain certification from a physician that he meets the physical requirements set forth in the regulations promulgated by the State Defendants, and thereby incorporates the very discriminatory conditions of employment at issue in this case. Id., at 17. Section IV(B) of the contract requires the driver's annual submission of an "application for Approval of Employment" to the District for approval, and provides that "No Driver is to be assigned to perform any part of this contract prior to such approval by the District." Id. at 18. Under Section IV(F), the District "reserves the right to have the bus Contractor replace immediately those drivers the [District] determines unsatisfactory." Id. at 20 (emphasis in original). And pursuant to Section II(D), Amboy is liable in liquidated damages for using a driver who is not approved by the Superintendent. Id. at 11.

When Amboy refused to restore Mr. Bacalakis to his job, it acted pursuant to specific discriminatory employment standards imposed on Amboy by the District in a contract required by SED. If Amboy had not complied with those standards and restored Mr. Bacalakis, it would have owed the District monetary penalties. Thus, the District exercised contractual provisions that have all of the attributes of the "control" necessary under the

interference theory adopted by the Spirt court to make the District an employer for purposes of the ADA. See People of the State of New York v. Holiday Inns, Inc., 1993 WL 30933 (W.D.N.Y., Jan. 28, 1993 at *6)("[I]n order to hold a third party liable under Title VII or the ADEA, the third party must have exercised a direct and significant degree of control over the complaining party's direct employer or the complaining party's 'work environment.' The "control" necessary under an interference theory is not be confused with, nor is the same as, the 'right to control' which is necessary to find an employer/employee relationship. Rather it is the degree of control necessary to allow a third party to influence or interfere with an employee's employment opportunities.")

The District protests, however, that while Amboy complied with the very discriminatory employment standards the District required it to enforce when it refused to restore Mr. Bacalakis, the District cannot be held liable because the District never passed on a written application tendered by Mr. Bacalakis. Indeed, it makes much of the fact that Mr. Bacalakis did not complete one of the District's employment applications, though it concedes that it was aware that he sought restoration to the job. But the fact is that when Mr. Bacalakis appeared at Amboy numerous times over three years to obtain restoration to his job, he was not given the opportunity to complete an employment application. See Bacalakis Dep. at 88-89.

Although the District had every opportunity to remedy

the discriminatory operation of its contract, it stood by as the discriminatory contract with Amboy and the state regulations kept Mr. Bacalakis unemployed. At her deposition, the District's transportation coordinator, Ms. McCarthy, testified about her meeting with Mr. Bacalakis in the fall of 1993, when he spoke directly to her about his desire to be re-employed:

Q. Did you make any suggestion to Mr. Bacalakis during the conversation of December 1993 that he complete an application for employment with Amboy?

A. No, I didn't.

Q. Is there a reason that you didn't?

A. It just never entered my mind for him to submit an application.

Q. But you knew he wanted to be employed, correct?

A. I knew he wanted to return to work.

Q. And you knew the process for doing that required him to complete an application, is that right?

A. Yes.

Q. And knowing that, is there a reason why you didn't suggest to Mr. Bacalakis that he complete an application?

A. Well, I knew that he wasn't going to be able to pass the physical examination.

* * * * * * *

Q. Did you ask Amboy at any point to reinstate Mr. Bacalakis as a bus driver?

A. No, I did not.

Q. Is there a reason that you didn't?

A. It actually would be inappropriate.

Q. In what sense would it be inappropriate?

A. Well, how could I request them to reinstate a

driver that I knew they couldn't submit to the District the proper and appropriate physical examination papers, et cetera. You know, I would be acting inappropriately.

Q. When you say you would be acting inappropriately, you would be acting inappropriately because it would have violated state requirements?

A. Exactly.

McCarthy Dep., 67-71.

In sum, by exercising significant control through its contract over the hiring decisions of District drivers made by Amboy and by its other conduct, the District interfered with the employment relationship between Mr. Bacalakis and Amboy. There is ample proof that it is an employer and a covered entity within the meaning of the ADA under the law of this Circuit.

POINT II

THE COURT SHOULD AWARD BACK PAY

Defendants contend that the Court should deny back pay to Mr. Bacalakis, to which he is presumptively entitled under the ADA, because he did not diligently seek comparable employment and thereby failed to mitigate his damages. The State Defendants argue that Bacalakis failed to mitigate because he did not make diligent efforts to regain his job at Amboy by appealing to the Commissioner of Education or seeking a waiver of the State regulations from the Federal Highway Administration. State Deft's Mem. at 19. The District does not even suggest how Bacalakis could have made efforts to find comparable employment in a position from which he was barred by State regulations.

District's Mem. at 23.

We recognize, of course, that a victim of employment discrimination is obligated to mitigate damages. A claimant "forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied." Ford Motor Company v. EEOC, 458 U.S. 219, 232 (1982). But "the unemployed or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position." Id. at 231 and n.16;[5] see Hawkins v. 1115 Legal Service Care, 163 F.3d 684, 695-96 (2d Cir. 1998). In order to reduce the meritorious claimants' entitlement to back pay, "the defendant employer has the burden of demonstrating that [the plaintiff] has failed to attempt to mitigate . . . by establishing (1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." Id. at 695 (citing Dailey v. Societe Generale, 108 F.3d 451, 456 (2d Cir. 1997).

Defendants seek to invoke the rule recently adopted by

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[5]Citing NLRB v. Madison Courier, Inc., 153 U.S.App.D.C. 232, 245-246, 472 F.2d 1307, 1320-1321 (1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); Wonder Markets, Inc., 236 N.L.R.B. 787, 787 (1978) (offer of reinstatement ineffective when discharged employee offered a different job, though former position still existed), enf'd, 598 F.2d 666, 676 (CA1 1979), supplemental decision, 249 N.L.R.B. 294 (1980); Good Foods Manufacturing & Processing Corp., 195 N.L.R.B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits), supplemental decision, 200 N.L.R.B. 623 (1972), enf'd, 492 F.2d 1302 (CA7 1974); Harvey Carlton, 143 N.L.R.B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).

the Second Circuit that an employer "is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment." Greenway v. Buffalo Hilton Hotel, 143 F.3d 47, 54 (2d Cir. 1998). But that rule is inapplicable in this case. Mr. Bacalakis, a high school graduate and amputee, had spent his entire working career from the age of 22 as a District school bus driver with Amboy. He was barred by the State defendants' regulations from obtaining another job as a school bus driver in another district, the only work comparable to the employment he had held. Indeed, other than the State defendants' specious statements that he should have pursued more aggressively his effort to be restored to Amboy employment, defendants do not suggest -- even in the abstract -- the type of employment Bacalakis could have obtained that would have been consonant with his particular skills, background, and experience and would not have involved conditions substantially more onerous than his position as a school bus driver.

Padilla v. Metro-North Commuter Railroad, 92 F.3d 117 (2d Cir. 1996) raised a similar issue. There, the employer illegally demoted the plaintiff from his position as superintendent of train operations for the railroad, a position that he had held from the age of 22 and for which he was uniquely qualified. The employer challenged an award of front pay on the ground that Padilla had not actively sought a position as a superintendent of train operations with another railroad. The

evidence showed, however, that there were only three other such positions in the relevant geographic area and little likelihood that any of them was or soon would be available, and that there were no comparable positions in other industries. Applying the same mitigation standards applicable to an award of back pay, the court refused to bar front pay relief to the plaintiff. "In view of the absence of evidence that suitable work existed for him and in view of his unique and narrow work qualifications, Padilla's failure to attempt to find a position comparable to that of superintendent of train operations did not constitute a failure to mitigate his damages." Id. at 125; see also Fox v. City University of New York, 1999 WL 33875 (S.D.N.Y. Jan. 26, 1999) at *13-*15. In this case, there was no reasonable prospect that Bacalakis could have found employment comparable to the job discriminatorily denied him because the State defendants' regulations made such employment unavailable to him.

The State Defendants insist that Bacalakis had a reasonable prospect of returning to his position at Amboy, but abandoned the opportunity by failing to file an administrative grievance with the State Education Commissioner under N.Y. Education Law § 310. Apparently, it was not enough that SED had already advised Bacalakis through the District that it would adhere to its discriminatory regulation. Nor was it enough that Bacalakis filed a charge of discrimination against SED with the EEOC, which evoked a response from the agency's counsel reiterating that Bacalakis was ineligible for employment as a

school bus driver. Nor was it enough that when the EEOC sought to obtain relief through conciliation efforts after finding reasonable cause against the State defendants, the State Defendants demurred, citing a gubernatorial moratorium on regulatory changes that prevented such relief.

The State Defendants' argument that Bacalakis should have petitioned the Education Commissioner under § 310 is little more than a poorly disguised version of the exhaustion argument previously presented by Amboy to, and rejected by, this Court:

> In arguing that Mr. Bacalakis should have pursued relief from the Department of Motor Vehicles and the Department of Education, Amboy is essentially asking that the aggrieved party in this context be required to lobby these state agencies to change the law, as there is no indication that he could have been excused from its application, assuming that the law remained in effect. It is quite unlikely that this is the type of administrative exhaustion that Congress had in mind when it enacted the ADA. A primary purpose of the exhaustion requirement is to allow an administrative agency an opportunity to help the parties resolve their dispute without judicial intervention; filing a charge with the EEOC suffices to further this goal in this case.

EEOC v. Amboy Bus Company, 96 CV 2935 (ARR) (August 19, 1998), at 6 n.6 (emphasis in original). Moreover, the Court found that the provisions of § 310 did not even apply to Mr. Bacalakis's situation. Id. Refashioning Amboy's failed exhaustion argument as one involving Mr. Bacalakis's purported failure to mitigate does not give it any additional force. It should be rejected once more.

Finally, the State Defendants expend considerable time

charging that Mr. Bacalakis abandoned his efforts to be restored to his position at Amboy by failing to apply to the Federal Highway Administration (FHWA) for a waiver. State Deft's Mem. at 17-20. They are apparently referring to DMV's response to an information request from the EEOC following Mr. Bacalakis's filing of charges, in which DMV referred to an FHWA "provision for waiving the physical/medical requirements for commercial drivers with missing limbs who can pass an evaluation." See Cohen Aff., Exh.K at 2.[6] According to the State Defendants, by not seeking an FHWA waiver, Bacalakis failed to pursue "an available avenue of relief that could have speeded his reinstatement [to Amboy]." State Deft's Mem. at 20.

The State Defendants are simply wrong. The FHWA regulations specifically provide that they are not applicable to school bus operations. 49 C.F.R. § 390.3(g) provides that "[u]nless otherwise specifically provided, the rules in this subchapter do not apply to (1) All school bus operations as defined in § 390.5." 49 C.F.R. § 390.5 defines the term "school bus operation" as "the use of a school bus to transport only school children and/or school personnel from home to school and from school to home." Thus, even had Mr. Bacalakis applied for and obtained an FHWA waiver, it would not have advanced his ability to be restored to a school bus driver job at Amboy or any other employer. DMV recognized as much, declining in its letter

[6]The FHWA waiver provision is set forth at 49 C.F.R. § 391.49.

to the EEOC to make any commitment that Mr. Bacalakis could be restored to his employment as a school bus driver if he obtained the waiver.

In sum, defendants' arguments that Mr. Bacalakis failed to mitigate are insubstantial. Accordingly, he should be awarded back pay for the period when defendants' discriminatory regulations, contractual provisions and conduct prevented his employment.

CONCLUSION

For the foregoing reasons and those set forth in the Memorandum of Law in Support of the United States' Motion for Summary Judgment, the United States respectfully submits that is motion for summary judgment should be granted.

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Respectfully submitted

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