BEFORE
THE PRINCE GEORGE'S COUNTY
HUMAN RELATIONS COMMISSION

IN RE: Darryl Green

Complainant

By

Executive Director

v.

Verizon Maryland LLC

Respondent

HRC Case No.: HRC17-0804
EEOC Case No.: 531-2017-00049

THE OPINION AND ORDER
OF
THE PRINCE GEORGE'S COUNTY
HUMAN RELATIONS COMMISSION

Under the authority of Article 12 of the Code of Public Local Laws of Maryland, Prince George's County § 2-185 et seq. (2011 Edition, as amended), the Prince George's County Human Relations Commission ("Commission") adjudicates the Charge of Discrimination brought by Complainant Darryl Green against Respondent Verizon Maryland LLC for alleged (1) Respondent's failure to provide Complainant a reasonable accommodation based upon his record of disability and (2) disability discrimination in violation of the Americans with Disability Act and Prince George's County Human Relations Act.

This matter was called for public hearings before a three-member Employment Panel ("Panel") of the Commission on November 13 and 15, 2018. After hearing all witnesses and reviewing the Parties' post-hearing submissions, the Panel recommended the following to the full

Commission: (1) finding in favor of Complainant on all issues of liability; (2) award Complainant $72,001.73 in damages plus post-judgment interest at the statutory rate; and (3) impose a $10,000.00 fine on Respondent. As outlined in detail below, the Commission unanimously accepts the recommendation of the Panel.

I. FINDINGS OF FACT

The following findings of fact are derived from the Public Hearing convened on November 13 and 15, 2018, including witness testimony and admitted exhibits, pleadings contained within the record, and publicly available information.

A. Background of the Parties

Complainant Darryl Green is an individual residing in Columbia, Maryland. Respondent Verizon Maryland LLC ("Verizon" or "Respondent") is the Maryland-based subsidiary of Verizon Communications Inc., described as "a holding company that, acting through its subsidiaries, is one of the world's leading providers of communications, information and entertainment products and services to consumers, businesses and governmental agencies." FORM 10-K, Verizon Communications Inc. at 3 (Securities and Exchange Commission Feb. 23, 2018).

Mr. Green graduated *magna cum laude* from Florida Agricultural and Mechanical University, earning a Bachelor of Science in electronics engineering technology with a minor in mathematics. (Nov. 13, 2018 Tr., 83:1-6.) Prior to 2009, Mr. Green was employed by Verizon as a systems technician. (*Id.* at 82:12-15.) From 2009 to February 11, 2018, Mr. Green was employed by Verizon as a Cable Splicing Technician in Verizon's office located in Prince George's County, Maryland. (*Id.* at 82:7-15; Nov. 15, 2018 Tr., 80:21-22.) From February 12, 2018, through the present, Mr. Green is employed by Verizon as a Service Representative. (Nov. 13, 2018 Tr. at 82:12-16.) In charging documents filed with the Commission, Mr. Green alleges that

Respondent's discriminatory conduct occurred during his employment as a Cable Splicing Technician. (*See* Ex. ED-2[1] (Charge of Discrimination).) During his employment with Verizon, Mr. Green was and remains a member of union CWA Local 2108. (Nov. 13, 2018 Tr. at 57:14-18.)

B. Description of Cable Splicing Technician

Verizon maintains a "Job Brief," a document detailing the description, duties, responsibilities, education and training requirements, and skills needed for the position of Cable Splicing Technician. (Ex. R-5.) The Job Brief contains both holistic and quantitative metrics. (*Id.*) The Job Brief indicates that the Cable Splicing Technician is a full-time position with a 40-hour workweek. (*Id.* at GREEN000037 (bates stamp).) Per Verizon's summary, a Cable Splicing Technician is responsible for performing the following:

> Add, place, remove, reroute, set up, rack, splice, transfer, repair, rearrange, bond, pressurize, and test serial, underground, and buried cable. Mount, cut-in, and repair cable terminal and load cases. Rearrange service drops, aerial and buried jumper wire and step poles. Read and interpret engineering prints. Testing, locating and repairing defects in wires for copper cables and fibers for fiber optic cables, using electrical and mechanical testing apparatus.

(*Id.*) Cable Splicing Technicians can work on three (3) different types of networks: copper, FIOS, and Enterprise. (Nov. 15, 2018 Tr. at 15:11-17.)

Copper is described as "plain old telephone services, primarily transmitting voice" with the possibility of Internet service through DSL.[2] (Nov. 13, 2018 Tr., 84:3-10.) FIOS is a Verizon fiber optic product that "handles voice services, data services, and also video services to residential

[1] The Executive Director's admitted exhibits were marked as "ED" and Verizon's admitted exhibits were marked as "R."

[2] Verizon's website explains that DSL is a "digital subscriber line" that "connects you to the internet over a telephone network." *See* https://www.verizon.com/info/dsl-services/.

customers as well as small-business and medium-business sized customers." (*Id.*; *see also* Nov. 15, 2018 Tr. at 15:19-22.) Enterprise is described as "large business services." (Nov. 15, 2018 Tr. at 81:18-21.) FIOS is a relatively new product that was implemented in January 2016. (Nov. 13, 2018 Tr. at 83:18-19.) Verizon's hallmark FIOS package is a "Triple Play," which is voice, data, and video services over Verizon's fiber optic network. (*Id.* at 17:18-21.)

Today, Cable Splicing Technicians are initially trained on FIOS. (Nov. 15, 2018 Tr. at 82:12-13.) For those who began employment as a Cable Splicing Technician prior to the implementation of FIOS, they worked on the copper network. (*Id.* at 82:14-16.) Enterprise services is viewed a distinct specialty from work on copper, FIOS, or a combination of copper/FIOS. Terry Minor, Verizon's Director of Operations for the State of Maryland and Verizon's corporate representative, stated that "Enterprise services is something that our specialized technicians do, we don't train every single person on it." (*Id.* at 82:16-18.) Mr. Minor also explained that a Cable Splicing Technician "can come off the street doing [Enterprise]" but "if we take a technician into that realm off the street, that will probably be their sole thing to do until they get experience with it." (*Id.* at 82:22-83:7.)

A Cable Splicing Technician's paramount function is to install phone, video, and/or internet services for Verizon's customers. Mr. Minor succinctly explained the role of a Cable Splicing Technician in the business model of Verizon:

> When you look at a technician, a special install, a technician is basically at the end of [a] sales cycle. We have a salesperson that actually makes the sale with the customer, but at the end, that service has to be installed. So it's the end of the sales cycle. If that service is not installed, then the transaction doesn't exist until that first bill.

(*Id.* at 27:18-28:9.)

C. Work Rules and Measuring Productivity for a Cable Splicing Technician

Mr. Minor explained the work rules and performance criteria for a Cable Splicing Technician. As Mr. Minor testified, he supervises up to 1300 employees, including Cable Splicing Technicians that operate in the State of Maryland. (*Id.* at 14:3-13.) Cable Splicing Technicians are subject to field work rules promulgated by Verizon. (*Id.* at 16:16-17:10; *see also* Ex. R-6 (copy of Potomac 2017 field work rules).)

Verizon highlighted the "marking up, staying current, [and] closing out" work rules. (Nov. 15, 2018 Tr. at 17:11-13.) Marking up and staying current "means when a technician is dispatched on a customer check, it is imperative that the technician stays current . . . for a supervisor to gauge how a technician's day is going, they want a technician to dispatch on each component as he or she goes throughout the day . . . that's staying current with the jobs that you're on." (*Id.* at 17:15-18:6.) "Closing out" means a technician uses a Verizon-issued tablet to "electronically close out each component of the job" once they are finished with that job. (*Id.* at 18:20-19:8.) In general, the work rules provide "a framework of how [a technician] to go about their day," thus "if a technician follows these work rules, it clearly outlines how he should approach his day and how he should basically go about completing the install or going through a trouble." (*Id.* at 21:12-17.)

Mr. Minor testified that the primary measure of productivity of a Cable Splicing Technician is meeting hours per dispatch ("HPD"). HPD is the amount of time, measured in hours, taken by a technician to install a component. (*See* Nov. 13, 2018 Tr. at 86:16-87:1.) A component is a distinct service such as voice, data, or video.[3] (*See id.*) Verizon calculates the HPD it expects each Cable Splicing Technician to take per component based upon "historical factors" and

[3] For example, a "double play," consisting of Internet (data) and video, is two (2) components. (*Id.* at 86:18-21 (explanation by Mr. Green).)

extrapolation of internal collected data. (Nov. 15, 2018 Tr. at 28:1-19.) Verizon uses HPD to determine its productivity standards for its Cable Splicing Technicians, its profit forecast, and service offerings by calculating the expected number of components and customers each Cable Splicing Technician can service in a given day. (*Id.* at 28:1-29:30:6.)

D. Verizon's Americans with Disabilities Act ("ADA") Policy

Verizon provides its ADA policy, version since July 2012, applicable to "all domestic applicants and employees of Verizon living and working in the U.S., excluding Verizon Wireless, which has its own applicable policy." (Ex. R-2, p. 1.) Verizon's ADA policy states, "[w]ith respect to all hiring and employment practices, Verizon will not discriminate against qualified employees and applicants with disabilities and will provide reasonable accommodations to enable qualified employees and applicants with disabilities to perform the essential functions of their job unless the accommodations would create undue hardship for Verizon." (*Id.*) Verizon's ADA policy provides definitions of the terms "qualified employees and applicants with disabilities," "employees or applicants with disabilities," and "reasonable accommodations." (*Id.*) "Employees or applicants with disabilities" is defined as "those with a physical or mental impairment that substantially limits one or more of their major life activities; who have a history of such impairment; or who are regarded as having such impairments." (*Id.*) "Reasonable accommodations" is defined as "modifications to an applicant's or employee's work environment, assigned tasks or schedule that enable the individual to perform the essential functions of the job they seek or hold and that do not create an undue hardship for Verizon. (*Id.*)

The "Policy Responsibilities" section of Verizon's ADA policy states that "[t]he Workplace Accommodation team is responsible for providing guidance regarding whether a reasonable accommodation is needed and appropriate," and "[e]mployees [] are responsible for

informing their management team or Human Resources of the need for accommodation." (*Id.* at 2.) The "Procedure" section of Verizon's ADA policy states that "[e]mployees and supervisors can access the Employee Accommodation Request form (20-1927) on the eWeb." (*Id.*)

E. Verizon's Mid-Atlantic Medically Restricted Policy ("MRP")

Verizon's MRP is separate and distinct from its ADA policy. Verizon provides its MRP effective October 9, 1998 and amended on September 19, 2012. (*See* Ex. R-3 (copy of MRP effective October 9, 1998); Ex. R-4 (MRP amendment dated September 19, 2012).) Samantha Miller, senior manager of Verizon's Workplace Accommodations team, explained that the MRP "set[s] out a policy in the process for restrictions for employees who are union employees in the Mid-Atlantic who have limitations and restrictions on essential functions and where there isn't a reasonable accommodation that's going to enable them to perform their jobs." (Nov. 15, 2018 Tr. at 163:21-164:5.) According to Ms. Miller, Verizon's MRP is designed to provide benefits to Verizon collective bargaining unit employees who Verizon finds are not be qualified under the ADA:

> [I]t's [the MRP] is really good because what it does is it takes an employee who is not a qualified individual under the ADA because they can't perform their job, there's no reasonable accommodation that we're going to be able to give to enable them to do that job, and provides a framework for us to give them some coverage and some benefits. And some of those benefits are they get 150 days at work even though they can't perform the job. So we allow them to come into work. They get paid as they normally would get paid at the same rate. They still have all of their benefits while they're at work, and it's really good that way.

(*Id.* at 164:11-165:1.) Ms. Miller further explained additional benefits under Verizon's MRP:

> What then happens is if the employee still can't do their job at day 150, on day 151 we would place them on unpaid leave of absence, and that is a job-protected leave of absence. So even if the employee doesn't have something like FMLA to protect that absence, they are job protected, and that can last an additional seven months.

> In addition to those things, if the employee remains restricted at week 44, we would then provide them with an opportunity to apply for long-term disability so the employee would have an opportunity to perhaps then decide if maybe their condition wasn't getting better, they didn't think they were going to be able to return to work full duty, they would be able to apply for long-term disability. And that's important because they wouldn't have to file for short-term disability first, which is the normal path to long-term disability.

(*Id.* at 165:2-20.) Ms. Miller highlighted the unique employment "priority placement" benefit of Verizon's MRP: "a really important feature of this plan[] is that it provides priority placement for our employees, and priority placement is something that enables an employee who might not even otherwise be able to get access to a job, gives them access to a job. It allows us to place them." (*Id.* at 165:21-166:5.)

Verizon's MRP defines a "medically restricted employee" as an employee "who is able to work but who, due to a medical restriction, is unable to perform one or more of the essential functions of his/her job or is unable to perform his/her job on a full-time basis." (Ex. R-3, p. 2.) Neither Verizon's MRP or the September 19, 2012 amendment to the MRP specifically defines "medically restricted" or "medical restriction." (*See id.* (definitions section only containing "a medically restricted employee" and "suitable work") (emphasis in original); *see also* Ex. R-4 at GREEN000016 (stating that "[t]his Amendment addresses the treatment of associate employees who are determined to be able to work but have medical restrictions," does not contain a specific definition for medical restriction).)

F. Mr. Green Placed on a HPD Performance Plan in February-March 2016

Prior to January 2016, Mr. Green worked on Verizon's copper network as a Cable Splicing Technician. (Nov. 13, 2018 Tr. at 83:16-22.) Around January 2016, he was involuntarily transferred from copper to FIOS due to an internal Verizon reorganization. (*Id.* at 84:11-22.) On

February 29, 2016, Verizon, through the actions of supervisor Kevin Zynn, placed Mr. Green on a HPD performance plan. (*See* Ex. R-9, GREEN00190.) The HPD performance plan stated that Mr. Green needed to achieve a 10% improvement on his annual HPD of 2.08, specifically reducing his HPD from 2.08 to 1.88. (*Id.*) The HPD performance plan stated that Verizon's objective was a HPD of 1.49. (*Id.*)

On March 9, 2016, Mr. Zynn met with Mr. Green to discuss Mr. Green's "failure to follow his HPD performance plan." (*Id.*) Mr. Zynn scheduled another meeting for March 29, 2016. During the March 9, 2016 meeting, Mr. Zynn "explained to [Mr. Green] the importance of time management" and cited an incident where Mr. Green "dispatched on order at 8am and did not notify me [Mr. Zynn] of any issue[s] until 12:52pm. [Mr. Green] was on this job from 8am till 2 pm." (*Id.*) Further, Mr. Zynn explained that Mr. Green "had to communicate with me [Mr. Zynn] if he [Mr. Green] was on a job longer than 1.5 hours or if his ONT[4] was not activated within 2 hours of dispatching." (*Id.*) Verizon, through Mr. Zynn, stated that Mr. Green would be suspended for one day starting March 29, 2016 as a result of his failure to follow the HPD performance plan and that "[f]ailure to follow HPD Performance Plan and work rules / processes will result in progressive disciplinary actions up to and including dismissal." (*Id.*)

On March 15, 2016, Mr. Zynn followed up with Mr. Green regarding the HPD performance plan. Mr. Zynn "informed [Mr. Green] that he failed to achieve the target that he had agreed he could make and that was a 10% improvement. [Mr. Green] actually went from an overall 2.08 to an overall 2.44." (*Id.*) Mr. Zynn stated that he would maintain the 10% HPD improvement target and meet with Mr. Green in two (2) weeks. Mr. Zynn also stated that moving forward, Mr. Green "need[ed] to communicate with me [Mr. Zynn] whenever you [Mr. Green] are on a trouble greater

[4] An ONT is a "box[] inside [a customer's] home that actually -- that brings services to [the customer's] home, whether it be Comcast, Verizon provider." (Nov. 15, 2018 Tr. at 72-:2-5.)

than 1.5 hours (FIOS or Copper) and FIOS orders, single, double, or triple if ONT is not activated within 2 hours and job is not completed within 1.5 hours per component." (*Id.*) The communication requirement was imposed so that Mr. Zynn would "know what roadblocks you [Mr. Green] are running into," so that Mr. Green's HPD time and efficiency could be improved with discussion of "daily action items and different techniques." (*Id.*)

G. June-July 2016 Investigation

On June 24, 2016, Mr. Zynn conducted an investigatory interview with Mr. Green. (Ex. R-11; *see also* Nov. 13, 2018 Tr. at 130:12-16 (Mr. Green's recollection of June 24, 2016 interview).) A union representative was also present. (Ex. R-11 at GREEN000059.) The stated purpose of the interview was to discuss "[o]verall job performance - failure to notify management of roadblocks/time spent on job(s)." (*Id.*) Mr. Zynn discussed Mr. Green's workday on June 19, 2016 where Mr. Green spent approximately 9.75 hours on his first job and was on a second job from 5:45 p.m. into the next early morning. (*Id.* at GREEN000060.) Mr. Zynn was concerned that Mr. Green did "not keep[] anyone informed of your long duration jobs and very late work hours;" Mr. Green admitted that he did not call his duty supervisor that he was working until midnight. (*Id.* at GREEN000060-61.)

On July 1, 2016, Verizon issued an Employee Contact Memorandum to Mr. Green that stated that Verizon found, based upon Mr. Zynn's investigation, that Mr. Green violated the HPD performance plan. (Ex. R-12.) Specifically, Verizon found that Mr. Green's conduct on June 19, 2016 violated the HPD performance plan's provisions regarding communication "whenever you [Mr. Green] are on a trouble greater than 1.5 hours (FIOS or Copper) and FIOS order, single, double or triple" and "communicating [] roadblocks timely[.]" (*Id.*) Verizon suspended Mr. Green for five (5) days, effective July 1, 2, 3, 5, and 6, 2016. (*Id.*)

H. Verizon's Mid 2016 Performance Evaluation of Mr. Green

On July 18, 2016, Mr. Zynn completed a 2016 Associate Mid-Year Evaluation that reviewed Mr. Green's performance through that date in 2016. (Ex. R-10.) In the compliance section of the 2016 Associate Mid-Year Evaluation, Mr. Green was found to have met Verizon's requirements for ethics, diversity, safety, and attendance and punctuality. (*Id.* at 1-2.) Mr. Green also had no issues with safety, eTouchpoints, and attendance excluding Family Medical Leave Act leave. (*Id.* at 3-4.) In the performance objectives section, Mr. Green was found to have been "running .76 minutes over objective for 1st quarter" in HPD. (*Id.* at 2.) HPD had 30% weight on Mr. Green's overall performance. (*Id.*) However, under first dispatch resolution under customer experience, which also carried 30% on Mr. Green's overall performance, he was over Verizon's objective of 93% with a score of 96.13%. (*Id.* at 3.)

In the supervisor performance summary section, Mr. Zynn wrote that Mr. Green "is new to FIOS and is struggling with HPD. I [Mr. Zynn] have been working with [Mr. Green] on his time management skills and I will continue to help [Mr. Green]." (*Id.* at 4.) Mr. Zynn also noted that Mr. Green "takes personal accountability with his customers and looses [sic] focus on company objectives. [Mr. Green] needs to work on finding a medium where he is delivering quality service while also staying productive. His overall performance is suffering do [sic] to his production and the rest of his scorecard is very good." (*Id.* at 4.) The 2016 Associate Mid-Year Evaluation is signed by Mr. Zynn, but is not signed by Mr. Green. (*Id.*) Mr. Minor explained that under the collective bargaining agreement applicable to Mr. Green, "technicians and associates are not required to -- to sign anything." (Nov. 15, 2018 Tr. at 71:9-14.)

I. Post Mid-Year Evaluation Employment Actions - August, September, and November 2016

On August 21, 2016, Mr. Zynn met with Mr. Green to discuss the HPD performance plan. (Ex. R-14.) Mr. Green's HPD was at 2.26. (*Id.*) Mr. Zynn reiterated Verizon's need for Mr. Green to improve his HPD and maintain communication for roadblocks. (*Id.*) About one month later, on September 20, 2016, Mr. Zynn met with Mr. Green to further discuss the HPD performance plan. (Ex. R-15.) Mr. Zynn noted that Mr. Green's HPD had increased to 2.38 for the month of September 2016 and overtime restrictions were being added to the HPD performance plan. (*Id.*)

On November 2, 2016, an investigatory interview was conducted by Verizon through Renee Casteel,[5] who replaced Mr. Zynn as Mr. Green's supervisor. (Ex. R-16.) The issue was the

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[5] The Hearing Panel finds that Ms. Casteel was not a credible witness. For example, she repeatedly could not recall her own testimony made on direct examination and engaged in obfuscation on cross-examination:

> [DIRECT EXAMINATION]
>
> Q [Counsel for Respondent] All right. What complaints did you receive that you can remember today?
> A [Ms. Casteel] I remember the first complaint I received . . . he was in the house, the customer's house until, like, 7 o'clock at night. . . .
> A Then there was another time when he [Mr. Green] called me. . . . So that was another all-day job where he was in the house from 7:30 in the morning until 11 o'clock at night.
>
> [CROSS EXAMINATION]
>
> Q [Counsel for Complainant] One time you said -- okay. You testified that he [Mr. Green] was there until 11 o'clock at night. Was there more than one incident when he was there until 11 o'clock at night?
> A [Ms. Casteel] How many did I mention at 11 o'clock at night?
> Q I'm asking you.
> A I know --
> Q I know you testified about one. I'm asking you was there more than one that you testified -- that you testified about today?
> A Past 11:00?
> Q Um-hum.
> A I don't recall.

(Nov. 15, 2018 Tr. at 103:18-104:4, 106:10-22, 131:17-132:8.)

time spent by Mr. Green on a job on November 1, 2016 and his alleged failure to maintain communication with Ms. Casteel. (*Id.* at GREEN000070.) On November 14, 2016, Verizon issued an Employee Contact Memorandum informing Mr. Green that he had been found by Verizon to have violated the HPD performance plan and work rules. (Ex. R-17, GREEN000072.) Verizon stated that Mr. Green would be suspended for 10 days. (*Id.* at GREEN000073.)

J. Verizon's 2016 Year End Evaluation of Mr. Green

On January 30, 2017, Verizon issued its 2016 end of year evaluation of Mr. Green. This end of year evaluation identifies Ms. Casteel as Mr. Green's manager, but the document itself is signed by Mr. Zynn. (*See* Ex. R-19, pgs. 1, 5.) Verizon found Mr. Green to have not met ethics requirements, but did meet requirements for diversity, safety, attendance and punctuality, and eTouchpoints. (*Id.* at 1-3.) Mr. Green's 2016 annual HPD was 2.31, missing Verizon's target of 1.49. (*Id.* at 2.) Mr. Green's 2016 annual first dispatch resolution was 88.03%, missing Verizon's target of 93%. (*Id.* at 3.) Verizon's performance summary found Mr. Green's "overall performance is very low" due to "missing HPD [and] FDR [first dispatch resolution] over month and YTD." (*Id.* at 4.) The performance summary was authored by Mr. Zynn. (*See id.*)

K. April 2017 - Mr. Green Requests a Reasonable Accommodation from Verizon

On April 14, 2017, Mr. Green submitted an Accommodation Request to Verizon. (Ex. ED-9.) The Accommodation Request is a "fillable form" provided by Verizon with Verizon letterhead for the purpose of "[b]ased on your disability, this form will help us identify a job accommodation so you can perform the essential functions of your job or complete the interview/testing process." (*Id.* at 1.) In Section 1 of the Accommodation Request, Mr. Green reported that he "can perform all tasks, however the time takes me longer[] due [to] the struggle of mentally focusing on complex

multistep processes." (*Id.*) The reasonable accommodation that Mr. Green requested was "more time to complete job tasks and limiting my work day to 10 hours or less." (*Id.*)

Answering question prompts posed by Verizon on the form, Mr. Green stated that his requested accommodation "will allow me to perform the essential functions of my job in a way that is more safe and less distracting and more focused compensating for my racing thoughts." (*Id.*) Mr. Green explained that he requested a work day capped at 10 hours because he felt his medication would begin to wear off after 8 hours; "limiting my day to no more than ten hours would help me maximize . . . effectiveness in the field while on the medicine." (Nov. 13, 2018 Tr. at 94:20-95:7.)

Mr. Green indicated that his requested accommodation "is required indefinitely." (Ex. ED-9 at 5.) He signed the Accommodation Request form and dated it for April 14, 2017. (*Id.*) He identified Ms. Casteel as his supervisor. (*Id.*) Section 2 is "[t]o be completed by supervisor of employee" with numerous prompts to be answered by a supervisor. (*Id.* at 2.) Section 2 instructed that a supervisor should "[s]ubmit Section 1 and Section 2 to the Workplace Accommodations Team" via email or fax and a copy should be sent a HR Business Partner. (*Id.*) Section 2 of the Accommodation Request contained in the record of this action is blank. (*Id.*)

Section 4 of the Accommodation Request contained medical questionnaire provisions to be completed by a health care prvovider. (*Id.* at 5.) Don Elrod, PA-C (psychiatric physician assistant), completed Section 4 on March 6, 2017. (*Id.* at 7.) Dr. Elrod reported that Mr. Green "is having difficulty keeping up with the required pace of service" and "is having difficulty sustaining focus on work days that last longer than 10 hours." (*Id.* at 5.) Dr. Elrod reported that Mr. Green would suffer from "[d]ecreased focus, concentration and processing speed" as a result of his medical condition and "there is a limit to how much these symptoms can be improved with

medication;" "symptoms are only managed with medication and are usually life long." (*Id.* at 7.) Dr. Elrod reported that the cause of Mr. Green's difficulties was his diagnosed Attention Deficit Disorder ("ADD"), inattentive type. (*Id.* at 5.)

L. Verizon Responds by Placing Mr. Green in the MRP on June 26, 2017

Ms. Casteel testified that she was notified of Mr. Green's Accommodation Request by "e-mail from our workplace accommodations team." (Nov. 15, 2018 Tr. at 107:17-19.) Ms. Casteel stated Verizon's policy requires that supervisors such as herself "interview the employee and [] find out what the restrictions are, what he [Mr. Green] needed from us to assist him in being successful at doing his job[.]" (*Id.* at 107:22-108:3.) She documented her interview of Mr. Green in an electronic form maintained by Verizon. (*Id.* at 108:5-16; *see also* Ex. R-31 (exhibit specifically identified by Ms. Casteel as the electronic form she completed).) The form completed by Ms. Casteel is titled "Mid Atlantic Medically Restricted Plan Work Restriction Claim." (Ex. R-31 at 1.)

In the form completed by Ms. Casteel, she stated that she received an email from Candice Brown on June 26, 2017 that reads, "I [Ms. Brown] spoke with Darryl Green this morning and explained that since he and his doctor have requested additional time to complete job tasks and to limit the number of customer service jobs per day, he would be accommodated under the MRP since these are essential functions of his job. Please open an MRP case for this employee." (Ex. R-31 at 1.) The form stated that the MRP was effective as of June 26, 2017. (*Id.*) Ms. Miller confirmed that Ms. Brown formally contacted Mr. Green, described as an "interactive dialogue," sometime on June 26 or 27, 2017. (Nov. 15, 2018 Tr. at 183:14-20; *see also id.* at 184:12-15 (when Ms. Miller was asked "if she [Ms. Brown] had a formal interactive dialogue with him [Mr.

Green] before June 26th, she would have documented it, right[,]" Ms. Miller answered, "She would have, yes.").)

During Mr. Green's conversation with Ms. Brown on June 26, 2017, Mr. Green stated that he "needed about six hours to complete a job," specifically a Triple Play. (Nov. 13, 2018 Tr. at 117:9-17.) This is an approximately 1.5 hour increase from the expected time Verizon provides for Cable Splicing Technicians to complete a Triple Play. (*Id.* at 117:15-118:4.) However, in the MRP form completed by Ms. Brown, she wrote that Mr. Green stated "he needs an additional 6 hrs per job[.]" (Ex. R-31 at 2.) Mr. Green's uncontroverted testimony was that he did not tell Ms. Brown that he needed an additional six hours per job.[6] (Nov. 13, 2018 Tr. at 117:3-8.)

Ms. Casteel's first contact regarding Mr. Green's Accommodation Request was also on June 26, 2017. (Ex. R-31 at 1.) In a phone call, Ms. Casteel informed Mr. Green that his "accommodation request didn't qualify and that I [Mr. Green] needed to have a work restriction." (Nov. 13, 2018 Tr. at 102:21-103:1.) Ms. Casteel could not recall communicating with Mr. Green regarding his Accommodation Request before June 26, 2017. (Nov. 15, 2018 Tr. at 142:1-8.) Ms. Casteel also could not recall if she would have documented a communication with Mr. Green other than the June 26, 2017 phone conversation. (*Id.* at 143:18-21 (when asked by Complainant's counsel "[i]f you [Ms. Casteel] had had such a discussion, you would have documented it just like you did for June 26th, wouldn't you[,]" Ms. Casteel answered, "I don't recall.").)

Ms. Miller explained that by the time Ms. Casteel received the form marked as Exhibit R-31, Verizon already decided Mr. Green's Accommodation Request "to be an MRP:"

> Q [Complainant's counsel] All right. So then the interactive dialogue with his supervisor, who this form in R31 is for, Ms. Casteel would have occurred after this had already been decided to be an MRP, is that right?

[6] Ms. Brown was not present and did not testify in the Public Hearing.

> A [Ms. Miller] It would have -- yes, because Candice [Brown] would have had the dialogue, she would have reviewed the information he submitted, and then she would have asked the supervisor, that being Renee [Casteel], to open up the MRP case.

(*Id.* at 187:21-188:8.) Thus, Ms. Casteel's June 26, 2017 communication with Mr. Green was "an interactive dialogue for an MRP, not for a workplace accommodation:"

> Q [Complainant's counsel] Okay. So it's Ms. Casteel's responsibility to open the MRP case?
>
> A [Ms. Miller] It's her responsibility to conduct that initial interactive dialogue, these questions. Not -- not on page 1 so much, but if you look at the questions on page 2, it's her responsibility to ask those questions.
>
> Q All right. And so in asking those questions, she's doing an interactive dialogue for an MRP, not for a workplace accommodation, is that correct?
>
> A That is correct.

(*Id.* at 188:9-20.) Ms. Miller further explained that Verizon maintains separate forms for MRP matters and requests for reasonable accommodation under the ADA, but Verizon only provides a questionnaire to supervisors for MRP cases:

> Q [Complainant's counsel] All right. And, in fact, this form in Exhibit R31, as it reads at the top, is an MRP work restriction claim form --
>
> A [Ms. Miller] Correct. . . .
>
> Q Is there any form that -- similar to this that you have for workplace accommodation requests?
>
> A Yes. . . .
>
> A So when it's a [MRP], there's an electronic process where his [Mr. Green's] supervisor is prompted to ask questions, and at the same time writes down the employee's answers. When it comes to an accommodation request, the employee just gets the form, either the supervisor hands it to them or maybe they're getting it off the

> Internet -- Intranet I should say, and then the employee completes the questions themselves.
>
> Q Okay. And so -- understood. My question is: Is there a form from the company similar to the one in R31 for workplace accommodations where the interactive dialogue is done through a form for MRP in R31? Is there a form like that for workplace accommodations --
>
> A I understand your question.
>
> Q -- interactive discussion.
>
> A I'm sorry. No, there is no form because my team conducts an interactive dialogue. They're trained on how to do it. The MRP has some very specific provisions in it, and we want to make sure supervisors ask the correct questions, and that's why this is all laid out for them. But my team is trained to ask questions, to understand what questions they need to ask. So they have that conversation without a formal -- you know, there's no questionnaire for them to read to an employee.

(*Id.* at 188:21-191:3.) Any dialogue between a Verizon supervisor and employee concerning an employee's request for a reasonable accommodation or medical restriction would be documented. (*See id.* at 191:7-18.)

On July 13, 2017, Mr. Green received a letter from the Workplace Accommodations Team at Verizon that stated that his "restriction under the [MRP] has reached 150 days as of 07-13-2017. Beginning Day 151, you will be placed on an unpaid leave of absence, therefore, you will no longer report to work beginning 07-14-2017 through the remainder of the 52 week period which ends on 02-13-2018 or until you are able to perform the essential functions of your job, with or without a reasonable accommodation." (*See* Ex. ED-12 (first page, not numbered).) Verizon stated that during Mr. Green's time on the MRP, he would not be paid. (*See id.* ("During this time, you will not receive pay.").) Further, if Mr. Green was "unable to return to work within 52 weeks, [his] unpaid leave of absence will end and [he] will be separated from service with Verizon." (*Id.*)

Verizon represented that it would "look for an available job in the same, equivalent or lower job classification, for which you are test qualified and medically able to perform, with or without a reasonable accommodation." (*Id.*)

Mr. Green was on leave without pay from July 14, 2017 through February 11, 2018. (Nov. 13, 2018 Tr. at 106:19-20.)

M. Mr. Green's Medical History of ADD

Dr. Elrod reported that Mr. Green first sought treatment for ADD on January 6, 2014 with a "Dr. Kim." (Ex. ED-9 at 5.) It is not seriously disputed that Mr. Green was diagnosed with ADD sometime in December 2014. (*See* Nov. 13, 2018 at 91:15-20 (testimony from Mr. Green).) Since December 2014, Mr. Green sought medical treatment for his ADD from a psychiatrist at Joshi & Merchant. (*Id.* at 92:15-17.) Mr. Green was prescribed Adderall and took Adderall twice a day, 20 milligrams. (*Id.* at 92:18-21.) He continues to take Adderall at the same dosage in the present. (*Id.* at 92:22-93:3.)

Mr. Green described the effect of ADD upon his work performance, specifically his time management and HPD, as follows:

> I found myself losing kind of train of thought regularly. I can, I can, I can catch up to where I was at. Let's say, for example, if you look at, I always kind of describe it best as this. If I'm following a train of thought and you draw a line on a chalk board, at some point in time in the blink of an eye, it's like somebody erases that line on the chalkboard, and I have to sort of figure out what happened, where did I lose my spot. Now, I can find my spot and I'll pick it up, but this constantly happening inside of my head is, it contributes, it takes more time to kind of put it in a nutshell.

(*Id.* at 93:10-21.)

On September 24, 2017, approximately five (5) months after Mr. Green submitted his Accommodation Request to Verizon, an independent medical examination of Mr. Green was

performed by Carol C. Kleinman, M.D., J.D., F.A.P.A pursuant to a request by Verizon's disability vendor MetLife. (*Id.* at 109:6-21; *see also* Ex. ED-10 (Dr. Kleinman's report).) Dr. Kleinman concluded that Mr. Green "has been diagnosed with ADD" but "believe[s] he can function properly and safely in his job, but has asked for and does require some additional time to complete certain tasks." (Ex. ED-10 at 7.) Dr. Kleinman "[did] not believe he [Mr. Green] is malingering" and that Mr. Green "can return to work and fulfill his assigned tasks" with an adjustment to "another drug, a short acting stimulant taken in the afternoon" that is "added to his daily regimen by his own psychiatrist." (*Id.*) Dr. Kleinman found that "Mr. Green should be able to adjust to his new medication by December 1, 2017, and return to work, though it will be necessary to accommodate his ADD by giving him a bit more time to complete certain tasks and limiting his overtime, as he has requested . . . given extra time and some accommodation in his work load and hours, he can compensate for his attention difficulties, and perform well." (*Id.*)

N. Verizon's Pattern and Practice of Applying the MRP

Amory Proctor is the Executive Vice President of union Local 2108. (*Id.* at 71:6-8.) His duties as Executive Vice President include advocating for union members in disputes with Verizon. (*Id.* at 71:9-15.) Mr. Proctor has worked for Verizon for 35 years and is employed as a Cable Splicing Technician, although he currently "spend[s] most of [his] time in the local union office." (*Id.* at 58:5-9.) Mr. Green directly communicated with Mr. Proctor about the Accommodation Request, seeking advice from the union on "whether or not they [Verizon] were accommodating him [Mr. Green] properly or trying to accommodate him properly." (*Id.* at 58:19-21.)

Over the last five years, Mr. Proctor was deeply involved in "three to five" cases involving a Verizon's employee request for a reasonable accommodation that resulted in placement on the

MRP. (*Id.* at 65:21-66:12.) Based upon his discussions with Mr. Green, Mr. Proctor found that Verizon denied Mr. Green's request for a reasonable accommodation at the same time he was placed on the MRP and he believed "someone had made a mistake somewhere" in the course of making that decision. (*Id.* at 64:16-65:7.)

O. Mr. Green is Placed into a Lower Paying Position on February 2018

Mr. Green was on leave without pay, pursuant to his placement on the MRP, from July 14, 2017 through February 11, 2018. (*Id.* at 106:17-20.) On February 8, 2018, Kelly Felix, Senior Analyst for Verizon and responsible for internal replacement of employees placed on the MRP, informed Mr. Green that he was eligible for a service representative position with Verizon pending completion of an online assessment and interview. (Nov. 15, 2018 Tr. at 215:16-216:3; Ex. R-30.) That same day, Mr. Green replied to Ms. Felix with his acceptance of the Service Representative position and confirmation that he would report to work with Verizon as instructed. (*See* Ex. R-30 at GREEN000148; Nov. 13, 2018 Tr. at 82:12-16.) Mr. Green has been on Verizon's payroll as a Service Representative since February 12, 2018. (Nov. 13, 2018 Tr. at 82:12-16.)

Mr. Green's salary as a Cable Splicing Technician for the year 2017 was $1,545.00 per week. (*Id.* at 121:16-122:2.) His salary as a Service Representative started at $1,306.50 per week and was increased effective June 24, 2018 to $1,339.00 per week. (*Id.*; *see also* Ex. ED-17 (Mr. Green's calculation of his lost wages).) Effective June 24, 2018, the salary of a Cable Splicing Technician was increased to $1,583.63 per week. (*See* Ex. ED-17.)

P. Procedural History of Proceedings Before the Commission

On August 3, 2017, Mr. Green filed a Charge of Discrimination (the "Charge") before the Commission and against Verizon. (Ex. ED-2.) In the Charge, Mr. Green alleged that Verizon "discriminated against me in the terms, conditions, and privileges of my employment by failing to

provide me with a reasonable accommodation based on my disability (record of)." (*Id.*) Mr. Green further elaborated that "[o]n April 14, 2017, I submitted an accommodation request form to accommodate my disability" and "[o]n June 26, 2017, the Respondent's Workplace Accommodation Team denied my accommodation request . . . As a result, of failing to accommodate my disability, I was investigated and subsequently suspended without pay for violating work rules." (*Id.*) The Charge asserts claims under the ADA and Prince George's County Code, Subtitle 2, Division 12. (*Id.* at 6 (page not numbered, letter from Executive Director to Verizon, c/o Candice Brown, dated August 15, 2017).) The Charge was dual-filed with the United States Equal Employment Opportunity Commission ("EEOC"). (*Id.* at 5.)

After an investigation led by the Executive Director of the Commission, the Executive Director issued the Determination on March 14, 2018. (Ex. ED-4.) In the Determination, the Executive Director found that "the Complainant's allegation that he was subjected to discrimination by [Verizon's] failing to reasonably accommodate his disability and placing him on a Medically Restricted Plan [MRP] is with merit." (*Id.* at 2.) The Executive Director found that the Complainant Mr. Green provided medical documentation and documents showing that he requested a reasonable accommodation from Respondent Verizon on April 14, 2017 "involving additional time to perform his job duties and a limited work day[.]" (*Id.*) Then, "Respondent held that the Complainant's request for additional time to perform duties *and* a limited number of working hours per day constituted a medical restriction and not an accommodation." (*Id.*)

The Executive Director stated that the "facts of the investigation revealed that placing the Complainant on a restriction when he could perform the duties of his position constituted a failure to accommodate his disability." (*Id.*) Accordingly, "there is sufficient evidence to support that

the Complaint was denied reasonable accommodations and was removed from his position based on his disability" and the parties were directed to conciliation. (*Id.* at 3.)

Conciliation was unsuccessful and on June 2, 2018, the Executive Director certified the Charge to the Commission for a Public Hearing. The Commission subsequently set a Scheduling Order with the dates for the Public Hearing set for September 25, 2018. On August 8, 2018, Respondent filed the Consent Motion to Reschedule Public Hearing Date, which sought to continue the Public Hearing to November 13 and 15, 2018. On August 20, 2018, the Commission entered the Order granting the Consent Motion to Reschedule Public Hearing Date and set the Public Hearing for November 13 and 15, 2018.

The Public Hearing was convened on November 13 and 15, 2018. All parties and members of the Hearing Panel were present on each date. The Hearing Panel received and admitted Executive Director's Exhibits 1-18 and Respondent's Exhibits 1-31. Further, the Hearing Panel received witness testimony from the following individuals: (1) Jose Villegas, (2) Amory Proctor, (3) Darryl Green, (4) Terry Minor, (5) Renee Casteel, (6) Samantha Miller, and (7) Kelly Felix. (*See generally* Nov. 13, 2018 Tr.; Nov. 15, 2018 Tr.) The Hearing Panel granted the parties' request to submit post-hearing briefs in lieu of closing statements. (Nov. 15, 2018 Tr. at 222:9-21.) The parties each timely submitted their respective post-hearing brief on December 11, 2018.

II. CONCLUSIONS OF LAW

Preliminarily, the Hearing Panel shall address an evidentiary issue arising from the Public Hearing that was reserved for post-hearing review.

Weight Given to Dr. Kleinman's Report

Respondent objected to the admissibility of the findings and conclusions made in Dr. Kleinman's report on grounds of lack of foundation and hearsay. (*See* Nov. 13, 2018 Tr. at 52-

53.) The Hearing Panel overruled Respondent's objections as to the admissibility of Dr. Kleinman's report and noted that the Hearing Panel would determine the "appropriate weight" to be given to the statements contained therein. (*Id.* at 53:16-18.) Respondent's counsel indicated that the objections would be addressed in its post-hearing brief. (*Id.* at 53:19-20.) In its post-hearing brief, Respondent continues its objections and also contends that interpretation of Dr. Kleinman's report by the Acting Executive Director, who did testify, is inadmissible speculation. (Respondent's Brief at 20, n.7.)

Under Maryland law, "hearsay evidence is admissible at administrative hearings" and "administrative agencies are not generally bound by the technical common-law rules of evidence, although they must observe the basic rules of fairness as to parties appearing before them." *Eichberg v. Md. Board of Pharmacy*, 50 Md. App. 189, 193 (1981) (citations omitted). Here, while Respondent correctly contends that Dr. Kleinman did not testify and Respondent did not have the opportunity to cross-examine Dr. Kleinman, Complainant meritoriously responds that (1) Dr. Kleinman was retained by Respondent's disability vendor, not Complainant, and (2) Dr. Kleinman executed her report under the penalty of perjury. (*See* Nov. 13, 2018 Tr. at 53:5-12, 109:6-21; *see also* Ex. R-10 (after page 10, there is an unpaginated eleventh page that contains Dr. Kleinman's executed affirmation).)

Accordingly, the Hearing Panel finds that there is sufficient indicia of probative value and reliability to admit and grant weight to Dr. Kleinman's findings and conclusions stated in her report. There is no material concern that Dr. Kleinman's report would contain self-serving statements in favor of Complainant because she was not retained by Complainant to examine him or prepare the report. Had Respondent sought to challenge Dr. Kleinman's findings and conclusions on cross-examination, Respondent had the opportunity to subpoena Dr. Kleinman and

compel her to testify in this action; a witness designated by a party to testify before the Commission is not required by law to physically appear unless compelled to do so under subpoena or other judicial order. *See* Prince George's County Code, Subtitle 2, Division 12, Section 2-194(a) ("the Commission has power to . . . upon majority vote of the full Commission, to issue subpoenas").

However, the Hearing Panel finds Respondent's objection regarding the interpretation of Dr. Kleinman's report by the Acting Executive Director to be persuasive. The Acting Executive Director was not qualified as a medical expert and did not have firsthand participation in the preparation of Dr. Kleinman's report. The Acting Executive Director's interpretation of a medical professional's report would be a layperson's speculation. Accordingly, the Hearing Panel does not credit the Acting Executive Director's interpretation of Dr. Kleinman's report.

The Hearing Panel now turns to the merits of Complainant's Charge certified to the Commission for a Public Hearing.

A. Applicable Legal Definitions

Under Prince George's County Code, Subtitle 2, Division 12, Sections 2-185 and 2-222, it is unlawful for an employer to engage in employment-based discrimination including discrimination against a person with a physical or mental handicap. Under federal regulations implemented in accordance with the ADA, it is unlawful for a "covered entity" to discriminate against a "qualified individual" on the basis of that individual's disability with regards to:

> (i) Recruitment, advertising, and job application procedures;
>
> (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
>
> (iii) Rates of pay or any other form of compensation and changes in compensation;

> (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
>
> (v) Leaves of absence, sick leave, or any other leave;
>
> (vi) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;
>
> (vii) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
>
> (viii) Activities sponsored by a covered entity, including social and recreational programs; and
>
> (ix) Any other term, condition, or privilege of employment.

29 Code of Federal Regulations ("C.F.R.") 1630.4(a). A covered entity includes an "employer." An employer as defined under the ADA is a "person engaged in an industry affecting commerce who has 15 or more employees for each working day[.]" 29 C.F.R. 1630.2(b), (e). A "qualified individual" is an individual that "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position." 29 C.F.R. 1630.2(m).

An individual with a "disability" has one or more of the following:

> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (ii) A record of such an impairment; or
>
> (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

29 C.F.R. 1630.2(g). An "essential function" is "the fundamental job duties of the employment position the individual with a disability holds or desires. The term 'essential functions' does not include the marginal functions of the position." 29 C.F.R. 1630.2(n). The evidence of whether or not a particular function is essential includes, but is not limited to:

> (i) The employer's judgment as to which functions are essential;
>
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
>
> (iii) The amount of time spent on the job performing the function;
>
> (iv) The consequences of not requiring the incumbent to perform the function;
>
> (v) The terms of a collective bargaining agreement;
>
> (vi) The work experience of past incumbents in the job; and/or
>
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. 1630.2(n)(3).

A "reasonable accommodation" is defined as:

> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
>
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or
>
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

29 C.F.R. 1630.2(o). "To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process with the individual with

a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. 1630.2(o)(3). If the qualified individual meets the definition of "actual disability" or "record of" an impairment, the covered entity is "required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual." 29 C.F.R. 1630.2(o)(4).

An "undue hardship" is defined as "significant difficulty or expense incurred by a covered entity, when considered in the light of the factors set forth in [29 C.F.R. 1630.2(p)(2)]." 29 C.F.R. 1630.2(p)(1). The factors to be considered in determining an undue hardship include:

> (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;
>
> (iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
>
> (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

29 C.F.R. 1630.2(p)(2).

B. Burden of Proof - Failure to Accommodate

The Commission follows Maryland common law, which in turns utilizes federal precedent for analysis of applicable federal regulations under the ADA. *See Peninsula Reg'l Med. Ctr. v. Adkins*, 448 Md. 197, 213 (2016) (applying precedent from the federal courts for analysis of an ADA claim). In this case where Complainant alleges that Respondent failed its statutory duty to accommodate him, "the burden of proving that an employer could not have reasonably accommodated a disabled employee does not arise until the employee presents his or her prima facie case." *Id.* (citing *Gaither v. Anne Arundel Cnty.*, 94 Md. App. 569, 583 (1993)).

To establish a prima facie case for a "failure to accommodate" claim, an employee must show by a preponderance of the evidence that: "(1) that he or she was an individual with a disability; (2) that the employer had notice of his or her disability; (3) that with reasonable accommodation, he or she could perform the essential functions of the position (in other words, that he or she was a 'qualified individual with a disability'); and (4) that the employer failed to make such accommodations." *Id.* (citing *Gaither*, 94 Md. App. at 583 and *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 579 (4th Cir. 2015)) (other citations omitted). Under the third element, the employee has the "burden of showing that [he] is capable of performing the essential functions," but the employer "'should bear the burden of proving that a given job function is an essential function.'" *Dahlman v. Tenenbaum*, 2011 U.S. Dist. LEXIS 88220 1, 26 (D. Md. 2011) (citations omitted). In addition, an employer is required to "'initiate an informal, interactive process with the individual with a disability in need of the accommodation.'" *Id.* (citing 29 C.F.R. 1630.2(g)(2)); *see also Fleetwood v. Harford Sys. Inc.*, 380 F. Supp. 2d 688, 701 (D. Md. 2005) ("if it is not immediately obvious what accommodation would be appropriate, the ADA requires

that the employer and employee engage in an interactive process to identify a reasonable accommodation) (citations omitted).

If an employee establishes a prima facie case, the burden shifts to the employer to prove, by a preponderance of the evidence, that the employer "could not [reasonably] accommodate the plaintiff's [] needs without undue hardship." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (citations omitted). To satisfy its burden of proof of undue hardship, the employer "must demonstrate either (1) that it provided the plaintiff with a reasonable accommodation [] or (2) that such accommodation was not provided because it would have caused an undue hardship--that is, it would have 'result[ed]' in 'more than a *de minimis* cost' to the employer.'" *Id.* (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986) (internal citation omitted)).

C. Complainant's Prima Facie Case for Verizon's Alleged Failure to Accommodate

The first two elements, Complainant's fact of a disability and notice given to Respondent, are not seriously in dispute; the record is clear that Complainant has a substantial medical condition impairing one or more of his major life functions (ADD), a record of receiving treatment for ADD since 2014, and notice of Complainant's disability given to Respondent on April 14, 2017. (*See* Ex. ED-9 (Complainant's accommodation request to Respondent); Ex. ED-10 (independent medical examination report completed by Dr. Kleinman).) Respondent challenges the third and fourth element, specifically that (i) Complainant was not a qualified individual because he could not perform the essential functions of a Cable Splicing Technician even with an accommodation and (ii) Respondent did not fail to provide him reasonable accommodations. (*See* Respondent's Brief at 17-19.) In summary, the Commissioners hold that Complainant is able to meet its prima

facie case and also established a violation of the ADA through Respondent's failure to conduct a good faith interactive dialogue.

i. Is Meeting HPD an Essential Function of a Cable Splicing Technician?

Respondent's primary contention in support of its position that Complainant could not be found to be a qualified individual under the ADA is that Complainant could never meet Respondent's HPD with or without a reasonable accommodation. (Respondent's Brief at 19.) The record shows that Complainant did not meet Respondent's HPD of 1.49 for Cable Splicing Technicians in the year 2016. (Ex. R-19 at 2.) However, Respondent's contention relies upon the presumption that the Commission should find HPD to be an essential function of a Cable Splicing Technician.

Complainant meritoriously contends that the record demonstrates that HPD is an *expectation,* not a requirement, and Verizon has failed to meet its burden of proof to establish that its desired HPD target is an essential function of a Cable Splicing Technician for the relevant times of Complainant's employment in that position. (*See* Complainant's Brief, p. 6.) Meeting HPD targets is absent from the job description for a Cable Splicing Technician. (*See generally* Ex. R-5 (Job Brief for Cable Splicing Technician).) While the omission of HPD from the job description is only one of multiple factors considered under the applicable regulation, 29 C.F.R. 1630.2(n)(3), the relevance of its absence can be seen in Respondent's 2017 Associate Objectives & Development Plan ("2017 Plan") where Respondent places HPD below "Section 2 - Performance Objectives." The 2017 Plan, dated February 13, 2017, explicitly states "the performance objectives the employee is *expected* to achieve during the year," including HPD under "Drive Growth and Profitability." (Ex. R-20, p. 1-2 (emphasis added).) Meanwhile, "Section 1 -

Compliance" states "[e]mployees are *required* to adhere to the Compliance requirements." (*Id.* (emphasis added).)

Respondent could have articulated in its 2017 Plan that performance objectives such as HPD were required, as it articulated for its compliance requirements. It, however, chose to distinguish between compliance and performance objectives and merely make performance objectives an expectation instead of a requirement. (*Id.*) Given that the 2017 Plan was in effect at the time of Complainant's request for a reasonable accommodation, made approximately two months later on April 14, 2017, the 2017 Plan must be viewed as a controlling document evidencing the "employer's judgment as to which functions are essential[.]" 29 C.F.R. 1630.2(n)(3). Thus, even if Respondent's contention that Complainant could have never met Respondent's HPD for the year 2017 was accepted as true, that contention is immaterial because Respondent's own documents demonstrate that meeting HPD was merely *an expectation*, not a requirement as a part of an essential function of a Cable Splicing Technician. This fact readily distinguishes the facts of Complainant's present case with *Shin v. Univ. of Md. Med. Sys. Corp.*, 369 Fed. Appx. 472 (4th Cir. 2010), where the minimum admissions for a resident was "*required.*" *Id.* at 478 (emphasis added); (*See* Respondent's Brief at 21 (asserting that *Shin* should be applied to this action).)

ii. Even if Meeting HPD was an Essential Function, Respondent's Blanket Refusal to Consider Any Deviation of HPD is Inconsistent with the ADA

Mr. Minor, Respondent's corporate representative, confirmed that Respondent would find "any additional time asked for beyond the hours per dispatch would be unreasonable[.]" (Nov. 15, 2018 Tr. at 53:13-17.) Respondent's blanket refusal to consider any deviation from its HPD ignores the second prong of an essential function, which requires an employer to take into consideration the possibility that an employee could be found to be a qualified individual because

that employee can perform the essential functions of the position *with* a reasonable accommodation. *See* 29 C.F.R. 1630.2(m) ("with or without reasonable accommodation"); *see also Bates v. UPS*, 511 F.3d 974, 993 (9th Cir. 2007) ("ADA generally requires individual assessment of whether a qualified individual is able to perform essential functions with or without reasonable accommodation, rather than use of blanket qualification standards") (citing *McGregor v. AMTRAK*, 187 F.3d 1113, 1116 (9th Cir. 1999)).

The effect of Respondent's blanket policy was seen in Respondent's failure to conduct an interactive dialogue with Complainant for approximately three months, between April and June 2017. (*See* Ex. ED-9 (Complainant's April 2017 request for an accommodation).) Then, on June 26, 2017, Respondent unilaterally informed Complainant that he was determined to be "medically restricted" and therefore ineligible for an accommodation under the ADA. (Ex. R-31.) Thus, Respondent demonstrated a predetermined intent to refuse to consider any request for a reasonable accommodation regarding time to perform tasks as articulated in HPD, which is already violative of the interactive dialogue provisions of the ADA. (*See* Nov. 15, 2018 Tr. at 53:13-17 (Mr. Minor's testimony confirming that "any additional time asked for beyond the hours per dispatch would be unreasonable").)

Although not necessary to our holding in this matter, it should be noted that Respondent's failure to have a good faith interactive dialogue with Complainant after his request for a reasonable accommodation was itself in violation of the ADA. "Liability for failure to engage in an interactive process depends on a finding that, had a good faith interactive dialogue occurred, the parties could have found a reasonable accommodation that would enable the disabled person to perform the job's essential functions." *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 347 (4th Cir. 2013) (citing *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 91 (1st Cir. 2012)).

Here, the record demonstrates that Respondent did not have a good faith interactive dialogue between April 14, 2017 and June 26, 2017. Respondent, through the testimony of Ms. Miller, confirmed that had there been an interactive dialogue before Respondent informed Complainant that he was found to be medically restricted, such a communication would have been documented. (Nov. 15, 2018 Tr. at 188:21-191:3, 191:7-18.) There is sufficient evidence to demonstrate that had a good faith interactive dialogue occurred, the parties could have found a reasonable accommodation to enable Complainant to perform the essential functions of a Cable Splicing Technician. For example, Verizon could have assigned Complainant to work on the copper network, which is still maintained by Respondent and was work that Complainant was originally trained to perform, or assigned Complainant to Enterprise. (*See* Nov. 13, 2018 Tr. at 85:1-5 ("We still have that product [copper] out there, as far as I [Complainant] know, so someone's got to service it.").) In fact, Respondent, through the testimony of Mr. Minor, bluntly stated anyone "can come off the street" doing Enterprise, which removes doubts as to Complainant's ability and qualifications to perform Enterprise work as a Cable Splicing Technician.[7] (Nov. 15, 2018 Tr. at 83:3-7.)

iii. Even if Respondent Prevailed on Element 3 of Complainant's Prima Facie Case, Respondent is Unable to Demonstrate that Offering the MRP is a Reasonable Accommodation to Complainant

Respondent contends in the alternative that placing Complainant on the MRP constituted an offer of a reasonable accommodation defeating Complainant's prima facie case on the fourth

[7] In addition, the independent medical examination performed by a medical expert specially retained by *Respondent's* disability vendor found that Complainant could "given extra time and some accommodation in his work load and hours, he can compensate for his attention difficulties, and perform well. (Ex. ED-10 at 7.) Respondent does not produce sufficient evidence explaining its apparent disregard of the conclusions drawn from its own disability vendor that found that Complainant could effectively perform the essential functions of a Cable Splicing Technician with "some accommodation in his work load and hours." (*See id.*)

and final element. (Respondent's Brief at 23-24.) Respondent contends that "multiple federal courts and the EEOC have already concluded that the MR-LOAPA provides reasonable accommodations under the ADA." (*Id.* at 24 (citing *Klik v. Verizon Va.*, 2016 U.S. Dist. LEXIS 29114 (W.D. Va. 2016), *aff'd Klik v. Verizon Va., Inc.*, 2016 U.S. App. LEXIS 18397 (4th Cir. 2016)) (other citation omitted).)

Respondent conflates the validity of the MRP in a vacuum versus the statutory and common law requirements of the ADA, which cannot be superseded and subsumed entirely by the MRP. Ms. Miller, who is the senior manager of Respondent's Workplace Accommodations Team, clearly explained that the MRP is specifically tailored for individuals who are found by Respondent to be ineligible for a reasonable accommodation under the ADA; "this plan allows us [Respondent] to do -- it's really good because what it does is it takes an employee who is not a qualified individual under the ADA[.]" (Nov. 15, 2018 Tr. at 164:10-13.) Thus, offering to place an employee on the MRP itself could not be viewed as a reasonable accommodation because it was never meant to act as Respondent's ADA policy, which is separate from the MRP. (*See* Ex. R-2 (Respondent's ADA policy).) Further, placing the Complainant (or other similarly situated employees) on the MRP in lieu of utilizing the processes articulated under the ADA constitutes an adverse employment action because Verizon's decision to automatically place Complainant on the MRP resulted in unpaid leave and his reassignment to a lower paying position. (*See* Ex. R-3 (Respondent's MRP); Nov. 15, 2018 Tr. at 164:11-165:1.)

Notwithstanding its MRP, when Complainant made his request for a reasonable accommodation, Respondent as a covered entity, was required to follow the provisions of the ADA, including an interactive dialogue and appropriate consideration of whether Complainant could perform the essential functions of the position with or without a reasonable accommodation.

See 29 C.F.R. 1630.2. The record reflects that Respondent determined on its own that it did not have to consider Complainant's request for a reasonable accommodation pursuant to the ADA and that Respondent could act as its own arbiter on which employee requests could be classified under the ADA or MRP. (Nov. 15, 2018 Tr. at 188:21-191:3, 191:7-18.) There is no statutory or other legal authority holding that Respondent is uniquely exempt from the ADA entirely because of the existence of the MRP; Respondent is not a supranational body that can overrule and ignore the laws of the United States or Prince George's County.

In addition, Respondent's reliance on *Klik* is unavailing. In *Klik*, the employee was employed as a Cable Splicing Technician and sustained a work-related injury to his left shoulder. 2016 U.S. Dist. LEXIS at 4. Crucially, the employer, a Virginia subsidiary of Respondent's parent company, *granted an accommodation to the employee* by placing him on light duty work for approximately a month until the employee underwent surgery. *Id.* Here, unlike the facts presented in *Klik*, there was no accommodation whatsoever granted to Complainant prior to placing him on the MRP, which in of itself is not a reasonable accommodation as previously discussed. (*See* Ex. ED-9; Ex. R-31.) Further, the *Klik* court's finding that the employee was not a qualified individual was based upon an essential function clearly articulated in Respondent's Job Brief, specifically lifting heavy equipment, which is not analogous to the voluntary expectation of HPD in this action. *Cf.* 2016 U.S. Dist. LEXIS at 14 ("In the CST job description, CSTs are required to work aloft, including carrying and climbing ladders and poles using gaffs, working underground and lifting tools and equipment weighing up to 100 pounds.").

D. Respondent's Affirmative Defense of Undue Hardship

As previously analyzed, Respondent is unable to prove that it provided Complainant a reasonable accommodation. Therefore, only the second element of the undue hardship defense remains.

i. Did Respondent Prove that it Could Not Accommodate Complainant's Request for More Time and a Daily Work Hour Cap Due to an Undue Hardship?

Respondent's assertion that "there is no dispute (because Green presented no evidence to the contrary) that permitting Green to work less hours and not meet his HPD requirement would require other technicians to work longer and cause Verizon to miss customer and regulatory commitments" is not supported by concrete evidence required to meet its burden of proving its undue hardship defense. (Respondent's Brief at 23.) Undue hardship "cannot be proven by assumptions nor by opinions based on hypothetical facts" and must "have a strong factual basis and be free of speculation or generalization about the nature of the individual's disability or the demands of a particular job." *Bryant v. Better Business Bureau*, 923 F. Supp. 720, 740-41 (D. Md. 1996) (citing *Int'l Ass'n of Machinists and Aerospace Workers AFL-CIO v. Anderson*, 442 U.S. 921 (1979)) (other citations omitted).

Here, Respondent, through the testimony of its corporate representative, merely presented hypothetical facts and generalizations couched by "ifs:"

> If we don't have those standards, it basically can cause chaos for, one, our customers; two, if we don't look at them, it can drive overtime. If we have technicians not meeting that standard, it can also impact other technicians because we have to send other techs to help them and drive overtime.
>
> If we have technicians at customers' homes too long, it causes customer frustration. It also may even cause churn, because if a technician can't complete his load in a given day and we can't find help for a technician, that customer might cancel.

(Nov. 15, 2018 Tr. at 29:11-30:1.) Respondent has failed to demonstrate a material financial impact upon Respondent or quality of life impact upon other employees. In fact, Respondent stated that it employs approximately one thousand Cable Splicing Technicians in Maryland, a number suggesting that Complainant could at worst be accommodated to assignments primarily in copper or Enterprise. (*See* Nov. 15, 2018 Tr. at 49:9-13; *see also id.* at 83:3-7 (Mr. Minor's testimony that anyone "can come off the street" to perform Enterprise).); *see also* 29 C.F.R. 1630.2(p)(2) (among factors to be considered for undue hardship includes "overall financial resources of the facility" and "overall financial resources of the covered entity").

It can be reasonably inferred that a "strong factual basis" is lacking because Respondent declined to consider Complainant's request for a reasonable accommodation in the first place, instead reclassifying his request under the MRP. (*See* Ex. R-31.) Thus, there was no opportunity to collect, let alone calculate, the potential financial hardship or other hardship of Complainant's request for additional time, cap on his workday, or potential reassignment to copper or Enterprise. Further, the record indicates that Respondent may have inadvertently, or under pretext, mischaracterized Complainant's request for additional time as unreasonable by framing his request as seeking six additional hours rather than six hours total for a Triple Play, which is only an increase of 1.5 hours. (*See* Ex. R-31 at 2; *Compare* Nov. 13, 2018 Tr. at 117:3-8.)

E. Damages

Having found that Respondent engaged in unlawful discrimination under the ADA due to failure to accommodate Complainant's disability, and in turn violated Prince George's County Code, Subtitle 2, Division 12, the remaining issue is to determine the relief to be afforded to Complainant. Under Prince George's County Code Subtitle 2, Division 12, Section 2-195.01(a), the Commission is empowered to award compensatory damages including lost wages and impose

a civil penalty under Section 2-195.01(b). Further, under Section 2-195.01(c), the Commission is empowered to "compensate complainant for humiliation and embarrassment suffered" at a maximum of $200,000.00. In addition, under Section 2-195(a), the Commission may impose "such affirmative action as equity and justice may require and prospective relief as is necessary to effectuate the purposes of the Division."

i. Lost Wages

The Commission credits Complainant's calculation of his lost wages at $52,001.73 incurred as a result of adverse employment actions taken against him after he made his request for a reasonable accommodation on April 14, 2017. (*See* Ex. ED-17.)

ii. Compensatory Damages for Humiliation and Embarrassment

The Commission awards Complainant non-pecuniary losses of $20,000.00. Complainant provided credible and emotionally powerful testimony that he was forced to miss his 103-year-old grandmother's funeral due to financial hardship as a result of being improperly placed on unpaid leave under the MRP. (Nov. 13, 2018 Tr. at 125:18-126:4.) Missing a loved one's funeral due to Respondent's improper conduct cannot be unwound and financial compensation alone is insufficient to cure that loss.

iii. Other Equitable Relief

The Commission also orders that Respondent reinstate Complainant to the position of Cable Splicing Technician with full pay and benefits appropriate to an employee of his experience in that position. Respondent must also consider any request for an accommodation made by Complainant under the ADA and common-law instead of solely applying the MRP. Upon Complainant's request for an accommodation, Respondent must seriously engage in an "interactive process" in a manner consistent with law and as explained by the EEOC:

> [I]f it is not immediately obvious what accommodation would be appropriate, the ADA requires that the employer and employee engage in an interactive process to identify a reasonable accommodation. The EEOC suggests that the employer should take the following steps to accomplish this goal:
>
> (1) analyze the particular job involved and determine its purpose and essential functions;
>
> (2) consult with the employee to ascertain the precise job-related limitations imposed by the disability and how they could be overcome;
>
> (3) in consultation with the employee, identify potential accommodations and assess the effectiveness of each in enabling the employee to perform his functions; and
>
> (4) consider the preference of the employee and implement the accommodation that is most appropriate for both the employee and employer.

Fleetwood, 380 F. Supp. 2d at 701 (citations omitted).

iv. Civil Penalty

The Commission imposes the maximum civil penalty of $10,000.00 upon Respondent. Respondent cannot be permitted to erode protections afforded by the laws of the United States under the ADA and Prince George's County by fiat, which is what Respondent did in this case through its improper unilateral application of the MRP instead of the ADA. The imposition of the civil penalty is meant to be a deterrent to such conduct in the future and is vital to protecting the rights of workers in Prince George's County.

BEFORE
THE PRINCE GEORGE'S COUNTY
HUMAN RELATIONS COMMISSION

IN RE: Darryl Green

Complainant

By

Executive Director

v.

Verizon Maryland LLC

Respondent

HRC Case No.: HRC17-0804
EEOC Case No.: 531-2017-00049

ORDER

Pursuant to the authority conferred on this Commission by Section 2-195, Division 12, Prince George's County Code, 1991, as amended, for the reasons stated above, the Commission issues this Opinion and ruling and finds that the Respondent, Verizon Maryland LLC, is liable for failure to accommodate and disability discrimination in violation of the Americans with Disabilities Act and Prince George's County Code §§ 2-222.

Judgment is entered in favor of Complainant and against Respondent for $72,001.73. The Respondent shall prepare a certified check, payable to **Darryl Green**, and deliver the check to the Prince George's County Human Relations Commission's Clerk at 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772 within 35 days of this Opinion and Order. If a check is not delivered within 35 days of this decision, post-judgment interest shall accrue at the rate of 10% per annum from that date until payment is made.

Further, the Commission imposes a $10,000.00 civil fine on Respondent, to be paid by Respondent to the Commission. The fine shall be paid by certified check, made payable to **Prince George's County Government** and delivered to the Prince George's County Human Relations Commission's Clerk at 14741 Governor Oden Bowie Drive, Upper Marlboro, MD 20772 within 65 days of this Opinion and Order. Interest will not accrue on this fine.

In addition, Respondent shall immediately reinstate Complainant Darryl Green in the position of Cable Splicing Technician with full pay and benefits commensurate with that position and his current years of experience.

On the 31st day of January 2019, **It is so Ordered.**

Under Section 2-197-C of the Prince George's County Code, any party aggrieved by a final decision of the Commission in a contested case is entitled to file an appeal pursuant to Subtitle B of the Maryland Rules of Procedure, Annotated Code of Maryland, within 30 days from the date last entered above.

Merrill Smith, Jr., Chairperson
Prince George's County
Human Relations Commission

Employment Panel:

Merrill Smith, Jr., Commissioner, Panel Chair
Johnathan Medlock, Commissioner
Nora Eidelman, Commissioner

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