IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF PONTIAC, a Municipality of the State of Michigan, Defendant.	)	CASE NO. 94-CV-74997-DT HON. DENISE PAGE HOOD

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PLAINTIFF UNITED STATES' REPLY BRIEF

TO DEFENDANT'S OPPOSITION TO

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF AUTHORITIES

I. DEFENDANT REGARDED HENDERSON AS BEING SUBSTANTIALLY LIMITED IN SEEING AND WORKING

Defendant's response to Plaintiff's uncontested evidence that Defendant regarded Henderson as being substantially limited in the activity of seeing is the false after-the-fact claim that testimony of Defendant's designee under Fed. R. Civ. P. 30(b)(6) constitutes the mere "opinions" of that individual. This Rule 30(b)(6) testimony, that Henderson could not sketch buildings, estimate distances, etc., amounts to the City's contention regarding functions the City believed Henderson could not perform due to his monocular vision and the reasons for the City's rejection of Henderson's application. This is clear from the deposition notice and was recognized by the deponent and Defense counsel during the deposition. Plaintiff's Notice of Rule 30(b)(6) Deposition (Exhibit 63) at 2; Rule 30(b)(6) Deposition of Defendant, (Exhibit 64) at 7/25-8/13, 145/21-146/19. Testimony elicited pursuant to Rule 30(b)(6), by its very nature, binds a party. Resolution Trust Corp. v. Southern Union Co., 985 F.2d 196, 197 (5th Cir. 1993).[1]

Defendant has also offered no evidence to contradict the clear factual showing that Defendant regarded Henderson as being substantially limited in working. Defendant neither contests that it regarded Henderson's monocular vision as disqualifying him from all positions in Defendant's Fire Department, nor that any other employer applying the NFPA vision standards would similarly reject Henderson from any fire fighting position.

Defendant's entire argument on this point rests on misapplication of case law. The cases cited by Defendant involve persons who were regarded as being limited in only one narrow activity, as opposed to Henderson, who was regarded as being unable to do many if not all functions required of a fire fighter. See Plaintiff's Exhibit 17 Nos. 2, 9, 11. For instance, in Jasany v. United States Postal Serv., the parties agreed that the plaintiff's mild strabismus (cross-eyes) only limited his ability to use one particular machine in the post office. 755 F.2d 1244, 1250 (6th Cir. 1985). Similarly, in Welsh v. City of Tulsa, the Court found that plaintiff's decreased sensation to hot and cold in two fingers only limited him as a fire fighter in that he might be injured if an ember burned through his glove. 977 F.2d 1415, 1416 (10th Cir. 1992). There was no evidence that the employer

[1]Defendant's interrogatory responses also show that Defendant regarded Henderson as being substantially limited in seeing. See Plaintiff's Exhibit 17, Nos. 2, 9, 11.

considered any other aspect of fire fighting, or any other function common to other jobs, to be compromised. Id.

Defendant also misrepresents that Welsh "dismissed out of hand as mere speculation plaintiff's contention that if other fire departments had the same regulations . . . that he would be excluded from all classes of fire fighting jobs." Defendant's Response Brief at 4. In that case, the Court held that plaintiff could not presume that other employers would misapply a State standard, as defendant in that case admitted that it had done. Welsh, 977 F.2d at 1416. Defendant also misconstrues the "unique" and "exceptional" abilities exception discussed by the Court in E.E. Black, Ltd. v. Marshall, where this exception applied only to a narrow category of jobs, such as NFL running back or concert pianist. 497 F. Supp. 1088, 1100 (D. Haw. 1980). Defendant's claims that the ability to clean vehicles and sketch buildings are tasks requiring exceptional visual skills falls far short of these examples.[2]

II. DEFENDANT HAS NOT REFUTED THAT HENDERSON IS QUALIFIED

Defendant does not, and cannot, contest the convincing evidence that Henderson is qualified under the ADA. Plaintiff's Brief at 21-22. Defendant relies only on its unfounded assertion that Henderson would pose a direct threat, which is irrelevant to Plaintiff's prima facie case. See Plaintiff's Response Brief at 3-4.

Moreover, Defendant has admitted that it did not perform an individualized assessment as required by the ADA, because Defendant admitted that it applies NFPA 1582 to fire fighter applicants, and that 1582 automatically excludes persons with monocular vision, without the possibility of an individualized assessment. See Defendant's Brief at 3, 8 & n.15, 27. Where, as here, a defendant admits that a policy exists and the only issue is whether it violates federal law, summary judgment is appropriate. Little v. Norris, 787 F.2d 1241, 1243 (8th Cir. 1986). Defendant's claim of "three months of careful consideration" by the Pontiac Fire Civil Service Commission ("Commission") is also blatantly false, because once the City discovered Henderson's monocular vision, it rejected him automatically, without consulting the Commission, Henderson

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[2]The NFPA vision standards do not require any exceptional visual abilities. Plaintiff's Exhibit 16 at 1582-8.

himself, or his current Fire Chief.[3]

Defendant's attempted distinction of cases which struck down blanket exclusions like those used by Defendant, calling those cases inapplicable because their exclusions were "pursuant to internal policies," is inapposite.[4] None of these decisions stress the source of the exclusionary standards; they invalidated them as a matter of law because they preclude individualized assessment. Moreover, the NFPA standards on which Defendant's argument relies are Defendant's internal policy, voluntarily adopted from guidelines issued by a national association.

In addition, Defendant's claim that it had no obligation to consider accommodations for Henderson because he did not request them is simply wrong. The statute clearly requires an employer who believes an individual poses a direct threat to consider whether any reasonable accommodations would eliminate or mitigate the perceived threat. Plaintiff's Brief at 32-34. The statute provides no exceptions to this requirement.[5]

Similarly, Defendant has failed to cite any authority or analysis for its claim that Henderson -- who Defendant admits is not substantially limited in his ability to work as a fire fighter and whose sight is not even affected by his monocular vision[6] -- can possibly pose a direct threat, i.e., a

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[3]In its Response Brief, Defendant now claims that Henderson was rejected on August 5, 1992, instead of August 3, 1992, although Defendant had already admitted that the decision not to hire Henderson had been made on or before August 3, 1992. Plaintiff's Exhibit 5 No. 26. This sudden change of position is obviously due to Plaintiff's discovery, (despite Defendant's wrongful withholding documents showing this fact), that Henderson was certified by the Commission in May 1992 and rejected by the City's Personnel Department before the Commission was consulted. See Plaintiff's Brief at 4-5, ¶¶ 10, 11. Defendant now tries to claim that the August 3 letter merely informed Henderson of the City's finding that he had monocular vision; but the letter also states clearly that because of his monocular vision, his "application [would] be given no further consideration." Plaintiff's Exhibit 20; Plaintiff's Brief at 25-26.

[4]This claim is also untrue. See, e.g., Sarsycki v. UPS, 862 F. Supp. 336 (W.D. Okla. 1994) (UPS exclusionary policy was based on national regulations).

[5]Defendant's citation to DiPompo v. West Point Military Academy, 770 F. Supp. 887 (S.D.N.Y. 1991), actually argues against Defendant's point. In DiPompo, the defendant and the court carefully considered several accommodations which would have enabled plaintiff, a person with dyslexia, to read the complex chemical words and symbols, under emergency circumstances. The court ultimately found the accommodations to pose an undue hardship on defendant. Id. Defendant has not asserted an undue hardship defense in the instant action.

[6]See Plaintiff's Brief at 36.

significant risk of substantial harm.[7]

III. DEFENDANT HAS FAILED TO PROVE THAT THE CITY IS NOT LIABLE FOR THE DISCRIMINATORY DECISION

Defendant continues to assert, relying solely on Act 78, that the Commission and the City are separate legal entities. Neither Act 78 nor the cited case law supports Defendant's arguments that commissions and their cities are separate legal entities; they hold only that an action can be maintained against a city by suing its commission. Defendant's Response Brief, Exhibit Q. Indeed, in two of the cases relied upon by the Defendant and attached as Exhibit Q to its response brief, the named defendant was the City, and not its commission.[8] In a case similar to the instant case, a court in this Circuit found that the City of Toledo was responsible for the hiring discrimination under the ADA despite the fact that its civil service commission mandated the rejection of all police applicants with insulin-dependent diabetes. Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993).

More fundamentally, Defendant totally ignored extensive evidence demonstrating that, regardless of the provisions of Act 78, the City made the hiring decision at issue, and the Commission operates as part of the City. It cannot be contested that the City, without any input from the Commission, made the decision to reject Henderson and informed him of this determination, Plaintiff's Brief at 4-5, ¶¶ 10-11; that the City and not the Commission is the employer of fire fighters, id. at 27-28; and that the City is liable for any discrimination committed through its hiring process. Id. at 28-29. Similarly, Defendant did not contest (and it is therefore an established fact) that the City's Law Department, required by the City Charter to provide counsel only to "the City and its Departments," provided legal counsel to the Commission, both on the Henderson application and other employment issues. Plaintiff's Brief at 24.

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[7]Defendant also does not, and cannot, refute Plaintiff's statutory argument that Defendant cannot assert a direct threat defense without also asserting and proving an affirmative defense that its exclusionary standards are "job-related and consistent with business necessity," which Defendant affirmatively withdrew.

[8]See Mollett v. City of Taylor, 494 N.W.2d 832 (Mich. App. 1992); Arsenault v. Mayor of Taylor, 296 N.W.2d 351 (Mich. App. 1980).

IV. OTHER DEFENSES DO NOT SHIELD DEFENDANT FROM LIABILITY

Defendant's suggestion that Plaintiff has "conceded" defenses 1, 3, 4, 6, and 11 is absurd. To the extent that they are defenses at all, they are subsumed in the issues of disability, qualified, and direct threat, and Plaintiff has established that summary judgment on these issues should be granted in favor of Plaintiff. See generally Plaintiff's Brief at 11-40.

Defendant has also failed to refute Plaintiff's argument that the statute of limitations and administrative failure defenses should be dismissed. Defendant previously admitted that it had no facts to support these defenses; no new facts have arisen since those admissions. See Plaintiff's Brief at 37. In addition, Defendant confuses statutes of limitations with administrative timing requirements, and then misstates the administrative requirements of Title VII and the ADA. The ADA contains no statute of limitations, but includes administrative timing requirements regarding the filing of charges of discrimination. Under those requirements, Henderson was required to file a charge of discrimination within 300 days (because Michigan allows for the referral of charges to a state civil rights commission) from the date he was notified of the rejection, which was August 3, 1992. Plaintiff's Brief at 4, ¶ 10. Undisputed facts establish that all these administrative timing requirements were met in this case. See Plaintiff's Brief at 37-38.

Defendant alleges that the EEOC must investigate, make a determination, attempt to conciliate, and refer all charges to the Department of Justice within 30 days of the filing of the charge. Defendant's Response at 12-14. This argument is patently false. E.E.O.C. v. Bartenders Int'l Union, 369 F. Supp. 827, 828-29 (N.D. Cal. 1973) ("[I]t is frivolous to contend, as defendant does here that Congress meant in § 706(b) that the investigation, reasonable cause determination, and conciliation attempts must be effected within thirty days from the filing of the charge."). This Circuit, also many years ago, rejected Defendant's arguments. E.E.O.C. v. Kimberly-Clark Corp., 511 F.2d 1352, 1356 (6th Cir.), cert. denied, 423 U.S. 994 (1975).[9]

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[9]The relevant time period for filing a charge begins from the notification of the rejection for employment, not the date of the application, as Defendant contends. Hamilton v. General Motors Corp., 606 F.2d 576, 579 (5th Cir. 1979), cert denied, 447 U.S. 907, reh'g denied, 449 U.S. 913 (1980). Defendant also attempts to mislead this Court by falsely claiming that Plaintiff filed its summary judgment motion late "without permission or excuse." See Defendant's Response Brief, Exhibit G.

Respectfully submitted,

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