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' RESPONSE BRIEF IN OPPOSITION

TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF ISSUES

In this action, Plaintiff United States alleges that Defendant City of Pontiac discriminated against Dennis Henderson on the basis of his disability, in violation of title I of the Americans with Disabilities Act ("ADA"), by failing or refusing to hire him as a entry-level fire fighter in Defendant's fire department because he has monocular vision. Plaintiff has moved for summary judgment, establishing a prima facie case of employment discrimination under the ADA by demonstrating that: Defendant regarded Henderson as having a disability; Henderson was qualified for the entry-level fire fighter position; Henderson was denied the fire fighter position because of his disability; and Defendant's affirmative defenses must fail as a matter of law.

Defendant cross-moved for summary judgment, alleging that: Henderson does not have a disability under title I; Henderson was not qualified for the fire fighter position; and Defendant is not a proper party to this action. Plaintiff demonstrates in this brief that Henderson has a disability because Defendant regarded him as being substantially limited in the major life activities of seeing and working; Henderson's extensive qualifications, actual fire fighting work experience, and performance on Defendant's entrance examinations demonstrates that he was qualified for the position, and Henderson can not pose a direct threat to the health or safety of himself or others; and the City is the proper Defendant because it is not a separate legal entity from the Fire Civil Service Commission and because the City is the employer of fire fighters and made the discriminatory decision to reject Henderson's application.

A complete Statement of Uncontested Facts and Argument is contained in Plaintiff United States' Brief in Support of Its Motion for Summary Judgment ("Plaintiff's Brief"), which has been filed with the Court, and the United States relies on those facts and arguments to support this Response. Other factual assertions, or clarification of inaccurate factual citations by Defendant in Defendant's Brief in Support of It's Motion for Summary Judgment ("Defendant's Brief") are contained in the Argument below.

TABLE OF AUTHORITIES

I. ARGUMENT

A. Dennis Henderson Is an Individual with a Disability under the ADA Because the Defendant Has Regarded Henderson as Having a Disability

In Part I of Defendant's Brief, Defendant asserts that Plaintiff's complaint should be dismissed because Henderson is not "disabled" within the meaning of the ADA. Defendant's Brief at 15-23. This argument should be rejected because undisputed facts demonstrate that, as a matter of law, Defendant has regarded Henderson as having a disability.

To support its arguments on the question of disability, Defendant first asserts that Henderson is not substantially limited in a major life activity. Defendant admits that "Mr. Henderson is able to function exceptionally both at work and socially despite his monocularity." Id. at 19. After reviewing Henderson's work history, including his work experience in the Wixom Fire Department, Defendant concludes that "no reasonable mind could find that Mr. Henderson is substantially limited in his ability to work." Id. at 21. Finally, Defendant states: "It is beyond reasonable dispute that Mr. Henderson does not suffer from a physical defect which 'substantially limits his ability to work.'" Id. Defendant has also admitted that Henderson's monocular vision does not substantially limit him in being a fire fighter. See Plaintiff's Brief, Exhibit 5 Nos. 36-39. Plaintiff agrees with Defendant, and urges this Court to consider them in ruling that Henderson cannot pose a direct threat because he has no substantially limiting impairment and is not limited in his ability to work safely as a fire fighter and granting summary judgment in favor of Plaintiff.

However, Defendant is incorrect when it asserts that Henderson has not been "regarded as" having a disability. Under the ADA, if the Defendant treated Henderson as if he had an impairment that substantially limits a major life activity, then Henderson has a disability. 29 C.F.R. § 1630.2(l)(3). Undisputed facts demonstrate that the City of Pontiac regarded Henderson as being substantially limited in two major life activities: working and seeing.

First, admissions in the form of Rule 30(b)(6) deposition testimony establish that the City of Pontiac assumed that Henderson would be unable to perform job functions which do not require superior visual abilities, such as cleaning equipment or sketching buildings. Plaintiff's Brief at 15-16. By asserting that Henderson was unable to perform these visual functions, Defendant has

regarded Henderson as substantially limited in seeing and therefore as having a disability.

Second, other admissions establish that Pontiac regarded Henderson as unable to work in an entire class of jobs: the class of fire fighting jobs. Plaintiff's Brief at 17-19. While this is sufficient to establish that Defendant regarded Henderson as substantially limited in working, it is also established that Defendant regarded Henderson as unable to perform in a broad range of jobs in various classes: for example, public safety jobs, jobs requiring driving, cleaning, inspecting or sketching, and other jobs. Plaintiff's Brief at 19-20. Consequently, the City also regarded Henderson as having a disability because it regarded him as substantially limited in working.

Defendant does not challenge these undisputed facts, and instead relies on inapposite caselaw. For example, Defendant's reliance on Cecil v. Gibson, 820 S.W.2d 361 (Tenn. App. 1991), is misplaced. First, Cecil did not even address the issue of being regarded as substantially limited in seeing, and its holding as to being regarded as substantially limited in "working" was fact specific and inapplicable. In Cecil, the Court rejected plaintiff's arguments that he was regarded as having a disability because, contrary to the instant case, the only evidence relied upon by Cecil was his rejection from one trainee position. Id. at 366. In contrast, Defendant's standards apply to every position in its Department, including fire fighter, engineer, fire officer, paramedic or EMT. Further, in Cecil, the standards at issue applied only to police officer trainees in the City of Nashville; in the present case, Defendant is relying on NFPA standards which are issued nationally and which purport to apply every person engaged in any fire fighting, rescue, or other emergency service across the country. Plaintiff's Brief at 18. Consequently, Henderson has been regarded as unable to work in every one of these positions.

Further, Cecil, a state court decision based on state law, is inapplicable because it has been directly contradicted by federal courts interpreting federal law. See, e.g., E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980) (Where an employer refuses to hire an individual because of a perceived impairment, a legal presumption arises "that all employers offering the same job or similar jobs would use the same requirement or screening process."); Cook v. State of Rhode Island, 10 F.3d 17, 25-26 (1st Cir. 1993) (same). Indeed, other state

courts, utilizing disability definitions that are identical to the ADA, have rejected the approach taken by Cecil. See, e.g., Colorado Civil Rights Comm'n v. North Washington Fire Protection Dist., 772 P.2d 70, 79 (Colo. 1989) (fire fighter applicant with 20/50 vision, who was denied employment because of his vision, was, as a matter of law, "regarded as" having a handicap); Brown County v. Labor & Industry Review Comm'n, 369 N.W.2d 735, 741 (Wis. 1985) (applicant for deputy sheriff positions who was refused employment because his vision was 20/400, correctable to 20/20, was "regarded as" having a handicap).

Defendant's reliance on Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 114 S. Ct. 1386 (1994) is also misplaced. In Chandler, the employer recognized the plaintiffs' "ability to perform most of the duties associated with their respective positions." 2 F.3d at 1393. It believed that the plaintiffs were disqualified from performing one particular task of their jobs: driving in jobs in which they would be "primary drivers." Id. Here, however, the City of Pontiac's reasons for disqualifying Henderson were not limited to one specific task or one specific job site. Rather, the City acted on the basis of an unfounded presumption that Henderson's vision disqualified him from the entire class of fire fighting jobs, and numerous other jobs outside of fire fighting. See Plaintiff's Brief at 17-20. That categorical disqualification demonstrates that the city "regarded" Henderson as being substantially limited in his ability to work.

B. Defendant Has Failed to Rebut Undisputed Evidence that Henderson Is Qualified Within the Meaning of the ADA

Defendant fails to rebut Plaintiff's demonstration that Henderson was qualified for Pontiac's entry-level fire fighter position because Defendant confuses the question of "qualified" -- part of plaintiff's prima facie case, with "direct threat" -- an affirmative defense which Defendant must plead and prove, and because the facts proving that Henderson is qualified are uncontroverted.

The ADA and the title I regulation makes clear that safety and direct threat factors are not part of the determination of whether an individual is qualified, and that direct threat must be pleaded and proved as an affirmative defense. "Direct threat" appears under "Defenses" in the statute and regulation. 42 U.S.C. § 12113(b); 29 C.F.R. 1630.2(r). Interpretive Guidance to the

regulation further supports the principle that safety issues must be presented as an affirmative defense rather than a part of a plaintiff's prima facie case.

> Many individuals with disabilities objected to the inclusion of the direct threat reference in [section 102] and asked the Commission to clarify that the direct threat standard must be raised by the covered entity as a defense. In that regard, they specifically asked the Commission to move the direct threat provision from § 1630.10 (qualification standards) to § 1630.15 (defenses). The Commission has deleted the direct threat provisions from § 1630.10 and has moved it to § 1630.15.

29 C.F.R. pt. 1630 App. 1630.10 (emphasis added).

Under title I, a plaintiff must prove, as part of its prima facie case, that an individual with a disability was qualified for the position at issue. "Qualified" means being able to perform the essential functions of the job, with or without reasonable accommodation. 42 U.S.C. § 12111(8). "Qualified" does not include safety considerations, since those considerations arise under the affirmative defense of "direct threat." Sarsycki v. United Parcel Serv., 862 F. Supp. 336, 340 (W.D. Okla. 1994).

Thus, Defendant's case and statutory citations and arguments under "qualified" are actually irrelevant to that determination, because they are based on direct threat considerations. Cases brought under the Rehabilitation Act of 1973, including those cited by Defendant, are also irrelevant to this point; while Rehabilitation Act cases are persuasive authority in other ADA title I issues, they are not controlling when conducting a "direct threat" analysis, since title I, unlike the Rehabilitation Act, explicitly established "direct threat" as an affirmative defense.

Defendant cannot credibly contest that Henderson was qualified within the meaning of title I, in light of Henderson's extensive prior experience as a fire fighter and outstanding scores on Defendant's entrance exams.[1] Plaintiff's Brief at 21-22. Defendant has also offered no evidence that Henderson's experience in Wixom should not be relevant to his qualifications to be a fire fighter in Pontiac. See Anderson v. Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Az. 1992) (court accorded "great weight" to individual's previous experience coaching and found that

[1]In direct contradiction to undisputed factual evidence, Defendant mistakenly describes Henderson as a "volunteer" fire fighter when, in fact, he works as a paid on-call fire fighter for the City of Wixom. Henderson Dep. (Exhibit 41) at 143.

defendant's exclusion of coaches who use wheelchairs violated the ADA).[2]

C. Even Assuming Defendant Is Permitted to Assert a Direct Threat Defense, Defendant Has not Proven Henderson Would Pose a Direct Threat Under the ADA

Defendant asserts that Plaintiff's complaint should be dismissed because of direct threat considerations. However, Defendant cannot, as a matter of law, be shielded by the direct threat defense, because (1) Defendant has admitted that its exclusionary standard is not job-related or consistent with business necessity, (Plaintiff's Brief at 34-35); (2) Defendant admitted that it failed to consider any reasonable accommodation to reduce any perceived risk, as required under the ADA, (Id. at 33-34); (3) Defendant admitted it did not conduct an individualized assessment of Henderson, as required to assert the defense, (Id. at 30-33); and (4) Henderson cannot pose a direct threat because he has no actual disability, (Id. at 35-36).

Even assuming arguendo that Defendant may assert a direct threat defense, Defendant has not proved such a defense as a matter of law. To be entitled to summary judgment on a direct threat affirmative defense, Defendant must prove as a matter of law that there is no genuine issue of material fact that Dennis Henderson poses a significant risk of substantial harm to himself or others. 29 C.F.R. 1630.2(r). Defendant's direct threat defense must fail because the evidence on which Defendant relies is based on mere speculation and ignores concrete, uncontested factual evidence showing that Henderson and other monocular fire fighters do not pose a direct threat.

According to the interpretive guidance to the ADA, the determination that an individual poses a direct threat must be based on valid, factual evidence, not "common sense" or speculation.

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[2] DiPompo v. West Point Military Academy, 770 F. Supp. 887 (S.D.N.Y. 1991), cited by Defendant, does not hold that past experience is irrelevant. Quite the contrary, the DiPompo Court carefully considered DiPompo's prior experience as a volunteer fire fighter in considering whether he was qualified for a career fire fighter position. The Court ruled against DiPompo (a fire fighter with dyslexia), because he, unlike Henderson, carried out far less difficult tasks as a volunteer that implicated his disability than he would have if employed by the defendant. Id. at 893. The Court also found that DiPompo, unlike Henderson, had required accommodations for his disability as a volunteer and that such accommodations would pose an undue hardship on the defendant. Id. at 893-94.

The guidance states:

> Such consideration must rely on objective, factual evidence -- not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes -- about the nature or effect of a particular disability.
>
> * * *
>
> The assessment that there exists a high probability of substantial harm to others, must be strictly based on valid medical analyses and/or other objective evidence.

29 C.F.R. pt. 1630, App. 1630.2(r) (direct threat).

The title I regulation specifies that an employer must prove that the risk is significant, not merely slight or theoretical. "An employer, however, is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk; i.e., high probability of substantial harm; a speculative or remote risk is insufficient." 29 C.F.R. pt. 1630, App. 1630.2(r) (direct threat) (emphasis added).

For instance, in a case under an analogous statute, the Court in Greenwood v. State Police Training Ctr., 606 A.2d 336, 342 (N.J. 1991) struck down a police academy's exclusion of a trainee with monocular vision. The court stated that exclusion was improper "unless there is substantial evidence that that limitation either prevents an employee from adequately performing the job or creates a substantial risk of serious injury to the employee or others." Id. at 342 (emphasis added). The Court emphasized that the visual limitation must "significantly" increase the risk that is posed to individuals without such a disability. Id. The Court also dismissed the opinions of defendant's expert, because although he speculated that the plaintiff might be at greater risk, he offered no "objective medical evidence" in support of this opinion. Id. Similarly, in Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992), the court struck down defendant's exclusion of HIV-positive persons from fire fighter positions, finding that defendant had failed to demonstrate that the risk of HIV transmission during emergency duties was significant. Id. at 569; see also Roe v. District of Columbia, 842 F. Supp. 563 (D.D.C. 1993) (fire fighter with hepatitis B does not pose a direct threat in performing CPR, because the risk of transmission is purely

theoretical).[3]

Most importantly, Defendant, rather than independently assessing any risks it believed would be posed by hiring Henderson, summarily relied on the NFPA 1582 standard. Reliance on that standard cannot support a direct threat defense, because the standard was based on unscientific conjecture rather than valid factual research.[4] The committee had no members with vision expertise. No ophthalmologist or optometrist served on the committee or was consulted by the committee. Vance Dep. (Exhibit 48) at 64; Rebuttal Expert Witness Report of James Melius, M.D. (Exhibit 54). The committee relied for its vision standards on Dr. Fedoruk, a specialist in toxicology and emergency medicine, not vision. Gerkin Dep. (Exhibit 47) at 40, 46-48. The committee based its decision to categorically exclude all individuals with monocular vision on what it claimed was "common sense." Exhibit 48 at 85-86. It did not obtain any data regarding individuals with monocular vision; nor did it obtain testimony or other evidence from such individuals or their supervisors. Id. at 76-78, 82. The committee never performed any validation study to support its vision standards. Fedoruk Dep. (Exhibit 49) at 67-69. The committee did not rely on scientific information or studies and had no information on monocular fire fighters. Exhibit 48 at 90-91, 102-03; Exhibit 47 at 60. The committee engaged in little discussion of its binocular vision requirement,[5] and the single item of research or data distributed to the committee regarding vision was a study having no application to monocular vision.[6] Prior to this litigation,

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[3]Chandler, cited by Defendant, is inapplicable to the instant case. The Chandler court based its upholding of defendant's exclusion of plaintiff (a person with insulin-dependent diabetes) on prior case law concerning that specific exclusion. Id. at 1395. Chandler has been found unpersuasive because the regulations on which the exclusion was based have subsequently been amended to allow for a waiver rather than an absolute ban. See Sarsycki, 862 F. Supp. at 341.

[4]Although Defendant cites general NFPA procedures, it fails to prove that any of those procedures were followed in the adoption of the binocular vision requirement at issue. Defendant also fails to cite a single adoption of that vision requirement as legislation or regulation at any government level, or any reference to that requirement by any federal agency.

[5]Exhibit 47 at 47-48; Conners Dep. (Exhibit 51) at 42-43.

[6]Contrary to Defendant's assertions, Dr. Fedoruk distributed only a portion of one study, the Montgomery County study, to the committee, and that portion contained nothing relevant to the committee's discussion of monocular vision. See portion of Montgomery County Study (Exhibit

Dr. Fedoruk himself expressed concern about applying the results of this study of a single fire department to other fire departments. See Letter from Dr. M. Fedoruk to Tom Healy, dated January 10, 1989 (Exhibit 50).[7]

Similarly, the opinions of Defendant's witnesses in this action are based on speculation rather than factual evidence. Plaintiff disputes the opinion of Defendant's witness, cited in Defendant's Brief, regarding stereopsis and depth perception in monocular fire fighters. See Defendant's Brief at 13-14.[8] Frank Landy, Ph.D., an expert in fire fighting job tasks and perceptual skills,[9] explains that a monocular fire fighter's depth perception is more than adequate to perform safely the functions of fire fighting, because depth perception is far more dependent upon experience and "monocular cues" -- environmental indicators that are perceived equally well by individuals with monocular vision and those with binocular vision -- than it is on having two eyes. A fire fighter's ability to perform tasks such as spotting ladders, estimating distances, driving

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52). The purpose of this study was to assess visual acuity needs and contact lens use among fire fighters. Carmean Dep. (Exhibit 53) at 62-63 It contained no research at all from individuals with monocular vision. Id. Even Defendant's expert Dr. Sheedy conceded the inappropriateness of basing conclusions about fire fighting with monocular vision on the Montgomery County study. See infra page 12.

[7]As Defendant states, Dr. James Melius, a member of the NFPA 1582 Committee who voted in favor of the vision standards in NFPA 1582, has, since that vote, revisited and researched the issue of monocularity and fire fighting. Dr. Melius now believes that monocular vision should not be grounds for automatically excluding fire fighters, and has agreed to serve as an expert for Plaintiff. See generally Exhibit 54. He testified that he believes the NFPA 1582 Committee was not careful enough and had insufficient data and expertise to render its opinion. Melius Dep. (Exhibit 45) at 130, 165. In addition, Plaintiff disputes Defendant's unsupported assertion that monocularity was the only condition unanimously agreed upon to be an automatic disqualification. There is no evidence to support this point. Defendant's Brief at 28.

[8]Stereopsis is simply "binocular" depth perception -- that is, seeing depth with two eyes. Sheedy Dep. (Exhibit 57) at 218-19, 226-28, 230-31. Defendant misrepresents the conclusions of its own vision expert with regards to stereopsis and depth perception. While Dr. Sheedy did testify that monocular individuals do not have "stereopsis," Dr. Sheedy nonetheless admitted that "monocular people have depth perception." Id. at 131. Dr. Sheedy emphasized that stereopsis is not depth perception, but rather it is merely one form of depth perception, and that there are other forms of depth perception based on monocular cues that both monocular and binocular people have. Id. at 219, 227.

[9]See Declaration of Frank J. Landy, Ph.D. (Exhibit 55); Plaintiff's Brief, Exhibit 3 for background on Dr. Landy's expertise.

and parking emergency vehicles and other tasks that require depth perception is determined principally by the amount of that fire fighter's prior experience in performing those tasks and by monocular cues rather than stereopsis. Binocular vision and stereopsis are largely irrelevant to fire fighting. Landy Dep. (Exhibit 56) at 103.

This purported concern about depth perception in fire fighting is so incredible that even another of Defendant's witnesses, Mr. Carmean, dismissed it. Exhibit 53 at 143-44. Defendant has no research to support any concern regarding the ability of individuals with monocular vision to measure depth, nor has it any evidence to support such a fear with regard to Dennis Henderson. Quite the contrary, Henderson's 17-year history of safely performing all of those tasks, including driving and parking large emergency vehicles, shows that his monocular vision has not adversely affected his own ability to perceive depth. Plaintiff's Brief at 1-2, Facts ¶¶ 1-4. Dr. William Monaco, an optometrist and vision expert who is the only expert to have medically examined Henderson, measured Henderson's depth perception and found it comparable to that of an individual with binocular vision. See Id. Exhibit 4 at 3. Defendant never measured Henderson's depth perception prior to rejecting him; its ophthalmologist merely assumed that Henderson's depth perception was diminished due to his monocular vision. Holloway Dep. (Exhibit 42) at 38/22-24. Defendant and its witnesses ignore the fact that Henderson and other individuals with monocular vision have been working safely as fire fighters in fire departments across the country. See Declarations of James J. Hunter, III, Michael Toohey, and Vincent A. Tomicich (Exhibits 59, 60, 61, respectively).

Another of the baseless concerns asserted by one of Defendant's witnesses is that an individual with monocular vision lacks sufficient peripheral visual fields. On this point too, Defendant's experts contradict each other.[10] Expert testimony shows that the practical significance of having monocular vision on peripheral vision is negligible because individuals with monocular vision compensate for the small difference in their peripheral fields through eye, head,

[10]Although Mr. Carmean claimed that a person with monocular vision would be unable to spot a victim on the upper floor of a building, Defendant's Brief at 9-10, Dr. Fedoruk testified that monocular vision would not affect this task. Exhibit 49 at 126-27.

and body movements.[11] Exhibit 55 ¶ 7; Plaintiff's Brief, Exhibit 3 at 13 and Exhibit 4 at 3. This is especially true for individuals who have been monocular over a long period of time, and for whom such compensatory movements are reflexive. Dr. William Monaco measured Henderson's peripheral awareness and found that Henderson, who has had monocular vision for nearly 20 years, has peripheral awareness within normal ranges for binocular individuals. Plaintiff's Brief, Exhibit 4 at 3. Defendant never measured Henderson's peripheral vision or awareness.

Moreover, Henderson has performed all fire fighting tasks for 17 years, including driving emergency vehicles, search and rescue, and other tasks that Defendant claims would be compromised by his monocular vision, and has never been adversely affected. Id. at 1-2, Facts ¶¶ 1-4. Further, Defendant's "concerns" about driving are pretextual because Defendant has admitted that in Pontiac fire fighters are not routinely assigned emergency vehicle driving responsibilities, and further admitted that driving responsibilities are primarily assigned to engineers, not fire fighters. Plaintiff's Brief, Exhibit 5 Nos. 53, 54. Anthony Collier, the person hired into a fire fighter position instead of Henderson, testified that during the entire time he has worked at Pontiac he has never driven the engine, rescue, ladder or Haz-Mat trucks on a fire call. Collier Dep. (Exhibit 58) at 23-27.[12]

The third of Defendant's purported concerns about monocular vision is the risk of "sudden incapacitation" during fire fighting. Defendant's witnesses claim that a fire fighter with monocular vision poses a significant risk that s/he will have their one functioning eye totally incapacitated during fire fighting. Defendant's witnesses' arguments are factually unfounded. First, fire fighters with monocular vision are at no greater risk of sudden incapacitation than are fire fighters with

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[11]In addition, wearing a Self Contained Breathing Apparatus (SCBA) obscures peripheral vision. Thus, all fire fighters, even those with binocular vision, have limited peripheral vision when performing some of the most dangerous fire fighting tasks. Exhibit 55 ¶ 7.

[12]Defendant misrepresents the conclusions of an American Medical Association report titled Medical Conditions Affecting Drivers. Defendant's Brief at 9. Contrary to Defendant's contention, the report does not conclude that monocular vision was even a factor, let alone a significant factor, in increased car accidents. Defendant enclosed only two pages of the report, omitting reference notes citing to the underlying studies and data. As Defendant's own expert, Dr. Sheedy, has admitted, none of the data underlying the driving studies show a causal connection between monocular vision and unsafe driving, let alone car accidents. Exhibit 57 at 175-76.

binocular vision. Exhibit 55 ¶ 5. Fire fighters are required to wear SCBAs during active fire suppression and many other activities. Even Defendant's experts agree that SCBAs adequately protect against the risk of debris flying into eyes. Exhibit 49 at 140. At other times, fire fighters wear face shields or goggles for eye protection, and Henderson wears safety glasses whenever he is not wearing his SCBA. Exhibit 41 at 75, 313.[13] The possibility that a totally incapacitating bit of debris will be permitted to fly into a monocular fire fighter's one functioning eye (rather than flying into the non-functioning eye) just at the time a fire fighter is forced to remove his or her eye protection, and that the fire fighter or another accompanying fire fighter will be unable to remedy the situation, is a concatenated series of probabilities too remote to occur, and certainly too remote to be significant. Exhibit 55 ¶ 5.[14] Defendant is incorrect when it implies that the risk of incapacitation would be more catastrophic for a monocular fire fighter then a binocular fire fighter. Id. Thus, the risk of sudden incapacitation is merely speculative and highly remote, and cannot satisfy the ADA's requirement for valid, medical evidence that shows a significant (high probability) risk of substantial harm. See Greenwood, 606 A.2d at 342 (risk of injury to a monocular police trainee's functioning eye was too remote to warrant exclusion).

It is highly relevant that Henderson, in 17 years of fire fighting in Wixom, has never been adversely affected by his monocular vision--that he has never experienced the alleged depth perception, peripheral vision, or eye incapacitation problems that Defendant's witnesses claim to

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[13]Defendant chooses to focus its risk analysis on the possibility that a fire fighter will remove its SCBA, and that totally incapacitating debris will during those times fly into a monocular fire fighter's one functioning eye. Dr. Landy, who has studied the experiences of fire fighters for 27 years, testified that the risk of this danger is so remote as to be implausible. Exhibit 55. Defendant's witnesses cited no evidence of incapacitation regarding persons with monocular vision, nor did they know whether persons with monocular vision might take more care to protect their eyes than persons with binocular vision. Exhibit 48 at 85-87, 90-91, 102-03. Further, the only evidence of SCBA failure and incapacitation offered by Defendant did not involve eye injuries. Defendant's Brief, Exhibit 5, at 54-55.

[14]Defendant's, and the NFPA committee's, reliance on the Montgomery County study on this point is misplaced. The study considered no evidence regarding individuals with monocular vision, see supra at 8 n.7, and Defendant fails to mention that the study showed a far lower rate of debris problems for fire fighters who wore eye protection, including glasses. Defendant's Brief, Exhibit R at 51. Henderson routinely wears safety glasses. Henderson Dep. (Exhibit 41) at 75, 313.

pose so significant a risk.[15] Plaintiff has also named several other active fire fighters with monocular vision and their fire chiefs to testify in this action. See generally Exhibits 59, 60, 61. Those fire fighters have been fighting fires for a combined total of nearly 50 years in large metropolitan areas. Their fire chiefs all attest that these fire fighters have performed effectively and safely. Id. In addition, Plaintiff has named as witnesses numerous other fire fighters with monocular vision, working across the country, who have similarly safe work records. Evidence of other individuals with the same disability in the same job is relevant to whether such individuals pose a direct threat. See, e.g., Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio 1993) (evidence of two other police officers with insulin-dependent diabetes).

None of Defendant's witnesses could quantify the risks they posited, or had any relevant research regarding individuals with monocular vision on which to base their opinion. Exhibit 53 at 105-06, 110-12, 172. While Defendant cited its vision expert, Dr. Sheedy, for support for its "sudden incapacitation" argument, Defendant failed to explain that the data Sheedy relied on to form this opinion provided no link between "particles in the eye" and incapacitation. Exhibit 57 at 72/11-12. Further, while Dr. Sheedy had reviewed the Montgomery County Study, he nonetheless admitted that there was no data to enable him to differentiate between the times a fire fighter is incapacitated and the times that particles getting in the eye is just a minor irritant. Id. at 73-74. Most importantly, Dr. Sheedy admitted there is no data "that would indicate that monocular individuals would be affected differently based on anything getting in their eye than binocular people would be." Id. at 72. Therefore, Dr. Sheedy's "concerns" about incapacitation are based on supposition, rather than facts; when asked if he was "aware of any data which link foreign particles in the eyes of fire fighters with injuries or death" Dr. Sheedy responded: "I am not aware of the existence of such data." Id. at 84/16-20.

Defendant, instead of assessing Henderson's individual abilities to be a fire fighter, relied on a blanket exclusionary standard. Defendant had never independently assessed this standard's

[15]It is also of note that none of Defendant's witnesses have ever met, interviewed, examined or tested the performance of Dennis Henderson.

validity or its appropriateness for Defendant's fire department. Plaintiff's Brief at 8-10, Facts ¶¶ 23-27. Indeed, it has admitted that the standard is not job-related. Id. at 9-10, Facts ¶ 26. Defendant's purported faith in the validity of the NFPA standards also is suspect because the Defendant has admitted that the City in fact does not comply with other NFPA 1582 standards. For instance, the evidence shows that Defendant chose not to adopt or enforce NFPA 1582's mandate to periodically test incumbent fire fighters for their compliance with the standard, as NFPA 1582 requires. Id. Exhibit 43 at 56/9-57/1. Defendant has admitted that it does not test incumbent fire fighters for their vision,[16] showing that Defendant apparently accepts the alleged risks of employing a current fire fighter with monocular vision.[17]

Moreover, all of Defendant's testimony regarding NFPA 1582 is irrelevant to this action. Defendant falsely claims that it relied on NFPA 1582 as the medical standard by which to reject Henderson, when all evidence shows that Defendant actually applied the predecessor vision standard, NFPA 1001. It may improve the City's position to assert that City utilized NFPA 1582 prior to its August 3, 1992 rejection of Henderson, since Defendant has retained (and is relying on) experts who developed the NFPA 1582 standard. Defendant's Brief at 3-13. However, the facts show that the when evaluating Henderson's application, the City utilized NFPA 1001, an older NFPA standard that was no longer in force, because it had been withdrawn by the NFPA, apparently because it did not provide for an individualized assessment.[18] The City's

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[16]See Defendant's Supplemental Answers to Plaintiff's Second Request to Produce Documents and Second Set of Interrogatories (Exhibit 62) at 3, No. 17.

[17]Even Defendant's own expert witnesses believe that employing incumbents with NFPA 1582 Category A conditions (automatically excluded conditions) poses the same risk as hiring applicants with those conditions. Exhibit 51 at 75/22-25; Exhibit 49 at 74; Exhibit 53 at 180-82.

[18]Defendant applied the NFPA 1001 standards despite the fact that, as it admits, NFPA 1001 was suspended in 1989, prior to Henderson's application. Defendant's Brief at 5 n.11. The NFPA had suspended the standard because it recognized that NFPA 1001 was outdated and perhaps violative of employment laws. See Tentative Interim Amendment, NFPA 1001 (Exhibit 46) at 1. The Amendment suspending NFPA 1001 stated that the standard was withdrawn because the "inherent variability in the severity of certain diseases or medical conditions will require a case by case determination of the ability of the candidate to perform the functions of the job. An arbitrary determination of ineligibility based solely on certain medical conditions may not be justified." Id. (emphasis added).

ophthalmologist testified that she utilized NFPA 1001. Exhibit 42 at 41, 54-55. Robert Lamson, the Fire Chief at the time of Henderson's application and rejection, also testified that he was not even aware of NFPA 1582 until months after Henderson's August 3, 1992 rejection. Exhibit 43 at 49. Further, the Defendant's rejection letter cited the NFPA 1001 Standard as the reason Henderson was rejected. Plaintiff's Brief, Exhibit 20. Defendant may have misrepresented this fact because none of Defendant's experts were involved in any way with the development of the NFPA 1001 standard.[19]

The uncontested evidence in this action shows that NFPA 1001 was not based on any job task analysis for fire fighters. Exhibit 45 at 181-83. Further, all of the testimony Defendant cites in support for its contention that Henderson would pose a direct threat comes in the form of testimony from witnesses who did not serve on the NFPA in any capacity regarding the NFPA 1001 standard. Their testimony should therefore be excluded.[20]

It is clear from the evidence offered in this action that Defendant's claims of direct threat risk are based purely on speculation rather than evidence of individuals with monocular vision who are fire fighters. It is also clear that the factual evidence shows that individuals with monocular vision can serve and have served as fire fighters effectively and safely over many years. It is also clear, most importantly, that Dennis Henderson has served effectively and safely as a fire fighter for 17 years. Therefore, the evidence convincingly demonstrates that Defendant has not proved as a matter of law that Henderson posed a direct threat.

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[19]While both NFPA 1001 and NFPA 1582 state that absence of an eye should be cause for rejection, the two standards contain significantly different visual guidelines, including different visual acuity and peripheral vision standards.

[20]Defendant also falsely claims or implies that some of it's witnesses testified before or were affiliated with the NFPA 1582 committee. Neither James Sheedy, whom Defendant mischaracterizes as having presented information to the NFPA 1582 committee, nor Gene Carmean, whose testimony Defendant quotes from extensively, nor his company Med-Tox, testified before or had any affiliation with the NFPA or the NFPA committees that developed the NFPA 1001 or NFPA 1582 standards. Exhibit 53 at 58-62, 68, 70; Defendant's Brief, Exhibit H at 2-3; Exhibit M.

D. The City of Pontiac Is Liable for the Discriminatory Hiring Decision

The Defendant seeks to escape liability for the discriminatory hiring decision by asserting that the Pontiac Fire Civil Service Commission ("Commission") both made the hiring decision at issue and is, pursuant to state law, a separate legal entity; therefore, Defendant argues, it is the Commission, and not the City, that is liable for the discrimination.[21] To support this assertion, Defendant relies almost exclusively on a statutory interpretation of the Michigan Fire and Police Civil Service Act, M.C.L. § 38.501 ("Act 78"). However, Defendant's arguments cannot succeed because Act 78 on its face does not support Defendant's contentions. Further, Defendant's arguments fail because undisputed evidence, which Defendant either ignores or misrepresents, establishes that the City of Pontiac, and not its Fire Civil Service Commission, made the discriminatory hiring decision at issue; that the City is the employer of fire fighters; and that the City bears ultimate responsibility for employment practices affecting Pontiac fire fighters.

1. The City of Pontiac Made the Decision to Deny Employment to Henderson

The linchpin of Defendant's "separate legal entity" argument is that the Commission, and not the City, made the decision to deny employment to Henderson. However, Defendant has ignored a fact that it cannot dispute: the Commission did, in fact, certify Dennis Henderson for hire on May 5, 1992. Plaintiff's Brief, Exhibit 12. After this certification, the City's Personnel Office overturned that certification and rejected Henderson, by letter dated August 3, 1992, without consulting the Commission.[22] Plaintiff's Brief at 4-5, Facts ¶¶ 10-11 and Exhibit 20.

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[21]The Defendant actually argues that the ADA, and by extension other civil rights statutes, does not apply to the City of Pontiac or other public employers in Michigan who create civil service commissions. Defendant asserts that "[i]n Michigan, the only entity which can be liable for ADA discrimination against a Pontiac firefighter applicant is the Pontiac Fire Civil Service Commission...." Defendant's Brief at 29. At the same time, Defendant asserts that the Commission cannot be held liable as a covered entity under the ADA. Id. at 36 n.37. Thus, if the Court were to adopt Defendant's interpretation of Act 78, any Michigan public employer who creates a civil service commission would be shielded from liability for violations of the ADA, Title VII or any other federal civil rights statute, leaving individuals who have been discriminated against with no remedy. This argument would eviscerate enforcement of civil rights employment statutes, and should be rejected.

[22]Plaintiff challenges more of Defendant's incorrect factual assertions. Without citation to anything in the record, Defendant states that the Commission "informed Henderson that he could

2. Act 78 Does Not Support Defendant's Contention that the Commission Is a Separate Legal Entity

While Defendant relies on a statutory interpretation of Act 78 to support its argument, it misconstrues and in some cases blatantly misstates the provisions of that Act. First, Act 78 neither expressly nor implicitly supports Defendant's contention that once a City creates a Commission, the "commission become[s] a separate and distinct entity" and is "not a part of the entity within which [it] was created." Defendant's Brief at 29. As support for its interpretations of Act 78, Defendant cites to the entire Act, and not to specific sections. Similarly, Defendant asserts, again citing to the entire Act, that "[o]nce a fire civil service commission is created, Act 78 relegates to it complete and exclusive control and/or authority over determinations and decisions concerning the need for and the qualifying, hiring, promotion and discipline of firefighters within the applicable fire department." This broad statement is not only unsupported by the Act, but the Act in fact expressly states the opposite. M.C.L. §§ 38.511, 38.513 & 38.514.

Nowhere does the Act grant the Commission the power to "sue and be sued," be "completely independent of the City," have "supreme authority over the Fire Department," "control[] the method and create[] the standards by which all determinations of eligibility for hire are made," "exclusively determine[] the need to hire" and numerous other powers that Defendant, again without any specific statutory references, attributes to the Act. See Defendant's Brief at 30. The powers and duties of the Commission are enumerated in M.C.L. § 38.509, and those powers are limited. See M.C.L. § 38.509. In addition, the Michigan Home Rule City Act, under which the City was chartered, also does not grant the Commission the power to sue or be sued. Mich.

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not longer be considered for employment," Defendant's Brief at 3, when in fact the City's Personnel Director, on City letterhead, informed Henderson in writing that he was rejected for the position. See Plaintiff's Brief, Exhibit 20. Defendant also inaccurately states that the "Commission held several hearings spanning October - December, 1992," regarding this issue, when the facts show that Henderson was "heard" by the Commission only once and the matter was discussed at only two Commission meetings during this time. Defendant's Brief, Exhibit V. Plaintiff also disputes that the Commission accorded "careful consideration" to this matter, as Defendant claims. See Plaintiff's Brief at 5, Facts ¶¶ 13-14. Finally, Defendant previously admitted that Henderson's applied for the job prior to October 9, 1991, not in April of 1991, as Defendant misstates in its Brief. See Plaintiff's Brief at 2, Facts ¶ 5.

Comp. Laws Ann. § 117.1 et seq. (West 1995).

Section 38.511 of Act 78 makes clear that the appointing officer (which is defined as the Mayor) alone has the power to determine when fire department vacancies exist, determine whether to fill vacancies and request that the Commission certify an eligible. M.C.L. § 38.511(2); see also DeGrace v. Shelby Township Police and Fire Civil Serv. Comm'n, 389 N.W.2d 137 (Mich. Ct. App. 1986) (mayor, and not commission, determines necessity of filling vacancies in civil service positions); Small v. City Manager of Saginaw, 197 N.W.2d 850 (Mich. Ct. App. 1972) (same). The Commission must then immediately, and without discretion, certify the name of the person receiving the highest scores. M.C.L. § 38.511(2). The Mayor then has the responsibility to "make the appointment from the names certified...." Id. The Mayor also bears responsibility under Act 78 for making decisions involving reductions, layoffs, suspensions and administering other discipline. Id. §§ 38.513, 38.514. Further, the Mayor retains the right, under the Act, to remove any Commission member for cause. Id. To state that the Commission has hiring authority would directly conflict with the City's Home Rule Charter, which explicitly states that "all boards and commissions are advisory." Defendant's Brief, Exhibit V at 9.

The Defendant has previously admitted that the City, and not the Commission, is responsible for hiring and firing fire fighters. Rule 30(b)(6) deposition of the Defendant, dated November 29, 1995 (Exhibit 44) at 176/12-177/2.[23] In addition, former Fire Chief Lamson also stated that "the mayor decides if someone is going to be hired or not." Lamson Dep. (Exhibit 43) at 26/1-10; 97/19-98/3.

The cases cited by the Defendant for support for the argument that the Commission has "exclusive" control over personnel decisions actually support Plaintiff's contention that it is the City, and not the Commission, that has such responsibility. For example, in Konyha v. Mount Clemens Civil Serv. Comm'n, 224 N.W.2d 833 (Mich. 1975), the court reviewed a discharge approved by the appointing authority, the fire chief. The court reversed the discharge, finding inter

[23]In addition, Defendant admitted that "the City of Pontiac" hired Anthony Collier as an entry-level fire fighter instead of Henderson. Plaintiff's Brief, Exhibit 5 Nos. 57 & 58 (emphasis added).

alia, that the appointing authority considered improper evidence and meted out too severe a punishment. Id.; see also Righter v. Civil Serv. Comm'n of Adrian, 136 N.W.2d 718 (Mich. Ct. App. 1965) (city administrator, and not commission, is both statutorily and practically the proper party to decide whether to discharge employees); Beer v. City of Fraser Civil Serv. Comm'n, 338 N.W.2d 197, 243 (Mich. Ct. App. 1983) (city is not bound by the decisions of its civil service commission). Neither Konyha, Righter nor Beer support the proposition that civil service commissions have broad powers rendering them independent of their cities or giving them ultimate authority over every indicia of employment.

Factually, it is not disputed that, regardless of the provisions of Act 78, the City of Pontiac retains ultimate authority over virtually all personnel issues affecting fire fighters. See Plaintiff's Brief at 7-8, Facts ¶¶ 18-21. Although Defendant asserts that the Commission establishes the "criteria and material for each of [the entry-level employment] examinations," Defendant's Brief at 2, the deposition pages cited by Defendant do not support this proposition, and undisputed facts actually show that the minimum qualifications for fire fighter, as well as what written, physical and oral examinations will be administered are determined by the City, the City's Fire Department and the City's Fire Fighters Union, Local #376. Plaintiff's Brief, Exhibit 26 at 28/5-31/2.

Defendant has misconstrued caselaw, misrepresented the provisions of Act 78, and ignored dispositive, uncontested facts in its attempt to escape liability. A proper interpretation of Act 78 and its judicial interpretations reveals that the City, and not the Commission, bears legal responsibility for the decision at issue.

3. Even if the Commission Is a Separate Legal Entity, the City Is Liable for the Discrimination

Even if the City shares some of its decision-making authority with its Commission (e.g., the responsibility to certify eligibles from the hiring list), the City cannot escape liability for its discriminatory conduct. The City is the employer of fire fighters, having responsibility for all customary personnel matters. See Plaintiff's Brief at 26-28. Consequently, Defendant cannot

escape liability by arguing that the City is not the proper covered entity or employer.[24]

However, even if the Court finds that the Commission shares some employment responsibilities, the City cannot escape liability under the ADA. As the Defendant correctly notes, liability under employment discrimination statutes extends not merely to the strictly defined "employer," but also to any party who plays a significant role in the employment process:

> [T]he term 'employer,' as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law.

Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 696 (D. Md. 1979).[25] Though Defendant cited Vanguard, it failed to point out that in Vanguard, the court found that one of the defendants was a proper party defendant because that defendant exercised authority in two areas: testing of entry-level applicants and budget control. Id. Defendant has admitted that the Pontiac Personnel Department and Fire Department are responsible for testing entry-level applicants, and further has admitted that the Mayor and City Council establish fire department budgets. See Plaintiff's Brief at 7-8, Facts ¶¶ 18-20 and Exhibit 23 at 15/18-25, 16/1-3.

A careful reading of the cases cited by Defendant, as well as other caselaw, warrants a finding that the City is a proper party defendant. See Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (defining "employer" broadly and stating: "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities . . . would be to condone continued use of the very criteria for employment that Congress has prohibited."); United States v. State of Illinois, No. 93-C-7741, 1994 WL 562180 (N.D. Ill. Sept. 12, 1994) (both the State and the Police Pension Fund were proper party defendants, in part because both "significantly affected"

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[24]It cannot reasonably be disputed that the City is a covered entity and employer as defined by the ADA. See 42 U.S.C. §§ 12111(2), 12111(5)(A), 2000e(a). It is also apparent that the City made the discriminatory employment discrimination. See supra at 15.

[25]Here of course, it is not disputed that Pontiac is the actual employer of fire fighters; as such, it obviously "significantly affects access" of individuals to employment opportunities in the

employment benefits). The Supreme Court has emphasized that employers cannot avoid Title VII responsibilities by "delegating discriminatory programs to corporate shells." City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 718 n.33 (1978). The Sixth Circuit has held explicitly that "[a]n employer, therefore, may not avoid Title VII liability by delegating its discriminatory programs to third parties." Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 116 (6th Cir. 1987) (citing Manhart); see also E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n, 727 F.2d 566 (6th Cir. 1984).

The City of Pontiac simply cannot escape ADA liability by shifting some decision-making authority to its Civil Service Commission. Not only is this a tenet of Title VII caselaw, the ADA expressly codified this mandate by prohibiting discrimination committed by "utilizing . . . methods of administration" that "have the effect of discrimination on the basis of disability" or "that perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. § 12112(b)(3)(A) and (B). Defendant does not address this specific statutory language and implicitly admits that it has established a method of administration that it believes escapes ADA liability. See supra at 15 n.21.[26]

II. CONCLUSION

For the foregoing reasons, Plaintiff urges this Court to deny Defendant's motion for summary judgment and to grant Plaintiff's motion for summary judgment.

Pontiac Fire Department. See Plaintiff's Brief at 26-28.

[26]Finally, even if the Court concludes that the Commission is a separate party that exercised complete responsibility for employment issues in the Pontiac Fire Department, the City is nonetheless liable because the Commission is an agent of the City. First, Defendant has admitted that the Commission is an agent. Plaintiff's Brief, Exhibit 31 at 9. Substantively, by delegating employment authority to the Commission through adoption of Act 78, the City has created an agency relationship, and the City is therefore liable for the discrimination of its agent. Terbovitz v. Fiscal Court of Adair County, 825 F.2d 111, 116-117 (6th Cir. 1987).

Respectfully submitted,

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