UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

WILLIAM PIERCE,	*	CIVIL ACTION NO. 17-1365
	*	
Plaintiff,	*	JUDGE: JUNEAU
	*	
VS.	*	MAGISTRATE JUDGE: HANNA
	*	
SHERIFF LOUIS M. ACKAL, et al.,	*	
	*	
Defendants.	*	
	*	
* *	*	

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY

Plaintiff William Pierce ("Pierce") submits this reply memorandum in support of his Motion for Partial Summary Judgment on Liability (Rec. Doc. 33). Defendants have presented no competent evidence demonstrating that their proffered reason for refusing to hire Pierce is anything other than a post-hoc pretext to justify their decision to discriminate against Pierce because of his HIV status. Even if the Court were to give credence to Defendants' inadmissible evidence, under Defendants' own telling they still violated the ADA, both by considering nonmedical factors after sending Pierce for a medical exam—violating the ADA's sequencing provisions—and by considering medical information obtained from an earlier unsuccessful application—violating the ADA's privacy protections. Summary judgment as to liability is appropriate.

1. Considerations Other Than the Results of a Pre-Employment Medical Exam Are Rendered Pretextual *Per Se* Under the ADA.

Defendants have failed even to challenge Plaintiff's primary argument in support of the motion for partial summary judgment, which is that the Court should not allow Defendants to rely upon Pierce's disciplinary record while employed at the Abbeville Police Department,

because the ADA requires that all non-medical considerations be taken into account and that a genuine offer of employment be made *before* sending an applicant for a medical exam. *See* Rec. Doc. 33, pp. 12-13; 42 U.S.C. § 12112(d)(2)-(3); *see also Buchanan v. City of San Antonio,* 85 F.3d 196, 199 (5th Cir. 1993). This sequencing provision makes clear to an applicant when an employer's hiring decision is based on the applicant's physical attributes that may implicate a disability, and prevents an employer from creating a post-hoc rationalization for the rejection of a candidate when the hiring decision was impermissibly based on a disability. *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. 2005) ("When employers rescind offers made conditional on both non-medical and medical contingencies, applications cannot easily discern or challenge the grounds for rescission. When medical considerations are isolated, however, applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial."); *see also O'Neal v. City of New Albany,* 293 F.3d 998, 1008 (7th Cir. 2002). In other words, the purpose of this ADA requirement is to prevent the very situation at hand and the very type of argument being made by Defendants in this case, *i.e.*, that the disability discovered during the medical exam had nothing to do with their decision and there was some other reason for the refusal to hire. Based on this violation of the ADA, and the Defendants' failure to offer any legitimate, nondiscriminatory reasons based on the results of the medical exam, the Court should grant partial summary judgment in Plaintiffs' favor. Otherwise, the statutory sequencing requirements imposed by Congress are defeated and rendered a nullity.

2. Defendants Have Not Presented Significant Probative Evidence Sufficient to Create a Genuine Issue of Material Fact.

If the Court were to permit Defendants to sidestep the clear requirements of the ADA regarding the sequencing of offers and medical exams, the Court should examine the reasons for the refusal to hire offered by the Defendants with a very jaundiced eye. With respect to those

proffered reasons, the Defendants have not met their burden of presenting significant probative evidence sufficient to create a genuine issue of material fact. In response to Plaintiff's assertions in the motion for partial summary judgment, Defendants are required to "articulate a legitimate, nondiscriminatory reason" why they refused to hire Pierce. *Johnson v. J.P. Morgan Chase Bank, N.A.*, 293 F. Supp. 3d 600, 609 (W.D. La. 2018). Furthermore, in support of that articulated reason, Defendants are required to produce "significant probative evidence" to demonstrate a triable issue of fact. *In re Mun. Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5th Cir. 1982); *Ferguson v. NBC*, 584 F.2d 111, 114 (5th Cir. 1978). The evidence is required to be sufficient to provide a reasonable basis for the fact finder to rule in favor of the defendant. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted). "If a rational trier could not find for the nonmoving party based on the evidence presented, there is no genuine issue for trial." *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd.*, 40 F.3d 698, 712-13 (5th Cir. 1994).

A. Defendants Have Not Submitted Evidence Sufficient To Establish That Their Stated Reason for Refusing to Hire Pierce Was Not Pretextual.

Defendants aver they did not hire Pierce because of the incident that took place during Pierce's prior employment with the Abbeville Police Department. Yet they made an offer of employment—which by law had to be contingent solely on the results of his medical exam, as discussed above—after being informed about the incident on several occasions. Defendants are unable to deny that Pierce disclosed the incident in his application. Neither can Defendants reasonably deny, because it was recorded, that Pierce explicitly discussed the incident in his interview and was told that the incident was not of concern to the Iberia Parish Sheriff Office ("IPSO"). Rec. Doc. 33-3, pp. 1-2, 6 and Rec. Doc. 33-4, pp. 1-2. Nevertheless, Defendants argue the interview statements should be disregarded because, even though the statements were made in

the course of an official interview by individuals empowered to make hiring decisions for the IPSO, the Sheriff himself did not make them. They argue instead that "Sheriff Ackal alone has the power and discretion to hire and fire IPSO employees," and "[i]t was upon discovery of the Abbeville incident that the Sheriff, in consultation with others, determined that Mr. Pierce could not join the IPSO force out of a fear for future claims of negligent hiring. . ." *See* Rec. Doc. 36 at pp. 2-3.[1] In addition to the fact it is illegal under the ADA to send an applicant for a medical exam before making that person a genuine offer of employment, if it is the case that Sheriff Ackal alone made hiring decisions, then to defeat summary judgment, Defendants are required to present evidence identifying why *Sheriff Ackal* changed his mind and decided not to hire Pierce. But Defendants have not bothered to provide any affidavit from Sheriff Ackal.[2] Instead, they offer inadmissible hearsay and speculation as to Sheriff Ackal's motivations from other witnesses, which are not sufficient to create a genuine issue of material fact. If the statements made by members of the hiring board at Pierce's interview are not probative of the views and hiring plans of the IPSO and its leader – a theory with which Plaintiff disagrees – then the statements Defendants present from other employees of the IPSO are not probative of those views and plans either. Defendants cannot have it both ways.

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1 There is contradictory evidence in the record as to the purported late discovery of the Abbeville incident. Chief Deputy Richard Hazelwood testified that news regarding the Abbeville incident involving Pierce was common knowledge among the force. Rec. Doc. 36-7, ll. 8-9. The Court need not resolve this issue at summary judgment.

2 In spite of Plaintiff's repeated attempts to secure the deposition of Sheriff Ackal, Defendants have still not yet made him available. A deposition tentatively scheduled for January 7th has now been postponed for a settlement conference mediated by Magistrate Judge Hanna.

B. The Court Should Exclude as Hearsay Hazelwood's Testimony as to Things the Sheriff Recently Told Him.

The testimony proffered by Defendant from other witnesses as to what Sheriff Ackal may have thought or said regarding the application is inadmissible or speculative. "At the summary judgment stage, evidence relied upon need not be presented in admissible form, but must be *capable* of being presented in a form that would be admissible in evidence." *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197, 208 (5th Cir. 2018) (citations omitted) (emphasis in original). In order to demonstrate Sheriff Ackal's personal knowledge, Defendants proffer testimony from Chief Deputy Richard Hazelwood about what the Sheriff believed based on a phone conversation between the Sheriff and Hazelwood the morning of Hazelwood's deposition. *See* Rec. Doc. 36-1, p. 5, #21. Plaintiff objects under Rule 56(c)(2) to this as classic, inadmissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence because it is an out-of-court statement – a conversation between Ackal and Hazelwood – offered to prove the truth of the matter asserted; namely, the basis of the Sheriff's decision in 2012. In 2012, Hazelwood did not speak to anyone with the Abbeville Police about the incident, did not conduct an investigation into the incident, did not instruct anyone to conduct such an investigation, and isn't aware that anyone else at IPSO investigated. Rec. Doc. 36-7 at p. 3, ll. 10-23. At no point, by Hazelwood's own admission, did he avail himself of the opportunity to learn more about Pierce. His only knowledge of the Sheriff's internal thoughts about the hiring process for Pierce is from a conversation he had with the Sheriff directly before being deposed. This is textbook hearsay. And thus, as inadmissible hearsay, it cannot be considered as evidence supporting Defendants' opposition to summary judgment.

C. Turner's Characterization of Sheriff Ackal's State of Mind Is Speculative At Best.

Defendants rely heavily on deposition testimony from then-IPSO Human Resources Director Ryan Turner. *See* Rec. Doc. 36 at pp. 4-6. Defendants offer deposition testimony from Turner describing a meeting which purportedly occurred *after* the PAR approving Pierce's hire—which triggered his medical exam—had already been signed by the Sheriff, Chief Deputy and Supervisor, at which he recommended that Pierce not be hired due to the Abbeville incident. Rec. Doc. 36-8 at p. 13. But Turner is unable to offer any admissible evidence regarding the reason the Sheriff ultimately declined the hire. Rather, he testified, "That was our opinion [to not hire Pierce] and the sheriff could do whatever he wanted to do." *Id.* Turner also testified that at the time he met with the Sheriff to discuss hiring Pierce, he was not in a position to know what the Sheriff already knew or didn't know of the Abbeville incident:

> It was – under my impression he was not aware. Yeah. I didn't get the impression that he definitely didn't know about it, you know. I won't say definitely. *I don't know what he knew or didn't know,* but it was my impression he didn't know. For sure, he definitely took it serious.

Rec. Doc. 36-8, p. 24, ll. 15-21 (emphasis added). Thus, Turner expressly disclaimed personal knowledge about what Sheriff Ackal knew about the Abbeville incident. "[W]hat he knew or didn't know" and his "impression" is not sufficiently probative testimony of the ultimate reason Sheriff Ackal decided not to hire Pierce. *Burns v. Check Point Software Techs.*, No. 3:01-CV-1906-P, 2002 U.S. Dist. LEXIS 21278, at *32 (N.D. Tex. Oct. 31, 2002) (party's "personal impression" alone deemed insufficient to create an issue of material fact for purposes of summary judgment). Indeed, when asked in follow up what actions or statements led him to the assumption that Sheriff Ackal had lacked knowledge regarding the Abbeville incident, Turner testified, "I don't

recall specifically." Rec. Doc. 36-8, p. 24, l. 24. Thus, Turner can ultimately only offer the Court speculation as to why Sheriff Ackal decided not to hire Pierce.

This type of speculative evidence regarding the basis for the Sheriff's refusal to hire is not sufficient to create a genuine issue of material fact. *See, e.g., Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002) ("[C]onclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment" (citations omitted)); *Waggoner v. Garland*, 987 F.2d 1160, 1166 (5th Cir. 1993) ("mere speculation [is] insufficient to create a genuine issue of material fact"). Further, any speculative deposition testimony from Turner as to *Sheriff Ackal's* personal knowledge is outside of Turner's personal knowledge and is not probative of Sheriff Ackal's decision making. It is further inadmissible under Rule 602 of the Federal Rules of Evidence, and Plaintiff objects pursuant to Rule 56(c)(2) to consideration of the deposition testimony on that additional basis.

D. Plaintiffs Have Offered No Admissible Evidence to Establish a Legitimate, Nondiscriminatory Basis for their Refusal to Hire Pierce.

If the inadmissible evidence described above is disregarded, Defendants are left without any evidence to support a legitimate, nondiscriminatory basis for the refusal to hire or ability to rebut Plaintiff's strong *prima facie* case, leading to the conclusion that the proffered reason is mere pretext. As Pierce outlined in his original memorandum, if the IPSO followed their hiring policies and procedures, consideration of the Abbeville matter would have been conducted before the Division Chief and the Sheriff signed the PAR. *See* Rec. Doc. 33-1 at pp. 14-15 and evidence referenced therein. Moreover, Pierce disclosed the Abbeville matter in his initial application, the matter was discussed during his job interview and the interviewers told Pierce the Abbeville incident was of no concern. Thus, knowledge of the Abbeville matter must be imputed to Sheriff Ackal. *See, e.g.*, Restatement (Third) of Agency § 5.03 (2006) (imputation of notice of

fact to principal). Further still, the decision not to hire Pierce came only two days after the IPSO received the medical report reporting his HIV status. The Abbeville incident is mere pretext.

3. Defendants Have Not Rebutted and Cannot Rebut the Summary Judgment Motion with Testimony Regarding the 2008 Application.

Defendants secondarily aver that they were already aware of Pierce's HIV status before he applied in 2012 because they obtained medical information about him during consideration of a prior employment application in 2008. Defendants state, "Mr. Pierce's HIV status would have been revealed in connection with that earlier application. As such, it cannot be suggested that Pierce's 2012 application was unsuccessful because of a nearly contemporaneous discovery of the plaintiff's HIV status." Rec. Doc. 35 at p. 2.

The Court should reject this additional argument because Defendants offer no evidence at all that they even reviewed the records regarding Pierce's 2008 application in connection with consideration of the 2012 application, and the issue is irrelevant. Not a single IPSO employee has testified that they even *remembered* Pierce's 2008 application, let alone reviewed it. Defendants cannot claim that the Sheriff or other IPSO employees knew about Pierce's HIV status just because the medical results had been stored in the IPSO's files; not only is that illogical, it also undercuts Defendants' own primary argument. Defendants argue that the Sheriff couldn't possibly have known about the Abbeville incident, even though high-ranking employees were contemporaneously interviewing Pierce on the subject, then immediately say that the Sheriff *must* have known about Pierce's HIV status, because he had applied for a job as a Sheriff's Deputy at some point four years earlier. Either the Sheriff takes an interest in the background of his applicants or he doesn't. In seeking to rebut Plaintiff's argument, Defendants succeed only in rebutting their own argument.

Furthermore, if Defendants were aware of Pierce's HIV status based on the 2008 examination, and then considered that information in connection with his 2012 application, then they violated an additional provision of the ADA. The ADA requires employers to maintain medical information about job applicants separate from the rest of the employment application and to keep that medical information confidential. 42 U.S.C. § 12112(d)(3)(B) ("information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record"). Further, the ADA expressly limits the purposes for which the employer may use medical information. The statute specifies medical information may only be shared with managers or supervisors as needed to facilitate any necessary restrictions on an employee's work or duties or necessary accommodations; with first aid and safety personnel; or with government officials investigating ADA compliance. 42 U.S.C. § 12112(d)(3)(B)(i)-(iii); *accord* 29 C.F.R. § 1630.14 (implementing regulations). Use in connection with a subsequent application for employment is not one of the enumerated, permitted exceptions to the ADA's privacy restrictions. Thus, if Defendants considered information regarding Pierce's HIV status obtained in 2008 as a part of his 2012 application process, they violated the ADA yet again.

Conclusion

Defendants violated the ADA if they refused to hire Pierce due to nonmedical considerations after referring him for a medical exam. Their inability to offer a legitimate, nondiscriminatory reason based on the results of the medical exam renders them liable. Further, Defendants were required to come forward with significant probative evidence to support a legitimate, nondiscriminatory reason for their refusal to hire, but the evidence they have produced is hearsay and speculation. Because Defendants have produced no admissible evidence demonstrating their stated justification for not hiring Pierce is anything other than a pretext, on

this summary judgment record the Court should conclude no genuine issue of material fact exists and summary judgment should be rendered in favor of Plaintiff on the issue of liability.

Dated: December 21, 2018

Respectfully submitted,

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C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Reply Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment on Liability has been served upon all counsel of record by CM/ECF filing, this 21st day of December, 2018.

/s/ J. Dalton Courson