UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

RONALD JOHNSTON,

Plaintiff,

vs.

FILE NO. 1:06-cv-14905
HON. Thomas L. Ludington

MIDMICHIGAN MEDICAL CENTER-MIDLAND,

Defendant.
_____/

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_____/

PLAINTIFF'S RESPONSE TO

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, RONALD JOHNSTON, by and through his attorneys, THE MASTROMARCO FIRM, and hereby responds to Defendant's Motion for Summary Judgment for the reasons set forth more fully in the brief in support of this response.

Respectfully Submitted:

THE MASTROMARCO FIRM

Date: October 17, 2007

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BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF ISSUES PRESENTED

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I. WHETHER PLAINTIFF HAS BROUGHT FORTH SUFFICENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT REGARDING HIS CLAIMS THAT HE WAS TERMINATED IN VIOLATION OF THE AMERICANS WITH DISABILITIES CIVIL RIGHTS ACT AND THE MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT.

Plaintiff would state: "yes."

SUPPORTING AUTHORITIES

FEDERAL CASES

UNITED STATES SUPREME COURT

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)

SIXTH CIRCUIT COURT OF APPEALS CASES

Burns v. Coca-Cola Enterprises, Inc., 222 F.3d 247 (CA 6 2000)

Manzer v. Diamond Shamrock Chemicals Company, 29 F.3d 1078 (CA 6 1994)

Plant v. Morton Intern., Inc., 212 F.3d 929 (CA 6 2000)

Deboer v. Musashi Auto Parts, Inc., 124 Fed. Appx. 387 (CA 6 2005)

Whitson v. Union Boiler Company, 47 Fed Appx. 757 (CA 6 2002)

FEDERAL DISTRICT COURT CASES

Ebelt v. County of Ogemaw, Ronald Knight and Clyde Sheltrown, 231 F.Supp.2d 563, 567-570 (2002)

MICHIGAN CASES

Chiles v. Machine Shop, Inc., 238 Mich. App. 462 (1999)

Chmielewski v. Xermac, Inc., 457 Mich. 593 (1998)

Hazle v. Ford Motor Co., 464 Mich 456 (2001)

Kerns v. Dura Mechanical Components, Inc., 242 Mich. App. 1 (2000)

STATUTES

Americans with Disabilities Civil Rights Act

Michigan Persons with Disabilities Civil Rights Act

FEDERAL RULES OF CIVIL PROCEDURE

Fed.R.Civ.P.56(c)

STATEMENT OF FACTS

The Plaintiff, Ronald Johnston, was employed by the Defendant MidMichigan Medical Center-Midland, as a Bio-Med Tech. Plaintiff was hired by the hospital in 1989 and he suffers from Type I diabetes. [Ex. 1, Pltf at 26]. Plaintiff suffers periodic diabetic episodes despite a strict diet and insulin regimen. The hospital has documented such diabetic episodes back to 95/96 and has accommodated Plaintiff's need to eat something (to return blood sugar levels to normal) when such episodes occur. [Ex. 2, Hepinstall Email at 9/20/04].

Plaintiff was qualified for the position by virtue of his degree in biomedical engineering which he obtained in 1986. [Ex. 1, Pltf at 23]. He is also an AAMI certified bio-technician. [Ex. 1, Pltf at 24]. Plaintiff worked under the supervision of the Bio-Med Manager, Robert Norris until 2003 when Rick Wood was hired and replaced Norris as the Bio-Med Manager. [Ex. 1, Pltf at 26; Ex. 3, Wood at 4-5]. As Bio-Med Technician (there were 6 employed by the hospital), Plaintiff was responsible for preventative maintenance and repair of the medical equipment maintained by the Defendant. [Ex. 1, Pltf at 29, 31]. He was required to occasionally travel to Defendant's Clare and Gladwin facilities to perform maintenance and repair on machines located at those facilities as well. [Ex. 1, Pltf at 57].

Rick Wood was aware that Plaintiff suffered from diabetes and believed that Plaintiff had "questionable eyesight." [Ex. 3, Wood at 6, 43]. Although Wood testified at his deposition that he "never" had concerns that Plaintiff's diabetic condition affected his ability to perform the duties of his job, discovery has revealed that Wood maintained a document entitled "Ron Johnston's Performance Concerns" which contains direct evidence of a discriminatory animus based on Plaintiff's disability, Type I diabetes. [Ex. 3, Wood at 6, 21; Ex. 4, Ron Johnston's

Performance Concerns]. This document was not produced to Plaintiff until the deposition of Mr. Wood[1] and is part of a "desk file[2]" maintained by Wood. [Ex. 3, Wood at 17-18]. This "desk file" was maintained by Wood at the direction of Human Resources for the hospital as evidenced by the following correspondence; in an email dated September 20, 2004, Wood states:

> We have discussed the issue of staff with diabetes in the past and I have another question on this subject. Ron had another incident Thursday while I was gone. It took another staff to assist him with eating something and about an hour of time to get him back to normal. I don't remember if you told me this before, but do you document these type of incidents and if so, on what or how? Cam, is this documentation something that you would also recommend and want on file anywhere?

[Ex. 5, Email dated 9/20/04].[3] Cam Jankowiak (a human resource representative) responded:

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[1] These documents would have remained undisclosed had Plaintiff's counsel not asked about the black folders Wood was seen holding in the hallway which were labeled "Ron Johnston, Personal (sic) file."

[2] In addition to this memorandum, this "desk file" contained various mail correspondence which will be discussed further infra which was not produced until the deposition of Rick Wood.

[3] Jeanie Hepinstall (Manager of Employee Health and Wellness Services) also responded to this email. She wrote:

> We have several incidents documented back to 95/96. We have not been notified that there was still a problem. The last time we were called to assist I documented that he had been under a physician's care making changes in his insulin regime. He had been to a diabetic refresher course and assured me that his blood sugars would be under control now that the changes were made. I documented that he indicated to me at that time that he was skipping meals or breaks here at work because he was too busy and that was out for his breaks and lunch so he could eat and was going to allow him to have snacks at his work area. I'm wondering if he is compliant with his diet. Doe she travel outside the department as a p art of his work and does he drive as part of his job to other facilities? I'm thinking out loud here trying to figure out how we could go about handling this. Maybe I will talk with our physician director and we can also talk with HR because this could very well end up being an ADA issue. I'm thinking we may be able to have him evaluated by our UC physician. We can do a visual acuity in Employee Health, and I'm thinking we should e able to have him provide proof that his physician is aware of the episodes that he is having with his blood sugar reactions and we can offer to send him to the classes again.

[Ex. 2, Hepinstall Email 9/20/04]. Wood responded:

> Sorry about not notifying you of more recent problems. I went to ER, HR, and others, but did not think to go to the one I should have in the first place. I believe Bob did make an effort to assure that Ron would take the necessary breaks for food. We have been continuing that effort since I came. However, there are still occasions when he is off (having a medical problem) and they have not been consistent in time (am or pm), so we have wondered if it might be related to how much insulin he gives himself and when. With his questionable eyesight, I would wonder if he can accurately see the syringe (if that is the way he administers the insulin). Ron does travel off sight (sic) and that concerns us as well. He often does this alone with non one to monitor him while he is on the road or working at the other facilities. A medical evaluation of how he is currently doing and what his actual eyesight is would probably be a good idea." [Ex. 2, Wood response 9/20/04].

> I would make note of them in your 'desk file' that is only seen by you. Should the time arise when you might need to present it, you would have the information at hand.

[Ex. 5, Response Email 9/20/04; Ex. 3, Wood at 38].[4]

The "desk file" and document prepared by Wood relating to "performance concerns" reflect concerns on the part of Wood as they relate to Plaintiff's diabetic condition. By way of example, an entry dated September 16, 2004 states: "Ron was responding slow and appeared incoherent for about an hour or longer. Note: This was not the first incident of this type." [Ex. 3, Wood at 23; Ex. 4, Ron Johnston's Performance Concerns]. Entries dated October 26, 2004, January 4, 2005, and April 5, 2005 state: "Ron was responding slow and appeared incoherent." [Ex. 3, Wood a 22; Ex. 4, Ron Johnston's Performance Concerns]. Wood testified as follows:

> Q. What did you believe the fact that he was responding slowly and appeared incoherent was attributed to?
>
> A. His diabetes.

[Ex. 3, Wood at 23]. He further testified:

> Q. Did you have concerns that at some point my client may become disoriented or incoherent and make a mistake as it pertained to his job duties?
>
> A. The thought had crossed my mind.

[Ex. 3, Wood at 31].

An email dated January 4, 2005[5] from Rick Wood to Jeanie Hepinstall, R.N. (Manager of Employee Health and Wellness Services) states:

[4] If Human Resources felt this was a genuine concern, why would Wood be instructed to keep this information in a secret file?

[5] Again, this email was part of the secret "desk file" maintained by Wood.

> Ron Johnston is acting strange again this morning. By strange, I mean very slow to respond to questions and slow movement. Should he be encouraged to be checked by ER or should we simply encourage him to eat something? How can this be documented, if at all?

[Ex. 6, Email dated 1/4/05; Ex. 2, Wood at 28].

In February of 2005, Plaintiff was involved in an off-duty automobile accident caused by his diabetic condition. [Ex. 1, Pltf at 54]. Plaintiff suffered a low blood sugar episode which manifests itself by causing Plaintiff to be confused and have a lack of coordination. [Ex. 1, Pltf at 56]. As a result of the incident and in April of 2005, the State of Michigan revoked his driver's license for six months. [Ex. 1, Pltf at 54, 59]. Plaintiff immediately informed Mr. Wood (on April 12, 2005) about the license revocation. [Ex. 1, Pltf at 23; Ex. 3, Wood at 24]. Wood's document entitled "Ron Johnston Performance Concerns" documents a conversation had with Plaintiff (on April 12, 2005) regarding the drivers license as follows:

> Ron informed me that the State had taken his drivers license away and it was connected to his diabetes [] I assured Ron that we would accommodate his driving limitations.

[Ex. 4, Ron Johnston's Performance Concerns].

On this same date, Rick Wood wrote an email[6] to Lorie Mault (Labor Relations Manager), Jeff Wagner (Wood's direct Supervisor), and Jeannie Hepinstall, R.N. (Employee Wellness) stating as follows:

> I met with Ron this morning to discuss a couple of meetings he recently had with both his doctor and the State. He informed me that the State has taken away his drivers license for six months as a result of a driving incident he had in February. He told me that on that day he accidentally gave himself too much insulin for his diabetes and on the way home from work he got disoriented and ended up in the ditch. After six months he will be required to take a written and driving test and

[6] Again, this email was contained within the secret "desk file."

> will need to have his eyes examined. It was not clear on whether he would have to also have a doctor's report on his condition at that time. I asked if it was his eye sight that resulted in the forfeiture of his license, but he said it was because of his diabetes. He is currently responsible for performing PM's in Gladwin and will now be riding with Marie to finish this task. In light of this recent development, I have a few questions.
>
> 1. Besides this email, should I fill out any other documentation regarding his condition?
>
> 2. Although I do not have the details, I know this is not the first driving incident Ron has had. Do we have specific policy for driving requirements or is it based on the State?
>
> 3. Will you be notified by the state or do we need to verify his status with them?
>
> 4. Ron occasionally wears glasses and I know there are some vision limitations. Should or could we check to see what his actual vision is?

[Ex. 7, Email dated April 12, 2005]. Jeanie Hepinstall[7] responded:

> We could refer him to a physician for an eye exam to determine fit for duty and we would pay for it. If you do not have any way to reasonably accommodate him, i.e., not requiring him to drive for his job and giving him equipment to work on that is not critical to patient or employee safety, then that is probably the route we should take. Lorie, your thoughts? **We do have to be careful with this one, I think. You will probably need to be able to prove that there is not anything that you can give him to do that would reasonably accommodate him.**

[Ex. 8, Email dated 4/12/05 (8:26AM)].

> In a responsive email[8] of the same date, Rick Wood wrote:
>
> **I was discussing the eye sight situation with Jeff this morning and even if we had him tested, we do not have a clear enough description in our job descriptions to act upon the results anyway. I am going to continue to concentrate on the performance side of the situation**. As far as driving goes, we can accommodate to some degree, but that is also being looked at at this time. We will be evaluating our entire department for staff needs, responsibilities, and expectations in the coming weeks and will report on the outcome.

[Ex. 9, Email dated 4/12/05 (9:39AM){emphasis added}].

[7] Again, this email was contained within the secret "desk file."
[8] Again, this email was contained within the secret "desk file."

On April 21, 2005, Rick Wood was advised that Plaintiff would be permanently restricted from driving by Defendant's insurer. He was copied in on an email[9] which states:

> Lorie, I had contacted our insurer regarding Ron Johnston. I did not give them his name but when they review the drivers at renewal time they will become aware of this situation. They will not insure him to drive for us ever again even if he doctor approves him to drive. **If there was an incident, we would be guilty of "negligent entrustment" now that we know he has a condition.** He will not be able to drive his own vehicle on business either for the same reason. Our policy covers us for hired and non-owned vehicles as well. So, unfortunately, Ron will no longer be able to drive while he is working for us.

[Ex. 9, Email dated 4/21/05 {emphasis added}].

Plaintiff was told that the license revocation would be accommodated by sending him with another technician to perform work at the Clare and Gladwin facilities so that he would not have to drive. [Ex. 1, Pltf at 60]. Defendant's insurance company apparently made a determination that Plaintiff would never be allowed to drive its vehicles even if his license were reinstated by the State. [Ex. 1, Pltf at 97, 99]. This is significant because Marie Dean, a similarly situated bio-med technician had her license suspended for driving under the influence of alcohol. [Ex. 3, Wood at 8]. After he drivers license was reinstated, the hospital allowed her to resume her driving duties unlike the Plaintiff who was permanently restricted from driving. [Ex. 3, Wood at 8-9].

Within a month's time and on May 16, 2005, Plaintiff was issued the first formal counseling action of his career. [Ex. 1, Pltf at 66; Ex. 3, Wood at 24]. Plaintiff had never previously been disciplined during his entire sixteen (16) year tenure with the hospital. [Ex. 1, Pltf at 85]. The discipline was administered to purportedly address "observations of questionable performance problems over the last months." [Ex. 1, Pltf at 67].

[9] Again, this email was contained within the secret "desk file."

On July 23, 2005, Plaintiff received a performance evaluation wherein he was evaluated by Mr. Wood indicating, and with respect to three areas of performance: "performance results showed inconsistent achievement of goals and improved results are needed if performance is to meet requirements." [Ex. 1, Pltf at 94-95]. The evaluation further stated:

> The State suspended Ron's driver's license this past year which resulted in permanent loss of his right to drive while on the job. His responsibilities will now be limited to MidMichigan Medical Center, Midland campus unless transportation to the other affiliates or off campus sites is provided.

[Ex. 1, Pltf at 96].[10] He further stated:

> His level of productivity is not high, but it is still not clear if that's related to poor time management, a slow work pace, or some other unknown problem.

[Ex. 1, Pltf at 102].[11]

On August 5, 2005, Wood's document entitled "Ron Johnston Performance Concerns" states:

> Ron was responding slow and appeared incoherent. He was taken from EMS, where he was working, to ER by EMS staff.

[Ex. 4, Performance Concerns].

Wood attributed this to Plaintiff's diabetic condition. [Ex. 3, Woods at 25]. The following day and on August 5, 2005, Plaintiff was on call and missed a page from the hospital. Wood's document states:

> Ron was on call but did not respond to two attempts to contact him via the pager. He had no reason other than he "can't do any better than that." I went to the hospital and took the call for radiology.

[Ex. 4, Performance Concerns].

[10] Why would this be part of his discipline if Defendant can accommodate this restriction?
[11] Plaintiff would submit that the "unknown problem" Wood is referring to is Plaintiff's diabetic condition.

On August 6, 2005, Rick Wood wrote an email[12] to Molly Sheltraw (Human Resource Generalist) entitled "Documentation on Ron." The highlighted portion of the e-mail clearly shows that Mr. Wood is blaming Plaintiffs non-response to a page on his preoccupation with Plaintiff's medical condition. The email states:

> I spoke with all of you yesterday regarding Ron's most recent episode with his diabetes. I understand that the medical issue is or can be documented and I can also refer him to counseling or FMLA considerations. However, I am not sure how to address the dependability side of his situation. He is currently on call and did not respond to an urgent call from radiology this Saturday morning. I called him at home and there was no explanation on why he did not hear the page except that he had the pager near his bed and he "can't do any better than that." This performance concern is serious. **I guess my question once again is do I connect the performance issue yesterday (which is obviously directly connected to his medical condition) and today's issue with the medical problem? I need help with this because we are probably going to find ourselves either dealing with a wrongful dismissal or a serious incident involving patient care or safety**.

[Ex. 10, Email dated 8/6/05{emphasis added}].

The responsive email[13] from Molly Sheltraw dated August 8, 2005 entitled: "Documentation on Ron" states as follows:

> The last disciplinary was a written warning on Ron. You will want to move forward to probation action due to his not answering page on Saturday. At this time you will want to counsel him on medical issues. If this were to lead to a discharge, as long as you have the documentation that you talked to him about FMLA, you have done your job. Did he come back to work on Friday after going to the ER? Did he have a doctor's note about any limitations/restrictions? This may explain the issue for Saturday. If not, then it is a performance issue and you want to proceed with the disciplinary actions. When meeting with him in regards to the probationary period, you want to stress that anything that happens within that time period or after can result in suspension and/or termination.

[Ex. 10, Email dated August 8, 2005].

On August 10, 2005, Molly Sheltraw sent an email[14] to Rick Wood stating as follows:

[12] Again, this email was contained within the secret "desk file."
[13] Again, this email was contained within the secret "desk file."

> Here is the summary from the meeting with Lynn. You need to document the performance issues. The last one you did was a written warning on 5/18/05. The next would be for the miss of the page on Saturday. This should be then putting him on probation since it is the progressive disciplinary. At this time, you will need to counsel for the FMLA. You will want to say "Is there anything that is preventing you from performing the duties of your job? And is there anything we can help you with your job to assist in you completing your duties." If he says no, then you can come back and state "We want to make sure that you are successful and if there is anything we can help to make that happen, you need to let us know. If you feel that there may be something in regards to a medical issue you are welcome to contact Chris Sheets to look into the FMLA options that are available." That is all you would need to say. You have counseled and let him know of his options and given him the opportunity to let us know of any accommodations that he may need. As far as I know, he hasn't asked for anything to assist in helping his eyesight issue. I had an employee in my past who told me that he had a problem with his eyesight and he worked with cellular phones. He asked me for a magnifying glass to be mounted on the bench so that he could see the small parts. I got it for him and his performance as great. If he does tell you that his diabetes may be a factor, then you let him know how to contact Chris Sheets to further discuss options with FMLA. Then you need to send Chris an email stating that the employee has told you he has a medical condition and could she send out the paperwork. She has a cover letter stating the process with a deadline date. If she doesn't receive anything form him by that date, then it is documented that he received it. **At this point you have presented the options to him. If this turns into a termination and he sues, we will have the documentation stating that we discussed what we could do to help him, we asked for accommodations and we were told that he was fine**.

[Ex. 11, email dated August 10, 2005{emphasis added}].

Plaintiff received the second formal counseling action of his career on August 11, 2005 which related to the missed page. [Ex. 1, Pltf at 105]. Plaintiff was placed on "probation" until October 7, 2005. [Ex. 1, Pltf at 107]. This discipline arose from a purported failure to respond to a page while on call hours after Plaintiff had been transported to the ER for a diabetic episode. [Ex. 1, Pltf at 108; Ex. 3, Wood at 26]. It should be underscored that the counseling action, in the subsection entitled "Desired Performance-Coaching/Action Plan" parrots the advice provided by Sheltraw to Wood in the mail dated 8/10/05 cited above. [Ex. 3, Wood at 37-38]. This is

[14] Again, this email was contained within the secret "desk file."

significant because at his deposition, Wood denied ever having asked the Plaintiff if there were medical issues that may be causing him difficulty performing his job. [Ex. 3, Wood at 6-7]. Wood received an email[15] on August 31, 2005 which states:

> NURSE ON 8/31/05 HAD CALLED DOWN TO BIOMED AND REQUESTED THAT WATCH-CHILD FROM ROOM 3 MOVE TO ROOM 6 RON ARRIVED TO THE FLOOR ACTED LIKE HE WAS MAINLY IN A DAZE - - NURSE STATED "SPACED OUT AND DIDN'T KNOW WHAT HE WAS DOING" NURSE SAID HE PLAYED WITH A COUPLE OF CORDS AND THEN TURNED AROUND AND LEFT - - DIDN'T SWITCH OUT MONITORS THAT HAD BEEN REQUESTED. THEN MANGER NOTIFIED RICK WOOD.

[Ex. 12, Email dated 8/31/05]. A handwritten note[16] on the document reads:

> Received call from MCH manager requesting assistance with service on watch child monitor and expressing concern regarding the actions of Ron. Sent Marie Dean down to complete the service task and locate Ron.

[Ex. 12, Email dated 8/31/05]. Wood's document states as follows in an entry dated August 31, 2005:

> Received notice that Ron was responding slow and incoherent [] sent Marie to check on Ron and finish the service.

[Ex. 4, Ron Johnston's Performance Concerns].

Thereafter and on September 1, 2005, Plaintiff was terminated. [Ex. 1, Pltf at 122]. Defendant claims that Plaintiff was terminated for (1) failure to respond appropriately to a service request at CFWH (2) unable to perform appropriate service in OB and (3) continued low response to incoming repairs. [Ex. 4, Ron Johnston's Performance Concerns; Ex. 15, Termination Notice]. The first involved a "failure to physically respond to a service request from the Center for Women's Health on the morning of August 30, 2005." [Ex. 1, Pltf at 125, Ex. 13, Termination Notice]. Plaintiff contends that he verbally gave the person calling in the repair a

[15] Again, this email was contained within the secret "desk file."
[16] Again, this note was contained within the secret "desk file."

suggestion as to how to get the machine at issue up and running. [Ex. 1, Pltf at 126-127]. Then, while preparing to physically respond to the call, Rick Wood told the Plaintiff that he would personally handle the call and that he did not need to respond. [Ex. 1, Pltf at 129]. The second involved an incident where Plaintiff had a diabetic episode while at work. Wood testified that he was aware that this incident was directly related to Plaintiff's medical condition. [Ex. 3, Wood at 46-47]. Defendant described the incident as "unable to perform requested service on watch child monitor system in OB on the morning of August 31, 2005." [Ex. 13, Termination Notice]. Plaintiff, due to his diabetic episode, sought the assistance of another technician to perform the repair. [Ex. 1, Pltf at 124]. Plaintiff would have been able to perform the repair on his own but for a diabetic episode which required him to get something to eat. [Ex. 1, Pltf at 140].

Following his termination, Plaintiff protested the termination by corresponding with Rick Wood and Chandra Morse asserting violations of the ADA. [Exs. 14, 15, September 8, 2005 email to Rick Wood; September 11, 2005 Letter to Chandra Morse]. Wood did nothing in response to the correspondence from Plaintiff. [Ex. 3, Wood at 44]. Morse responded on September 21, 2005 indicating that they were "investigating [his] allegations." [Ex. 16, Letter dated September 21, 2005]. Defendant responded, in pertinent part:

> We have taken your allegation very seriously. MidMichigan's Human Resource Department has reviewed your discharge and has conducted its own independent investigation. You were discharged for the following three incidents: (1) failure to physically respond to a service request from the Center for Women's Health on August 30, 2005, (2) inability to perform requested service on a watch child monitor in OB on August 31, 2005, and (3) not performing an adequate amount of center repairs.
>
> **In regard to the second incident, it will not be a basis for disciplinary action against you. Based on the information that we have been provided (including statements from you that you were able to perform your job without any assistance), we do not believe that you are protected by the Americans with**

> **Disabilities Act or that MidMichigan violated the ADA in any way.[17] At the same time, however, we understand that it might feel unfair to you that the incident was one reason for your discharge. As a result, you will not be disciplined or otherwise penalized for that incident. It will be removed from your personnel file.**

[Ex. 17, October 4, 2005 letter from Lynn Bruchhof, VP of Human Resources {emphasis added}]. The termination was affirmed and Plaintiff remains unemployed to date.

STANDARD OF REVIEW

The Federal District Court in Ebelt v. County of Ogemaw, Ronald Knight and Clyde Sheltrown, 231 F.Supp.2d 563, 567-570 (2002), has correctly set forth the standard of review for Motions brought pursuant to FRCP 56.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF HAS SET FORTH AFFIRMATIVE EVIDENCE WHICH SUPPORTS A VIABLE CAUSE OF ACTION AGAINST DEFENDANT FOR VIOLATIONS OF THE ADA AND MICHIGAN PERSONS WITH DISABILITES CIVIL RIGHTS ACT.

A. AMERCICANS WITH DISABILITIES CIVIL RIGHTS ACT

The ADA states:

> [N]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 USC 12112(a). A "covered entity" includes any employer who has fifteen or more employees each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 USC 12111(2),(5). A plaintiff alleging a violation of the ADA

[17] The irony is that Defendant's say they didn't consider the diabetic episode, yet, had Wood maintained the secret file that was to be "only seen by you," and had stated to Wood that should the time arise when you might need to present it, you would have the information at hand. [See Ex. 4, Response email dated 9/20/04; Ex. 2, Wood at 38]. The significance is that Defendant knows that if Plaintiff can perform his duties he is not protected by the ADA. But the emails contained in the secret file clearly show that the Defendant thought otherwise.

carries the burden of proving a prima facie case. Doe v. Univ. of Maryland Medical Sys. Corp., 50 F.3d 1261, 1264-1265 (C.A.4, 1995). To satisfy this burden, the plaintiff must first show that he is a "qualified individual with a disability" entitled to the ADA's protections. 42 USC 12112(a). A "disability" is defined under § 12102(2) as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires...." Section 12111(8).

In this case, Plaintiff has established that he was regarded as having a physical or mental impairment that "substantially limits" one or more of his major life activities. 42 USC 12102(2). Burns v. Coca-Cola Enterprises, Inc., 222 F.3d 247 (CA 6 2000). Driving a car, thinking, walking, seeing and working are major life activities. Whitson v. Union Boiler Company, 47 Fed Appx 757, 760 (CA 6 2002). As stated in Whitson,

> The intent behind this provision is to reach those cases in which "myths, fears and stereotypes" affect the employer's treatment of an individual. *Plant v. Morton Intern., Inc.*, 212 F.3d 929, 938 (6th Cir.2000). An individual may be "regarded" as having a disability if the employer "mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or "mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *Sutton*, 527 U.S. at 489, 119 S.Ct. 2139. "In both cases, it is necessary that a covered entity entertain misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.*

Id at 761.

Plaintiff has produced evidence that Defendant believed his diabetic condition to be substantially limiting when in fact, the impairment was not so limiting. As stated previously, Rick Wood was aware that Plaintiff suffered from diabetes and had "questionable eyesight." [Ex. 3, Wood at 6, 43]. Wood's secret desk file reveals that he documented occasions where he perceived Plaintiff to be suffering from his diabetic condition and "responding slow and incoherent."[18] [Ex. 4, "Ron Johnston's Performance Concerns; see also Ex. 6, email dated January 4, 2005 noting Plaintiff was "acting strange"]. He was further concerned that Plaintiff would make a mistake by way of his job duties due to his diabetic condition (an unsubstantiated fear). [Ex. 3, Wood at 23]. The record reveals that Plaintiff never suffered a diabetic episode resulting in a "mistake" or any act that would compromise patient care.

As it pertains to Plaintiff's ability to drive (a major life activity), the Defendant believed him to be substantially limited beyond the license revocation imposed by the State of Michigan. In fact, Defendant permanently restricted him from driving while working. [Ex. 7, Email dated 4/21/05]. It should be underscored that Marie Dean, a similarly situated bio-med technician, was allowed to drive for Defendant after her license was reinstated by the State of Michigan. [Ex. 3, Wood at 8, 9]. She had been convicted of driving while under the influence of alcohol. [Ex. 3, Wood at 8]. Defendant has never explained this disparate treatment.

As it pertains to Wood's perception as to Plaintiff's ability to work, the desk file he maintained designates incidents where he believed Plaintiff to be "responding slow and

[18] This secret file reveals that Wood believed Plaintiff's ability to adequately perform his duties was impaired by his disability. Wood informed Human Resources of this fact and is instructed to keep a secret file and to concentrate on the performance issues. When Plaintiff is terminated, Defendant subsequently agrees (in the October 4, 2005 letter) to remove the discipline related to his medical condition so as to make it appear that they did not act upon his disability. As such, Defendant now takes the position that he is not protected by the ADA or the Michigan PWDCRA. This Act of revoking the medical condition as a reason for discharge is purposeful on the part of HR, because without it they do not believe they have to comply with the Michigan PWDCRA and the ADA.

incoherent" as a "performance concern." [Ex. 4, Performance Concerns]. Furthermore, Wood attributed the fact that Plaintiff missed a page while on call to his diabetic condition (a fact which Plaintiff disputes). [Ex. 10, Email dated 8/6/05]. He stated:

> **I guess my question once again is do I connect the performance issue yesterday (which is obviously directly connected to his medical condition) and today's issue with the medical problem? I need help with this because we are probably going to find ourselves either dealing with a wrongful dismissal or a serious incident involving patient care or safety**.

[Ex. 10, Email dated 8/6/05{emphasis added}].

As further evidence of Wood's perception that his diabetic condition substantially limited his ability to work, Wood documented questions he posed to the Plaintiff (inquiring as to whether a medical condition could be underlying alleged performance deficiencies) in a meeting wherein Plaintiff was being presented with disciplinary action. [Ex. 3, Wood at 37-38]. Of further significance, Wood denied at his deposition that he ever inquired as to medical issues that may be causing Plaintiff difficulty in performing his job. [Ex. 3, Wood at 6-7].

Significantly, Woods actual beliefs differ from the reasons given by Human Resources as to why Plaintiff could not perform the job. Wood believed Plaintiff to be substantially limited in his ability to see (a major life activity). Wood's email dated April 12, 2005 evinces a concern that the license revocation was a result of his "eye sight." [Ex. 7, Email dated April 12, 2005]. It also references "vision limitations." [Ex. 7, Email dated April 12, 2005].

Plaintiff has presented evidence that Defendant possessed the sort of unrequited fear (and hid that belief) that Plaintiff's medical condition rendered him to be substantially limited. That belief affected the employer's treatment of the Plaintiff. Plant v. Morton Intern., Inc., 212 F.3d 929, 938 (6th Cir.2000). Plaintiff was "regarded" as having a disability and here, the employer

admittedly hid their belief in a "secret file" that the Plaintiff had a physical impairment that substantially limited one or more major life activities. The law also protects the Plaintiff from an employer who either mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. Sutton, 527 U.S. at 489, 119 S.Ct. 2139. Thus, Plaintiff has established that he is a qualified individual with a disability. Id at 761.

After the plaintiff presents sufficient evidence demonstrating that he is a "qualified individual with a disability," he must show that his employer "discriminated" against him. § 12112(b). Once the plaintiff has presented a prima facie case, the burden shifts to the employer to rebut the plaintiff's evidence. Manzer v. Diamond Shamrock Chemicals Company, 29 F3d 1078, 1082 (1994). Defendant must produce some evidence that Plaintiff was rejected, or that someone else was preferred, for a legitimate, nondiscriminatory reason. Id.

Thereafter, Plaintiff must proffer evidence of pretext. As stated in Manzer:

> To make a submissible case on the credibility of the employer's explanation, the plaintiff is "required to show by a preponderance of evidence either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge.

Id at 1084.

Plaintiff would submit that he has established that the proffered reasons did not actually motivate the discharge. As stated previously, documents reveal that the hospital made a determination that the Plaintiff's job description was insufficient to take action based on his medical condition (lack of clearly defined duties) and thus decided to focus on the "performance side of the situation." [Ex. 8, Email dated 4/12/05]. Furthermore, the purported reasons for discharge were insufficient to motivate discharge because Plaintiff was never disciplined, during

the entire tenure of his employment until Rick Wood became the Manager of the department and until Plaintiff suffered a diabetic episode while driving his vehicle. Wood stated in an email dated April 12, 2005 "we do not have a clear enough descriptions to act upon the results anyway. I am going to continue to concentrate on the performance side of the situation." [Ex. 8, Email dated 4/12/05 (9:39 AM)]. Plaintiff would submit that the combination of suspicious timing of Plaintiff's termination, suspicious timing of the employer's negative reaction to Plaintiff's alleged poor performance after he suffered a diabetic episode while driving his personal vehicle, and the suspect manner in which Plaintiff's supervisor was required by HR to document Plaintiff's medical condition in a secret "desk file" referencing "Performance Concerns" sufficiently demonstrates pretext so that Summary Judgment in employer's favor should be precluded. Deboer v. Musashi Auto Parts, Inc., 124 Fed. Appx. 387 (CA 6 2005). Based on the foregoing, Plaintiff would submit that he has brought forth sufficient evidence to create a question of fact as to whether Defendant is guilty of disability discrimination as defined by the ADA.

B. MICHIGAN PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

As it pertains to Plaintiff's state law claims of violations of the Michigan Persons With Disabilities Civil Rights Act, the analysis is similar to the ADA analysis. In Chmielewski v. Xermac, Inc., 457 Mich. 593, 601 (1998)(quoting Allen v. Southeastern Michigan Transportation Auth., 132 Mich. App. 533, 537-538 (1984)), the Michigan Supreme Court stated that the Act "prohibits discrimination against individuals because of their handicapped status. The purpose of the act is to mandate 'the employment of the handicapped to the fullest extent reasonably possible." Pursuant to MCL 37.1202(1)(a)-(e), an "employer" shall refrain from taking any of a number of adverse employment actions against an individual "because of a disability ... that is

unrelated [or not directly related] to the individual's ability to perform the duties or a particular job or position."

A *prima facie* case of discrimination under the Act requires Plaintiff to show (1) that he is [disabled] as defined in the act, (2) that the [disability] is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute. Id at 602.

A "disability" is defined as: (i) "[a] determinable physical or mental characteristic of an individual ... if the characteristic: (A) ... substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position ..."; (ii) "[a] history of [such a] determinable physical or mental characteristic ..."; or (iii) "[b]eing regarded as having [such a] determinable physical or mental characteristic...." " 'Unrelated to the individual's ability' means, with or without accommodation, an individual's disability does not prevent the individual from ... performing the duties of a particular job or position." MCL 37.1103(l)(i).

Once the plaintiff has proved that he is a "qualified person with a disability" protected by the PWDCRA, he must next demonstrate that he has been discriminated against in one of the ways set forth in MCL 37.1202. If the plaintiff presents a prima facie case of purposeful discrimination, the burden then shifts to the defendant to rebut such evidence. Kerns v. Dura Mechanical Components, Inc. (On Remand), 242 Mich App. 1, 12 (2000); Hazle v. Ford Motor Co., 464 Mich. 456, 463-466 (2001).

Defendant spends a considerable amount of time, in its Motion for Summary Judgment, arguing that Plaintiff is not "disabled" as defined by the ADA and the Michigan Persons With Disabilities Civil Rights Act (PWDCRA). But Defendant's "secret file" and Wood's testimony clearly show that Defendant believed he was so disabled.

Both the ADA and the PWDCRA provide protection against discrimination in employment for those with disabilities, including those regarded as having a disability. 42 USC 12112(a). MCL 37.1103(d)(iii). To succeed on such a claim, plaintiff must show that: a) he was regarded as having a determinable physical or mental characteristic, b) that the perceived characteristic was regarded as substantially limiting one or more of the Plaintiff's major life activities and c) that the perceived characteristic was regarded as being unrelated to the Plaintiff's ability to perform the duties of a particular job. Id.

In Chiles v. Machine Shop, Inc., 238 Mich App 462 (1999), the Michigan Court of Appeals discussed the analysis in a case where a plaintiff complains of discrimination based on a perceived disability as follows.

> First, we consider whether [Plaintiff's condition] was a physical impairment. Second, we identify the life activity upon which the [Plaintiff] relies… and determine whether it constitutes a major life activity under the [PWDCRA]. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity.

In this case, Plaintiff would also submit that his employer viewed her as having an impairment which impacted the major life activities of working, performing manual tasks, seeing and caring for himself. Chiles supra at 477 (holding that major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and

working). Furthermore, Plaintiff has presented direct evidence that Rick Wood regarded the Plaintiff as having a disability which interfered with his ability to work.

Plaintiff has also brought forth evidence that his disability did not affect his ability to perform the essential functions of his job. In fact, Defendant does not dispute that Plaintiff had an unblemished performance record for 16 years and it was not until Rick Wood was hired and began to make note of Plaintiff's diabetic condition which he characterized as a "performance concern" was Plaintiff disciplined and later terminated It is undisputed that he suffered an adverse employment action.

Plaintiff has brought forth evidence that the purported non-discriminatory explanations are pretext for unlawful employment discrimination. As such, Plaintiff would submit that whether illegal disability discrimination occurred should be a question of fact for the Jury to decide.

Respectfully Submitted:

THE MASTROMARCO FIRM

Date: October 17, 2007

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PROOF OF SERVICE

I hereby certify that on **October 17, 2007,** I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system which will send notification of such filing to the following: **James B. Thelan,** and I hereby certify that I have mailed by United States Postal Service the document to the following non ECF participants: **N/A**.

Respectfully Submitted:

THE MASTROMARCO FIRM

Date: October 17, 2007

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