

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
NADYA BUTTIGIEG,

Plaintiff,

Civil Action No. 14-CV-4141
(Scanlon, M.J.)

- against -

THE CITY OF NEW YORK and
THE NEW YORK CITY FIRE DEPARTMENT,

Defendants.

-----X

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

ROBERT L. CAPERS
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

MICHAEL J. GOLDBERGER
Assistant U.S. Attorney
(Of Counsel)

Table of Contents

PRELIMINARY STATEMENT 1

BACKGROUND 2

DISCUSSION 3

POINT I PLAINTIFF IS ENTITLED TO THE PROTECTIONS OF THE REHAB
ACT..... 4

POINT II BLANKET RULES DISQUALIFYING JOB APPLICANTS WITH
DISABILITIES ARE ILLEGAL UNLESS THEY ARE JOB RELATED
AND CONSISTENT WITH BUSINESS NECESSITY 5

POINT III EMPLOYERS ARE NOT PERMITTED TO MAKE MEDICAL
INQUIRIES OF AN APPLICANT BEFORE EXTENDING A
CONTINGENT OFFER OF EMPLOYMENT 9

POINT IV DOJ’S ISSUANCE OF A RIGHT TO SUE LETTER IS NOT A
DETERMINATION ON THE MERITS 10

Table of Authorities

Cases

Addoo v. New York City Bd. of Educ., No. 04-CV-2255, 2006 WL 5838977
(E.D.N.Y. Dec. 18, 2006) 4

Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993)..... 6

Dipol v. New York City Transit Auth., 999 F. Supp. 309 (E.D.N.Y. 1998) 6

Doe v. Syracuse Sch. Dist., 508 F. Supp. 333 (N.D.N.Y. 1981)..... 10

Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997)..... 4

Gibbs v. City of New York, No. 02-CV-2424, 2005 WL 497796 (S.D.N.Y. Jan. 21, 2005)..... 4

Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991) 3

Hoehn v. Int’l Sec. Servs. and Investigations, Inc., 120 F. Supp. 2d 257 (W.D.N.Y. 2000)..... 8

Hutchinson v. United Parcel Service, Inc., 883 F.Supp. 379 (N.D. Iowa 1995) 6

Jones v. Las Vegas Valley Water Dist., No. 2:10-CV-1941-JAD-PAL,
2014 WL 1248233 (D. Nev. Mar. 26, 2014) 11

Katz v. Adecco USA, Inc., 845 F. Supp. 2d 539 (S.D.N.Y. 2012) 9

Neeld v. American Hockey League, 439 F. Supp. 459 (W.D.N.Y. 1977)..... 8

Pandazides v. Virginia Board of Education, 946 F.2d 345 (4th Cir. 1991) 6

Sarsycki v. United Parcel Service, 862 F.Supp. 336 6

Stillwell v. Kansas City, Mo., Board of Police Commissioners, 872 F. Supp. 682
(W.D. Mo. 1995)..... 6

Statutes

28 U.S.C. § 517..... 1

29 U.S.C. § 701..... 1

29 U.S.C. §§ 794(a)(d)..... 1, 4

42 U.S.C. §§ 12101(b)(3) 1, 7

42 U.S.C. § 12102(1)(3)(A)..... 4

42 U.S.C. § 12111.....	1, 4
42 U.S.C. § 12112(b)(6)	6
42 U.S.C. § 12112(d)(2)(A).....	9, 10
42 U.S.C. § 12112(d)(2)(B)	9
42 U.S.C. § 12113(b).....	7

Regulations

29 C.F.R. § 1630.13(a).....	9
29 C.F.R. § 1630.2(g)(1)(i)-(iii).....	4
29 C.F.R. § 1630.2(i)(1)(i) and (ii)	5
29 C.F.R. § 1630.2(r)	7
29 C.F.R. §§ 1630.10(a).....	6
29 C.F.R. §§ 1630.14(a)(b)(3)	6, 9
29 C.F.R. Pt. 1630, App. § 1630.2(r).....	8
29 C.F.R. Pt. 1630, App. § 1630.13(a)	9

PRELIMINARY STATEMENT

In the instant action, Plaintiff Nadya Buttigieg alleges, among other things, that Defendants, the City of New York and the New York City Fire Department (FDNY), violated the Rehabilitation Act of 1973, Section 504, as amended, 29 U.S.C. § 701 *et seq.* (the Rehab Act) when they: (1) refused to hire her as a paramedic because she has monocular vision; and (2) inquired into her medical condition before they extended her an offer of employment.

The United States respectfully submits this Statement of Interest to address the proper interpretation of the Rehabilitation Act and title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 *et seq.* (the ADA, or title I), given that employment actions under section 504 require the application of the standards under title I of the ADA, 29 U.S.C. § 794(d). Under 28 U.S.C. § 517, “the Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

The United States has a strong interest in supporting the proper interpretation and application of title I of the ADA; furthering the ADA’s explicit congressional intent to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities; and ensuring that the Federal government plays a central role in enforcing the standards established under title I. *See* 42 U.S.C. § 12101(b). Further, the United States has a strong interest in promoting employment and independent living for individuals with disabilities, in addition to ensuring that entities that receive federal funding do not engage in discriminatory practices on the basis of disability. The purpose of the ADA and the Rehab Act is to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with

disabilities who are otherwise qualified to perform the essential requirements of a position of employment.

As set forth below, the ADA and Rehab Act require employers to perform individualized assessments of a potential employee's ability to perform the essential functions of a job. Blanket rules barring individuals with particular disabilities are prohibited unless the rule is shown to be job related for the position in question and consistent with business necessity. Further, employers are prohibited by the Rehab Act from inquiring into a potential employee's medical history before making a conditional offer of employment.

Accordingly, the United States respectfully requests that this Court consider the interpretation and application of the Rehab Act and title I, as set forth in this Statement of Interest, in resolving Defendants' and Plaintiff's cross-motions for summary judgment.

BACKGROUND

The parties to this action concur that Plaintiff has monocular vision; she can see out of only her right eye. (*See* Compl. ¶ 9, July 3, 2014, Dkt. No. 1). She alleges that Defendants discriminated against her by refusing to hire her as an FDNY Emergency Medical Specialist-Paramedic due to her monocular vision. She asserts that she passed all of the prerequisite examinations and met all of the posted requirements for the position. (*Id.* ¶¶ 1, 46). Plaintiff further asserts that she supplied the FDNY with evidence that she had successfully served as a paramedic and an ambulance driver before applying to the FDNY, and that she also supplied the FDNY with a report from an ophthalmologist attesting that she was fully able to perform the essential functions of a paramedic, including driving an ambulance. (*Id.* ¶ 1).

Plaintiff also states that Defendants did not conduct an individualized assessment of her ability to perform the essential functions of the paramedic position, and that Defendants inquired into her medical history before extending an offer of employment, in contravention of the Rehab

Act. (*Id.* ¶¶ 26, 46; *see* Plaintiff’s Memorandum of Law in Support of Her Motion for Summary Judgment (“Pl.’s Mem.”), at 20–22, July 22, 2016, ECF No. 58-24; Plaintiff’s Local Rule 56.1 Statement of Undisputed Material Facts (“Pl.’s 56.1”), ¶ 30, July 22, 2016, ECF No. 58-23).

Defendants maintain that Plaintiff is not a qualified individual because individuals with monocular vision lack sufficient peripheral vision and depth perception to perform the essential functions of the job of paramedic. (*See* Defs.’ Mem. at 2; Defendants’ Local Rule 56.1 Statement of Undisputed Material Facts (“Defs.’ 56.1”), ¶ 19, July 22, 2016, ECF No. 60-1). In particular, they assert that Plaintiff cannot safely drive an ambulance. They also assert that they did conduct a test of Plaintiff’s vision, which she failed. (*Id.*) Defendants assert there is no reasonable accommodation that would permit Plaintiff, and persons with monocular vision in general, to safely operate an ambulance under emergency conditions and eliminate the direct threat of injury to the public or employee. Accordingly, they conclude, individuals with monocular vision are not otherwise qualified to perform the essential requirements of the position. (*See* Defs.’ 56.1 ¶¶ 3, 29).

DISCUSSION

The Rehab Act, which was intended to prevent discrimination against individuals with disabilities and “to expand their employment opportunities and integration into society, prohibits [Defendants] from discriminating against [disabled] individuals solely by reason of their [disabilities].” *Gilbert v. Frank*, 949 F.2d 637, 639–40 (2d Cir. 1991). Section 504 of the Rehab Act states in relevant part:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a). The same standards used in determining a violation of title I of the ADA, 42 U.S.C. § 12111 *et seq.*, are applied to allegations of employment discrimination under section 504 of the Rehab Act. *See* 29 U.S.C. § 794(d); *see also Francis v. City of Meriden*, 129 F.3d 281, 284 n. 4 (2d Cir. 1997) (“Because the ADA and the [Rehab Act] are very similar, we look to case law interpreting one statute to assist us in interpreting the other.”).

POINT I

PLAINTIFF IS ENTITLED TO THE PROTECTIONS OF THE REHAB ACT

As a threshold matter, Plaintiff must meet the definition of disability in order to assert a claim under section 504 of the Rehab Act. *See Addoo v. New York City Bd. of Educ.*, No. 04-CV-2255, 2006 WL 5838977, at *9 (E.D.N.Y. Dec. 18, 2006) (Ross, J.) (“In order to state a prima facie claim under the ADA or Rehabilitation Act, Plaintiff must demonstrate that she is ‘disabled’ within the meaning of either statute.”); *see also* 42 U.S.C. § 12102; 29 U.S.C. § 794(d). Under Section 504 and the ADA, a person is considered to have a disability if that person has “(1) a physical or mental impairment that substantially limits one or more major life activities of such individual, (2) a record of such an impairment, or (3) [been] regarded as having such an impairment.” 42 U.S.C. § 12102(1); *see also* 29 C.F.R. § 1630.2(g)(1)(i)–(iii). Further, an individual meets the “regarded as” definition “if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. 12102(3)(A); 29 C.F.R. § 1630.2(g)(1)(iii).

The parties do not dispute that Plaintiff meets the definition of disability—that Plaintiff’s monocular vision substantially limits a major life activity. *See Gibbs v. City of New York*, No. 02-CV-2424, 2005 WL 497796, at *4 (S.D.N.Y. Jan. 21, 2005) (finding Plaintiff’s blindness in one

eye affected his “special senses” making Plaintiff impaired within the meaning of the ADA); 29 C.F.R. § 1630.2(i)(1)(i) and (ii) (listing “seeing” as a major life activity). Further, there is no genuine dispute that Plaintiff is regarded as disabled because Defendant refused to hire her because of her monocular vision.

POINT II

BLANKET RULES DISQUALIFYING JOB APPLICANTS WITH DISABILITIES ARE ILLEGAL UNLESS THEY ARE JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY

Plaintiff alleges that Defendants have a blanket rule against hiring individuals with monocular vision as paramedics and that they did not conduct an individualized assessment of her ability to work as a paramedic. (*See* Pl.’s 56.1 ¶¶ 23, 38, 43, 107). Defendants respond in part that federal law permits a blanket rule against paramedics with monocular vision because all such individuals constitute a direct threat to health and safety, and that their rule is therefore job-related and paramount to the business necessity of ensuring public safety. (*See* Defs.’ Mem. 7–10). They also argue that they did not rely solely on the blanket rule, but also conducted an individualized assessment of Plaintiff’s vision, administering a vision test called a “Titmus” test. (Def. Mem. At 9). Plaintiff counters that the Titmus test did not constitute a proper individualized assessment of her ability to perform the duties of a paramedic. (Pl. Mem at 14). To the extent that Defendants did in fact rely upon the blanket prohibition and cannot demonstrate that the prohibition is job related and consistent with business necessity, they violated the Rehab Act.

The ADA generally requires an individualized assessment of an individual’s ability to perform the job. Accordingly, it is unlawful for a covered entity to

us[e] qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered

entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12112(b)(6); *see also* 29 C.F.R. §§ 1630.10(a) (same), 1630.14(b)(3). The Interpretive Guidance on Title I of the ADA (the Interpretative Guide), 29 C.F.R. Pt. 1630, App. at Section 1630.10(a), explains that

[t]he purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job.

In other words, “[d]efendants cannot merely mechanically invoke any set of requirements and pronounce the [disabled] applicant or prospective employee not otherwise qualified.” *Pandazides v. Virginia Board of Education*, 946 F.2d 345, 349 (4th Cir. 1991); *see Dipol v. New York City Transit Auth.*, 999 F. Supp. 309, 316 (E.D.N.Y. 1998) (Johnson, J.) (finding plaintiff successfully proved disability discrimination under the ADA where defendant failed to perform an individualized assessment of plaintiff's diabetic condition).

If the FDNY does in fact have a blanket exclusion of individuals with monocular vision from employment as paramedics and applied this policy or practice to Plaintiff, it improperly denied Plaintiff an individualized assessment of her qualification for the job. *See Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379, 396-98 (N.D. Iowa 1995) (100% healed policy is a per se violation of the ADA); *Stillwell v. Kansas City, Mo., Board of Police Commissioners*, 872 F. Supp. 682, 686-88 (W.D. Mo. 1995) (blanket exclusion of one-handed applicants from licensing as police officers was a per se violation of Title II of ADA); *Bombrys v. City of Toledo*, 849 F. Supp. 1210, 1216-19 (N.D. Ohio 1993) (irrebuttable presumption that applicant cannot perform the essential functions of the job because of a disability violates the ADA); *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 341(W.D.Okl. 1994) (under the ADA, an “individualized

assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices”)

Further, Defendants assert that individuals with monocular vision are not qualified because they constitute a direct threat to safety. (Def. Mem at ¶ 11); *see also* 42 U.S.C. § 12113(b), (the term “qualification standard” may include a requirement that the individual shall not pose a direct threat to the health or safety of other individuals.). The ADA defines “direct threat” as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12101(3). Implementing regulations establish the analysis to be used in determining whether an applicant or employee poses a direct threat:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) the nature of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

29 C.F.R. § 1630.2(r); *see also Nelson v. City of New York*, No. 11-CV-2732,

2013 WL 4437224, at *10 (S.D.N.Y. Aug. 19, 2013).

The EEOC’s interpretive guidance for the “direct threat” provision provides that:

[a]n employer...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...Determining whether an individual poses a significant risk of substantial harm to others must be made on a case-by-case basis. The employer should identify the specific risk posed by the individual. . . . [C]onsideration [of the

relevant factors] 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, or of disability generally.

29 C.F.R. Pt. 1630, App. at Section 1630.2(r).

Defendants argue that their pre-employment medical inquiries satisfy the analysis required under direct threat. (See Defs.’ 56.1 ¶¶ 4–8). They assert that individuals with monocular vision lack depth perception and peripheral vision and therefore are threats to public safety if allowed to drive an emergency vehicle. (See Defs.’ Mem. at 3–4; Defs.’ 56.1 ¶ 19). However, a potential employee who lacks depth perception and peripheral vision does not pose a direct threat where she can establish her present ability to safely perform the essential functions of the job, based on the most current medical knowledge and/or on the best available objective evidence. See *Hoehn v. Int’l Sec. Servs. and Investigations, Inc.*, 120 F. Supp. 2d 257, 266 (W.D.N.Y. 2000) (binocular vision is not essential “to whether an individual possesses the essential skills to satisfactorily perform a job that involves quick-thinking and swift physical reaction time”); see also *Neeld v. American Hockey League*, 439 F. Supp. 459, 462 (W.D.N.Y. 1977) (granting preliminary injunction enjoining defendant hockey league from applying league regulation establishing minimum visual acuity requirements to plaintiff, a one-eyed professional hockey player who, despite impaired peripheral vision, demonstrated that his “visual handicap did not substantially detract from his skill and ability to play hockey in a competent and professional manner”).

Here, Plaintiff challenges Defendants’ contention that individuals with monocular vision pose a direct threat to the public, citing her employment experience as a paramedic and ambulance driver. (Pl. Mem. at 1, 6). She states that she worked as an ambulance driver before she applied to the FDNY, and subsequently worked as a paramedic for an ambulance service which contracted to perform work on behalf of the FDNY. (*Id.*). Assuming the accuracy of these assertions, it is

difficult to conclude that the FDNY's blanket prohibition against monocular paramedics is job-related and consistent with business necessity.

POINT III

EMPLOYERS ARE NOT PERMITTED TO MAKE MEDICAL INQUIRIES OF AN APPLICANT BEFORE EXTENDING A CONTINGENT OFFER OF EMPLOYMENT

Plaintiff alleges that Defendants regularly engage in the practice of conducting medical inquiries before making a conditional offer of employment, and that this practice was applied to Plaintiff. (*See* Pl.'s 56.1 ¶¶ 10, 12, 14, 15, 30, 33, 35, 53). Defendants concede that they conduct a medical assessment of candidates before making a conditional offer of employment. (*See* Defs.' Mem. at 4).

Employers violate the ADA and the Rehab Act by conducting pre-employment medical inquiries. It is unlawful for an employer to “make [pre-employment] inquiries [or to conduct a medical examination] of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.” 42 U.S.C. § 12112(d)(2)(A); *see* 29 C.F.R. § 1630.13(a); 29 C.F.R. § 1630.14(a); *see also* *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, found at <https://www.eeoc.gov/policy/docs/medfin5.pdf>. (“An employer may not ask disability-related questions and may not conduct medical examinations until *after* it makes a conditional offer to the applicant.”) At the pre-offer stage, employers are permitted only to make “inquiries into the ability of an applicant to perform job-related functions.” 42 U.S.C. § 12112(d)(2)(B); 29 C.F.R. § 1630.14(a); *see also* 29 C.F.R. Pt. 1630, App. § 1630.13(a); *Katz v. Adecco USA, Inc.*, 845 F. Supp. 2d 539, 545 (S.D.N.Y. 2012) (finding pre-offer inquiries by employer requiring candidates to list all disabilities violated the ADA, 42 U.S.C. § 12112(d)(2)(A)); *Doe v. Syracuse Sch. Dist.*, 508 F.

Supp. 333, 337 (N.D.N.Y. 1981) (holding pre-employment inquiries of applicant as to whether applicant is a disabled person or as to the nature and severity of the disability was violated when school district made pre-employment inquiry of applicant as to whether applicant was mentally ill or had even been treated for mental illness).

Defendants admit that they inquired into Plaintiff's condition and conducted a medical assessment of Plaintiff. (See Defs.' 56.1 ¶¶ 4–8, 13, 18–20; Defs.' Mem. at 1, 3, 4, 9). But Plaintiff states that she never received an offer of employment. (See Pl.'s Mem. at 20–22; Pl.'s Decl. ¶ 4). Accordingly, to the extent that Defendants conducted a medical exam of Plaintiff before they offered her a position, they violated the Rehab Act.

POINT IV

DOJ'S ISSUANCE OF A RIGHT TO SUE LETTER IS NOT A DETERMINATION ON THE MERITS

In its Memorandum of Law in this case, defendants note that in 1996, the EEOC found probable cause that the FDNY had discriminated against an applicant who had monocular vision when it conducted a pre-employment physical examination of the applicant. Defendants further note that after conciliation efforts by the EEOC failed, the matter was referred to the Department of Justice, which issued a Right-To-Sue letter. (Defendants' Mem. at 5; see Exhibit O to the Affidavit of ACC Alexis Downs). From this, Defendants conclude that the DOJ "accepted" the conclusion that individuals with monocular vision pose a direct threat as ambulance drivers. (Defendants' Mem. at 10). This is simply inaccurate. The mere fact that the Department of Justice issues a Right-To-Sue letter rather than brings suit against an alleged discriminating public entity does not indicate that DOJ has made a determination on the merits of a particular claim. See *Jones v. Las Vegas Valley Water Dist.*, No. 2:10-CV-1941-JAD-PAL, 2014 WL 1248233, at *7 (D. Nev.

Mar. 26, 2014) (internal citations omitted) (“Right to sue letters are merely jurisdictional prerequisites to discrimination suits, and the fact that such a letter has been issued is not evidence of the merits of a discrimination claim”). DOJ’s right to sue letter did not constitute a determination that individuals with monocular vision are unqualified to serve as ambulance drivers or paramedics. Indeed, the letter, attached to Defendants’ motion as Exhibit O, specifically states that the Department of Justice’s determination not to file suit “should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.”

Dated: Brooklyn, New York
October 18, 2016

Respectfully Submitted,

ROBERT L. CAPERS
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

By: _____/s/_____
MICHAEL J. GOLDBERGER
Assistant U.S. Attorney
(718) 254-6052
michael.goldberger@usdoj.gov

*The United States gratefully acknowledges the assistance of Allison Brown in the preparation of this Memorandum of Law. Ms. Brown is a third-year law student at Benjamin Cardozo School of Law.