

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN PESCE,

Plaintiff,

v.

THE NEW YORK CITY POLICE
DEPARTMENT, THE CITY OF NEW
YORK, ELI J. KLEINMAN, AS CHIEF
SURGEON OF THE NEW YORK CITY
POLICE DEPARTMENT, AND
RAYMOND W. KELLY, AS
COMMISSIONER OF THE NEW YORK
CITY POLICE DEPARTMENT,

Defendants.

12 Civ. 8663 (TPG)

**STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA**

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The United States, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,¹ in support of Plaintiff's opposition to the motion for summary judgment filed by defendants the New York City Police Department (the "NYPD"), the City of New York, Eli J. Kleinman, as Chief Surgeon of the New York City Police Department ("Dr. Kleinman"), and Raymond W. Kelly, as Commissioner of the New York City Police Department (collectively the "City" or "Defendants").

PRELIMINARY STATEMENT

Plaintiff Jonathan Pesce ("Plaintiff") asserts causes of action against the City pursuant to Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, *et seq.*, the Americans with Disabilities Act of 1990, as amended, ("ADA"), 42 U.S.C. § 12101, *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code §§ 8-101, *et seq.* In his complaint, Plaintiff alleges that, in violation of these federal and municipal statutes, the City improperly disqualified him for employment as an NYPD officer.

The City has now moved for summary judgment, and in its motion, the City does not dispute that Plaintiff was disqualified from employment with the NYPD. *See* Defs. Mem. Law

¹ 28 U.S.C. § 517 states that "[t]he 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 to 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 distinct interest in ensuring that the proper legal standards are applied in cases brought pursuant to the ADA and Section 504 and frequently files Statements of Interest in the district court concerning the applicability and interpretation of these federal statutes. *See, e.g., Brooklyn Center for Independence of Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 641 n. 9 (S.D.N.Y. 2013) (noting statement of interested filed in ADA and Section 504 challenge to NYC emergency planning procedures); *Noel v. N.Y. City Taxi and Limousine Comm'n*, 837 F. Supp. 2d 268 (2011) (noting statement of interest filed in ADA and Section 504 challenge to lack of wheelchair accessible taxi cabs), *rev'd*, 687 F.3d 63 (2d Cir. 2012).

Support Mot. Summ. J. (“Defs. Mem.”) 6. Nor does the City dispute that: (1) it is subject to Section 504, the ADA, and the NYCHRL; or (2) Plaintiff, as someone who has been diagnosed with epilepsy and has experienced seizures in the past, meets the definition of an individual with a disability under those statutes. *Id.* Instead, the City’s sole argument is that summary judgment is warranted because Plaintiff was not qualified to perform the essential functions of an NYPD police officer based on its de facto blanket policy of disqualifying individuals with epilepsy who use seizure medication. *See id.* Specifically, the City argues that Plaintiff, as a result of his disability cannot: (1) qualify and remain qualified for firearms usage and possession; and (2) be competent and prepared for an emergency at any hour. *Id.* at 9-10. As a result, the City argues that Plaintiff cannot establish a *prima facie* case of discrimination on the basis of his disability because “for reasons of public safety, candidates with active epilepsy or seizure disorders on medication, like plaintiff, cannot be qualified as a police officer.” *See id.* at 10.

Although a plaintiff alleging employment discrimination bears the initial burden of establishing as part of his *prima facie* case that he was qualified for the position in question, the factfinder must look not only at the employer’s judgment as to what functions are essential to that position, but also at objective data and the totality of the circumstances at issue. *See* 29 C.F.R. § 1630.2(n)(3)(i)-(vii); *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 120 (2d Cir. 2004) (“[Plaintiff’s] statements, together with all other relevant evidence, will have to be weighed by the factfinder to determine whether the doctor has established a claim of disability discrimination.”). Furthermore, to the extent a defendant asserts, as the City does here, that the plaintiff’s disability would present a “direct threat” to the health or safety of others, that assertion must be based “upon an expressly individualized assessment of the individual’s present ability to

safely perform the essential functions of the job.” *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002) (internal quotation marks omitted).

The record in the present case reflects that, in direct violation of its obligations under the ADA and its implementing regulations, the NYPD disqualified Plaintiff without conducting an individualized assessment. The record further reflects that, rather than perform the assessment required pursuant to the ADA’s regulations, the NYPD disqualified Plaintiff based solely on its practice of uniformly rejecting candidates who are currently taking antiseizure medications. The record therefore supports a finding that the City has violated its obligations under the ADA, and summary judgment must be denied. Denial of summary judgment is also warranted, however, because the record is replete with material disputes of fact as to whether the City has articulated a legitimate non-discriminatory reason for disqualifying Plaintiff. These disputes of fact regarding the City’s reasons for disqualifying Plaintiff further raise a material dispute of fact as to whether the City has adequately met its burden to demonstrate that Plaintiff’s disability poses a direct threat. The foregoing analysis is premised on the fact that, on a motion for summary judgment, the Court construes “the facts in the light most favorable to the non-moving party and resolve[s] all ambiguities and draw[s] all reasonable inferences against the movant,” *Delaney v. Bank of Am. Corp.*, 766 F.3d 163, 167 (2d Cir. 2014). In light of this standard of review, based on the record presented, the Court should find that summary judgment is improper.

BACKGROUND OF THE CASE

Plaintiff is a twenty-seven year old man who was born in 1988 and experienced his first seizure in October 2000. Defs. R. 56.1 Stmt. (ECF No. 22) (“Defs. 56.1”) ¶ 2. In 2001, following his third seizure episode, Plaintiff was prescribed the antiseizure medication Depakote. *Id.* at ¶ 7. Following the advice of his physician at the time, Plaintiff discontinued Depakote in

October 2003. *Id.* at ¶ 9. In the years following the discontinuation of his medication, Plaintiff experienced several seizures. *Id.* at ¶¶ 10-13. In March 2008, following a seizure, Plaintiff resumed taking Depakote and has been taking it continuously since then. *Id.* at ¶¶ 15-17. Plaintiff has not had a seizure in the seven years since he resumed taking his medication in March 2008, and he has never experienced any side effects from taking Depakote. Decl. Molly Smithsimon Opp'n Defs. Mot. Summ. J. (ECF No. 28) ("Smithsimon Decl."), Ex. 1 ("Pesce Dep.") at 141:3-5; 145:10-12. Plaintiff has repeatedly been administered electroencephalograms ("EEGs") since his diagnosis in 2000, and with one exception in 2001, these EEGs have all been normal. Smithsimon Decl., Ex. 4 ("Maniscalco Dep.") at 139:1-150:10.

Since January 2008, Plaintiff has been a volunteer fire fighter with the Massapequa Volunteer Fire Department. *Pesce Dep.* 8:11-12; 18:8-13. As a volunteer fire fighter, Plaintiff is on call 24 hours a day, seven days a week. *Id.* at 13:17-24. When a fire call occurs, Plaintiff will respond to the call and go to the firehouse to get on the fire truck. *Id.* at 13:17-23. Plaintiff's current title with the Massapequa Volunteer Fire Department is a Class A firefighter and paramedic. *Id.* at 20:5-8. In addition, since February 2014, Plaintiff has also been formally employed as a paramedic for the Hunter ambulance company. *Id.* at 10:3-12. As a paramedic, Plaintiff cares for patients and maintains medical equipment, working three days a week from 7 a.m. to 7 p.m. *Id.* at 11:4-10. Plaintiff frequently works overtime for Hunter, however, and his shift may run anywhere from a half hour to five hours past schedule. *Id.* at 11:4-25.

In October 2008, Plaintiff took the civil service exam for the position of an NYPD police officer. Defs. 56.1 ¶ 20. In January 2010, having received the results of his examination, Plaintiff reported to the NYPD Medical Bureau for a required medical examination. *Id.* at ¶ 25. Upon reporting for his medical examination, Plaintiff completed paperwork and underwent a

vision and hearing exam. *Id.* at ¶¶ 63-70. Plaintiff was then asked to sit in a room, and an NYPD employee, who did not identify himself as a physician, spoke to Plaintiff and asked questions regarding the paperwork that had been completed. *Id.* at ¶¶ 70-72. During Plaintiff's questioning, consistent with the medical questionnaire that he had submitted as part of the paperwork, Plaintiff reported that he had been diagnosed with a seizure condition for which he took medication. *Id.* at ¶¶ 64-66, 70. Plaintiff also reported that he had never experienced a seizure while taking medication, and that he had also never experienced side effects from the medication. *Id.* at ¶ 70. Plaintiff's question and answer session with the unidentified NYPD employee lasted a few minutes. Pesce Dep. 95:25-96:4. Following the interview, Plaintiff returned to another room and waited. Defs. 56.1 ¶ 72. After waiting for a period of time, Plaintiff was pulled out of the room by a different individual and handed a disqualification letter. *Id.* Upon being handed the disqualification notice, Plaintiff was informed by the person giving him the notice that he had been medically disqualified for the reason of having seizures. *Id.*

Although he never met with Plaintiff, Pesce Dep. 96:5-9, the individual who made the decision to disqualify Plaintiff was Dr. David Lichtenstein ("Dr. Lichtenstein"). Defs. 56.1 ¶ 33. Dr. Lichtenstein is the deputy chief surgeon of the NYPD who has conducted candidate medical screenings for the last five years, and his direct medical supervisor is Dr. Eli Kleinman ("Dr. Kleinman"), Supervising Chief Surgeon of the NYPD. Smithsimon Decl., Ex. 3 ("Lichtenstein Dep.") at 23:16-19; Smithsimon Decl., Ex. 2 ("Kleinman Dep.") at 106:9-23. Although Dr. Lichtenstein can refer candidates for review to the NYPD's neurologist, Dr. Anthony Maniscalco ("Dr. Maniscalco"), prior to disqualification, in Plaintiff's case, Dr. Lichtenstein disqualified Plaintiff without consulting with Dr. Maniscalco. Lichtenstein Dep. 156:18-157:13. Dr.

Maniscalco did not examine Plaintiff's medical records until after Plaintiff appealed his disqualification. Maniscalco Dep. 87:7-14.

STATUTORY AND REGULATORY BACKGROUND

Two decades ago, Congress determined that there was a “compelling need” to remedy widespread discrimination against individuals with disabilities through a “clear and comprehensive national mandate.” H.R. Rep. No. 101-485 (II), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332. In 1990, Congress enacted the ADA to implement that broad mandate. *See* 42 U.S.C. § 12101(b). The ADA has a “sweeping purpose,” and “forbids discrimination against disabled individuals in major areas of public life.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001). As a remedial statute, moreover, the ADA “should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003). Indeed, the ADA’s “comprehensive character” is one of its “most impressive strengths.” *See PGA Tour*, 532 U.S. at 675 (quoting the Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of the Attorney General)).

Title I of the ADA²

Title I of the ADA addresses discrimination on the basis of disability in the realm of employment. Title I specifically provides that “[n]o covered entity shall discriminate against a qualified individual with a disability on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees...and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4.

Claims under Title I of the ADA follow the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Young v. Westchester Cnty. Dept. Soc. Svcs.*, 57 Fed. App’x 492, 494 (2d Cir. 2003). Under this framework, the plaintiff bears the initial burden of establishing a *prima facie* case. *Id.* A *prima facie* case in this context requires a showing that: (1) plaintiff is an individual who has a disability within the meaning of the ADA, (2) that an employer covered by the statute had notice of the disability, (3) that with or without reasonable accommodation, plaintiff could perform the essential functions of the position sought, and (4) that the employer has refused to make such accommodations. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 216 (2d Cir. 2001).

² Although Plaintiff asserts causes of action pursuant to the ADA, Section 504, and the NYCHRL, in all ways relevant to this discussion, the ADA and Section 504 are generally construed to impose the same or similar requirements. *See Castellano v. City of N.Y.*, 142 F.3d 58, 70 (2d Cir. 1998) (citing *Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1515 (2d Cir. 1995)); 29 U.S.C. § 794(d) (“The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990. . . .”) Therefore, in light of the foregoing, this Statement of Interest will not separately discuss the City’s compliance or lack thereof with Section 504, but will solely address Title I and its implementing regulations. This Statement of Interest declines to take any position with respect to Plaintiff’s NYCHRL claims.

Once the plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action at issue. With respect to defenses, Title I specifically provides that, “[i]t may be a defense to a charge of discrimination” under the statute that “an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.” 42 U.S.C. § 12113(a). Moreover, “‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.” 42 U.S.C. § 12113(b). Such a “direct threat” defense can be asserted by an employer either as an argument for why the plaintiff is unqualified for the position sought, or as an affirmative defense to the plaintiff’s *prima facie* case.³ See also *Lovejoy-Wilson*, 263 F.3d at 216; *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

Under the ADA’s burden shifting framework, once the defendant is able to articulate a legitimate, non-discriminatory justification for its actions, the burden of proof shifts back to the plaintiff to show that the defendant’s cited justification is merely a pretext for discrimination. See *Glaser v. Gap, Inc.*, 994 F. Supp. 2d 569, 572 (S.D.N.Y. 2014).

³ Where the question of whether the plaintiff can perform an essential function of the position blends into the question of whether she presents a direct threat, courts are divided as to which party bears the burden of proof. See *Nelson v. City of N.Y.*, No. 11 Civ. 2732 (JPO), 2013 WL 4437224, at *9 (S.D.N.Y. Aug. 19, 2014) (collecting cases). The Second Circuit has not ruled directly on this question but has held that “[i]n the employment context, it is the defendant’s burden to establish that a plaintiff poses a “direct threat” of harm to others, and that determination requires an individualized assessment of the employee’s present ability based on medical or other objective evidence,” *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003) (internal quotations omitted).

EEOC Regulations

Responsibility for implementing regulations necessary for carrying out Title I is vested in the Equal Employment Opportunity Commission (“EEOC”). 42 U.S.C. § 12116. Because “Congress explicitly delegated authority to construe the statute by regulation,” to the EEOC, the Court must give these regulations “legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.” *United States v. Morton*, 467 U.S. 822, 834 (1984); *see also Civic Assoc. of the Deaf of N.Y. City, Inc.*, 915 F. Supp. 622, 635 (S.D.N.Y. 1996) (giving weight to the implementing regulations of Title II of the ADA).

On the specific issue of qualifications, the Title I regulations provide that a “qualified individual with a disability” is one who “satisfies the requisite skills, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.” 29 C.F.R. § 1630.2(m).

In determining the essential functions of a position, which are defined by the regulations as the fundamental job duties, as opposed to a marginal function, of the position, 29 C.F.R. § 1630.2(n)(1), the EEOC guidelines provide specific factors for consideration. A job function may be considered essential for several reasons, including: (1) that the position exists to perform that function; (2) that there are a limited number of employees available among whom the performance of that job function can be distributed; and/or (3) that the function is highly specialized, such that the employee was hired for his ability to perform that function. 29 C.F.R. § 1630.2(n)(2)(i)-(iii). Similarly, evidence of whether a particular function is essential may include, but is not limited to: (1) the amount of time spent on the job actually performing that function, (2) the consequences of not requiring the employee to perform the function, (3) the

current work experience of employees in similar jobs, and (4) the written job description at the time the employee was interviewed and hired. 29 C.F.R. § 1630.2(n)(3)(ii)-(iv),(vii). In the aggregate, these factors for consideration focus not only on the employer's judgment as to what functions are essential, but also on the totality of the circumstances. 29 C.F.R. § 1630.2(n)(3)(i)-(vii). Indeed, "the considerations set out in [the] regulation are fact-intensive." *Stone v. City of Mount Vernon*, 118 F.3d 92, 97 (2d Cir. 1997) . For these reasons, "[u]sually no one listed factor will be dispositive, and the regulations themselves state that the evidentiary examples provided are not meant to be exhaustive." *Id.*

The EEOC guidelines also expand on the statute's "direct threat" defense. Under the regulations, a direct threat refers to "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." 29 C.F.R. § 1630.2(r). The regulations further provide 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." *See also Lovejoy-Wilson*, 263 F.3d at 216 (citing *Hamlin v. Charter T'ship of Flint*, 165 F.3d 426, 432 (6th Cir. 1999) (citing 29 C.F.R. § 163.2(r)). Moreover, "the legislative history of the ADA also supports the premise that 'the plaintiff is not required to prove that he or she poses no risk.'" *Id.* (internal citations omitted).

In addition, and of particular significance in this case, to the extent an employer seeks to defend its actions by asserting that the plaintiff poses a "direct threat" to himself or others, the Title I implementing regulations impose a requirement that the employer conduct an "individualized assessment of the employee's present ability to safely perform the essential

functions of the job. . . .” *Sista v. CDC IXIS North America, Inc.*, 445 F.3d 161, 170 (2d Cir. 2006) (quoting 29 C.F.R. § 1630.2(r)). The purpose of this individualized inquiry is to protect individuals with disabilities against assertions of harm which are based more on “untested and pretextual stereotypes,” rather than “a particularized enquiry [sic] into the harms the employee would probably face.” *Chevron U.S.A., Inc.*, 536 U.S. at 86; *see also School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (noting that an individualized inquiry is necessary for Section 504 “to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear . . .”).

Such an assessment includes a consideration of factors such as: “(1) the duration of the risk; (2) the nature and severity of potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” *Sista*, 445 F.3d at 170. Moreover, this assessment must be based on “a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” 29 C.F.R. § 1630.2(r); *see also Lovejoy-Wilson*, 263 F.3d at 220 (internal citations omitted).

DISCUSSION

The Court Should Deny the City’s Motion for Summary Judgment Because the NYPD Failed to Conduct an Individualized Assessment to Determine if Plaintiff Is Qualified to Perform the Essential Functions of the Job

It its motion for summary judgment, the City asserts that Plaintiff cannot establish a *prima facie* case because he will be unable to demonstrate that he is qualified for the position because his medical condition poses a direct threat to the health and safety of others. Defs. Mem. 6-7, 9-10. Although the ADA allows that qualification standards may “include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,” 42 U.S.C. § 12113(b), “[t]he determination that an individual poses a ‘direct threat’ shall be based on an individualized assessment” 29 C.F.R.

§ 1630.2(r). This “individualized assessment of the employee’s present ability to safely perform the essential functions of the job” must be “based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence,” and the assessment is a prerequisite to an employer availing itself of the ADA’s direct threat defense. *Makinen v. City of N.Y.*, 53 F. Supp. 3d 676, 694 (S.D.N.Y. 2014) (quoting *Sista*, 445 F.3d at 17). Furthermore, where the employer “take[s] action without performing such assessment,” its subsequent employment action is deemed “inappropriate” pursuant to the ADA. *Dipol v. New York City Transit Auth.*, 999 F. Supp. 309, 316 (E.D.N.Y. 1998) (defendant failed to meet its burden of asserting a direct threat defense where court found that “tests conducted during Plaintiff’s examinations do not constitute an individualized assessment”); *see also Jackson v. New York City Police Dep’t*, No. 06-1835, 2011 U.S. Dist. LEXIS 43861, at 51-52 (E.D.N.Y. Mar. 3, 2011) (“The determination must be based on an individualized assessment that relies on a reasonable medical judgment.”).

The record reflects that the NYPD disqualified Plaintiff, not on the basis of any individualized assessment, but instead based on its de facto blanket policy of disqualifying candidates who are currently taking antiseizure medication. Defs. 56.1 ¶¶ 73-76. Plaintiff was disqualified during a mass candidate screening after he reported that he was currently taking antiseizure medication. *See id.* at ¶ 72. At the time of Plaintiff’s disqualification, the screening physician, Dr. Lichtenstein, a general internist with no special training in neurology, *see Lichtenstein Dep.* at 20:6-15, had not reviewed any of Plaintiff’s medical records, *id.* at 176:15-20, and had not consulted with the NYPD’s staff neurologist, Dr. Maniscalco. *See Maniscalco Dep.* 87:7-14. Instead, the sole decision maker, Dr. Lichtenstein, based his disqualification decision solely on Plaintiff indicating on his medical questionnaire that he was currently taking

antiseizure medication. Lichtenstein Dep. 152:14-154:13. This disqualification was entirely consistent with the NYPD's practice of disqualifying any candidate who states that he/she has been diagnosed with a seizure disorder and is currently taking antiseizure medications, Lichtenstein Dep. at 39:14-40:22, 46:11-47:13, 153:16-154:8, Kleinman Dep. 105:17-106:23; and accordingly, involved no consideration of the length of time that had elapsed since Plaintiff's last seizure or the circumstances and nature of his current employment.

The record therefore reflects that Dr. Lichtenstein, the individual whose assessment resulted in Plaintiff's initial disqualification, did not conduct an individualized assessment prior to reaching the determination that Plaintiff was not qualified to perform the essential tasks of an NYPD officer because he presents a direct threat. Given the cursory nature of Dr. Lichtenstein's review, and Dr. Lichtenstein's lack of expertise in neurology, it is difficult to see how the assessment that was undertaken in Plaintiff's case could have informed any reasoned consideration of the duration, likelihood, or imminence of the potential harm that Plaintiff posed to either himself or others. Nor is there evidence that Dr. Lichtenstein relied on "the most current medical knowledge and/or on the best available objective evidence," *Makinen*, 53 F. Supp. 3d 676, 694 (quoting 29 C.F.R. § 1630.2(r)), in making his decision. Indeed, that the NYPD's blanket practice of disqualifying candidates like Plaintiff lacks any indicia of an individualized assessment is further evidenced by the fact that the NYPD has never hired a candidate who was taking antiseizure medication at the time of hiring. Lichtenstein Dep. 78:18-25. In light of this failure to conduct an individualized assessment, summary judgment is improper.

The Court Should Deny the City’s Motion for Summary Judgment Because the Record Reflects Disputes of Material Fact as to Whether the City Has Articulated a Legitimate Non-Discriminatory Reason for Disqualifying Plaintiff

Although the Second Circuit has consistently held that considerable deference is given to an employer’s judgment as to what tasks are essential to a position, *see Shannon v. N.Y. City Transit Auth.*, 332 F.3d 95, 100 (2d Cir. 2003), the City has been inconsistent in its explanation as to why Plaintiff is unqualified to perform the essential tasks of an NYPD police officer. While the City asserts in its motion that Plaintiff cannot be qualified because of concerns relating to his ability to operate a firearm or work at any hour, Defs. Mem. 10, the decision maker who first disqualified Plaintiff, Dr. Lichtenstein, testified that individuals taking antiseizure medication could not be qualified because of an “overriding concern” that “it’s a natural aspect of police work to have a violent confrontation at some point in [a police officer’s] career and even minimal head trauma . . . can cause an acceleration of [an] underlying seizure disorder” Lichtenstein Dep. at 61:3-12. In contrast, Drs. Maniscalco and Kleinman testified that individuals taking antiseizure medication cannot be qualified because of public safety concerns relating to their ability to operate firearms and drive police vehicles. Maniscalco Dep. 54:4-15; Kleinman Dep. 151:18-152:20. These three explanations, which reference separate and independent concerns, create in and of themselves disputes of material fact within the record.⁴

⁴ The material disputes of fact regarding the City’s justification for its disqualification decision, even between the NYPD’s own physicians, are further highlighted by their diverging opinions as to whether an individual with a seizure disorder could ever be qualified as a police officer. *See* Lichtenstein Depo. 40:23-41:14 (“Generally speaking, if a candidate’s last seizure was at least two years in the past and they had a New York State driver’s license and they were not on antiseizure medication, I would qualify that individual unless their medical records showed that by CAT scan or MRI they had a fixed intracranial abnormality, such as a scar or a brain tumor.”); Kleinman Depo. 42:18-44:20 (Q: “So after two years of being seizure free, that person would not be employable?” A: “No.”).

Moreover, the record also contains facts put forth by Plaintiff to support a finding that Plaintiff is qualified without any accommodation, including: testimony that he has been medically cleared for duty by the Nassau County Police Emergency Bureau, Pesce Dep. 60:4-25, and the New York State Court Officers, *id.* at 148:25-149:7; testimony regarding how his present volunteer and employment positions require him to work irregular and extended hours, *id.* at 13:17-24, 11:4-25; a report from a Professor of Clinical Neurology from Albert Einstein College of Medicine which states that, “[a]t the time he was one year seizure free in March 2009, his risk of seizure was comparable to that of the general public,” Smithsimon Decl., Ex. 10 (“Haut Report”) at 5; and evidence that the Medical and Physical Fitness Standards and Procedures for Police Officer Candidates prescribed by the Municipal Police Training Counsel of the State of New York prescribes that candidates need only be seizure-free for at least 12 months prior to the date of examination. *Id.* at 4.

The record therefore reflects disputes of material fact on the issue of whether the City has articulated a legitimate non-discriminatory reason for disqualifying Plaintiff, and summary judgment is improper.

The Court Should Deny the City’s Motion for Summary Judgment Because the Record Suggests That the City Has Not Met Its Burden of Demonstrating That Plaintiff Poses a Direct Threat

To the extent the City asserts, as it does in its brief, that Plaintiff is unqualified because his medical condition presents an “unreasonable risk” to others, Defs. Mem. 13, it bears the burden of establishing that the plaintiff poses a direct threat of harm. *See Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003). Particularly given the NYPD’s failure to conduct an individualized assessment, the record strongly suggests that the City has failed to meet its burden of demonstrating that Plaintiff poses a direct threat.

Although the ADA permits an employer to assert a direct threat defense to support its actions, it is well established that “the ADA does not sanction deprivations based on prejudice, stereotypes, or unfounded fear.” *Doe v. Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d 324, 346 (S.D.N.Y. 2010). For this reason, the “focus is on the objective reasonableness of the significance of the risk” *Id.* The fact-finder’s responsibility in assessing this reasonableness is not to assess whether it believes that Plaintiff poses a direct threat, but rather, to determine “the reasonableness of Defendants’ actions based upon ‘reasonable medical judgments of public health authorities.’” *Id.* (internal citations omitted). Furthermore, the mere possibility that a risk of harm exists, without any analysis into either the likelihood or imminence of the potential harm, is insufficient to support a defendant’s reliance on the direct threat defense. *See Deer Mountain Day Camp, Inc.*, 682 F. Supp. 2d at 348 (“The mere existence of possible avenues of transmission, presented without a documented showing, does not create a genuine issue of material fact as to direct threat.”) (internal quotations omitted); *also* 29 C.F.R. § 1630.2(r)(1)-(4).

In the absence of any individualized assessment of the risk that Plaintiff specifically presents, Dr. Kleinman’s testimony that Plaintiff is unable to perform the duties of a police officer, because of his inability “to predict if and when he will suffer a grand mal seizure,” Kleinman Dep. 151:18-152:20, appears to be precisely the type of generalized fear that does not support a direct threat defense. Such an assessment gives no consideration to the likelihood of Plaintiff himself experiencing another seizure, and instead appears to impose on Plaintiff the burden of showing that “he . . . poses no risk,” which is a requirement that the Court of Appeals for the Second Circuit has explicitly rejected. *Lovejoy-Wilson*, 263 F.3d at 220 (internal citations omitted).

Because the record accordingly suggests that the City has failed to meet its burden of demonstrating that Plaintiff presents a direct threat, summary judgment is improper.

CONCLUSION

For the reasons set forth above, the Court should deny the City's motion for summary judgment.

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