

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-01871-RM-SKC

WENDY KOLBE, and

COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit organization,

Plaintiffs,

v.

ENDOCRINE SERVICES, P.C., a Colorado Corporation,

Defendant.

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant Endocrine Services, P.C. by and through its attorneys, Waters, Kubik & Cassens, LLC, Michael Waters hereby submits its Motion for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and in support thereof states as follows:

I. Introduction

In May 2016, Wendy Kolbe’s primary care provider referred her to Endocrine Services, P.C. for a consultation. Prior to the referral, the primary care provider ordered a lab test. In June 2016, Endocrine Service, P.C. was provided with the lab report along with an office note containing a brief history. The laboratory data contained no information to verify a diagnosis of diabetes. This court in a previous ruling found there was an issue of fact as to whether or not the Plaintiff has diabetes. Now that discovery is completed, there is still no evidence to support a diagnosis of diabetes.

II. Standard of Review

Rule 56 of the Federal Rules of Civil Procedure governs the determination of claims or defenses on their merits, without utilization of a trial. *In re Ribozyme Pharmaceuticals, Inc. Securities Litigation*, 209 F.Supp.2d 1106 (2002). Summary judgment is proper when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *In re Ribozyme Pharmaceuticals, Inc. Securities Litigation*, 209 F. Supp. 1106, 1110 (2002.); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Applying the standard of F.R.C.P. 56 requires a court to make two distinct determinations; first, whether there is a genuine dispute as to any issue of material fact and second, applying the law to the undisputed facts to enter a judgment.” *In re Ribozyme Pharmaceuticals, Inc. Securities Litigation*, 209 F.Supp.2d 1106, (2002)

“A factual dispute is ‘genuine’ for purposes of Rule 56 when the evidence presented in support and opposition to the motion is so contradictory that, if presented at trial, a reasonable jury could return a verdict for either party. [internal citations omitted]. *Id.* at 1110. “A scintilla of contrary evidence does not create a genuine dispute, nor does reliance upon the allegations in a party's pleadings. A genuine dispute means that the party opposing the Rule 56 motion has produced enough contrary evidence that had such evidence been presented at trial, no directed verdict could be entered in accordance with FED.R.CIV. P. 50(a).” *Id.* at 1110.

In the present case, the preliminary and primary material or factual issue is whether Plaintiff Kolbe has diabetes. This is the foremost element to prove in order to establish Plaintiff’s claims and, the burden to prove this material fact is upon the Plaintiff. *Id.* at 1110. Where, as in the present case, the party moving for summary judgment does not bear the burden at trial, the analysis is somewhat different. In this scenario, the moving party “must point to

an absence of evidence in the record to support the elements of the claim or defense which the other party is obligated to prove.” *Id.* at 1111. “The movant essentially forces the respondent to present sufficient competent evidence to establish a *prima facie* case. If the respondent fails to present competent evidence to establish every element of its claim, entry of summary judgment in favor of the movant is appropriate because the respondent cannot carry its burden of proof. *Id.* at 1111.

III. Argument

In the present case, the undisputed facts confirm Plaintiffs cannot meet their burden of proof at trial, as they cannot meet the first and primary element – whether Plaintiff Kolbe suffer from diabetes on June 8, 2016. This Motion for Summary Judgment is proper because Plaintiffs cannot meet the burden of proof for their *prima facie* case.

To state a claim under Title III, a Plaintiff must show that: (1) Plaintiff is disabled within the meaning of the ADA; (2) Defendant is a private entity that owns, leases, or operates the place(s) of public accommodation; (3) Plaintiff was deprived of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation; and (4) Defendant failed to make reasonable modifications that would accommodate Plaintiff’s disabilities without fundamentally altering the nature of the public accommodation. *Civil Rights Education and Enforcement Center v. Sage Hospitality Resources, LLC*, 222 F.Supp.3d 934, (2016), citing 42 U.S.C. § 12182(a) & (b).

Congress has defined the term “disability” under the ADA in three ways. 42 U.S.C. 12102 (1)(A)-(C). An individual may have (A) a physical or mental impairment that substantially limits

one or more major life activities of such individual; (B) a record of such impairment; or (C) be regarded as having such an impairment.

Defendant agrees that the standard for determining liability pursuant to the Section 504 of the Rehabilitation Act and Colorado Anti-Discrimination Statute (CADA) are essentially the same as for that of Title III of the ADA.

Therefore, for Plaintiff to prevail on her alleged claims, Plaintiff must establish that as of June 8, 2016, the date she presented to Defendant Endocrine Services, Plaintiff had been diagnosed with diabetes. The existence of diabetes as of that date is fundamental to Plaintiff's claims as it is the preliminary element in establishing her prima facie case.

The sole piece of medical evidence that existed and which was presented and relied upon by Defendant was the laboratory results dated April 26, 2016. These results confirm Plaintiff Kolbe's Hemoglobin A1c was in the non-diabetic range. (ECF No. 37-1, p. 1; No. 37-21, p.1.)

The only contrary evidence to the A1c test results are allegations in the pleadings and self-reporting to her primary care provider. This is not sufficient evidence to create a dispute of material fact.

"A scintilla of contrary evidence does not create a genuine dispute, nor does reliance upon the allegations in a party's pleadings." *In re Ribozyme Pharmaceuticals, Inc. Securities Litigation*, 209 F. Supp. 1106, 1111 (D. Colo, 2002.) Self-reporting to a primary care physician is akin to presenting allegations in the pleadings.

Defendant acknowledges the Court previously found on the record, then submitted a reasonable fact finder could go either way on the issue of whether Plaintiff Kolbe suffered from

diabetes. Now that discovery is closed, Defendant believes this Motion is proper as there is no evidence for Plaintiff to present a diabetes diagnosis as of June 8, 2016.

There is no evidence to counter or contradict the A1c blood test that was presented to and relied upon by Endocrine Services. Nor is there any evidence to support finding a record or being regarded as disabled.

Therefore, Defendant respectfully moves for an Order granting its Motion for Summary Judgment and finding there is not sufficient evidence to find Plaintiff Kolbe suffered from diabetes on June 8, 2016.

Dated this 19th day of November 2019.

/s/Michael R. Waters

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019 I electronically filed the foregoing document with the Clerk of the court using the CM/ECF system which will provide electronic service to the following:

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/s/Dawn Moon _____