IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-1871-RM-SKC

WENDY KOLBE, and
COLORADO CROSS-DISABILITY COALITION, a Colorado non-profit organization,

Plaintiffs,

v.

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

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned attorneys, hereby respond to Defendant's Motion for Summary Judgment (ECF No. 82) ("Motion").

INTRODUCTION

On November 19, 2019, following the close of discovery in this case, Defendant filed its Motion, arguing that "Plaintiffs cannot meet their burden of proof . . . whether Plaintiff Kolbe suffer [sic] from diabetes on June 8, 2016." Motion at 3. Defendant is incorrect for numerous reasons.

As an initial matter, as set forth in the Argument section *infra*, this Court has already ruled on the exact same arguments made with respect to the exact same asserted undisputed facts and exhibits submitted in its Order (ECF No. 60) denying Plaintiffs' Motion for Summary Judgment on Liability (ECF No. 28) ("Plaintiffs' MSJ"). (ECF No. 60, p. 7 ("On this record, a

reasonable fact finder could go either way on the issue [of whether Plaintiff Kolbe has diabetes]").) Defendant acknowledges the Court's finding with respect to whether Ms. Kolbe has diabetes, but Defendant asserts that this Court now should reach a different conclusion because discovery has closed. Defendant, however, fails to explain how all of the additional information provided through the discovery process (which Defendant ignores for purposes of its Motion) alters this Court's prior ruling regarding whether Ms. Kolbe has diabetes. For this reason alone, Defendant's Motion should be denied.

Furthermore, Defendant's motion borders on frivolous because Defendant ignores the myriad evidence Ms. Kolbe produced prior to the close of discovery to support her diagnosis, including additional medical records and deposition testimony (not relied upon in Defendant's Motion). In fact, the records Defendant admits it had in its possession at the time of Ms. Kolbe's visit to its office, some of which it filed in support of its Motion, state that she had diabetes and that she is using insulin. (MSUMF No. 6.)[1] (OSUMF Nos. 5, 7.)[2] *See also* Def's Ex. 1 (filed as ECF No. 85-1) (referral form stating "Primary/Billing Diagnosis: Type 2 diabetes mellitus without complications (E11.9)" followed by a list of current medications including multiple insulins); (OSUMF No. 5 (citing ECF No. 30 (May 12, 2016 office visit note which Defendant had at the time of Ms. Kolbe's visit, replete with references and discussion of Ms. Kolbe's diabetes and management)).[3] Moreover, Defendant's argument rests upon its continued

[1] All "MSUMF" references are to the movant's Separate Statement of Undisputed Material Facts filed in support of its motion for summary judgment.

[2] All "OSUMF" references are to the opposing party's Separate Statement of Undisputed Material Facts filed in opposition to Defendant's motion for summary judgment.

[3] Defendant refiled three exhibits, ECF No. 88-1 through 88-3, per the Court's Order (ECF No. 87) to refile exhibits which the Court had already placed under Level 1 restriction. *See* Orders (ECF Nos. 44, 45, 72). This Court ordered

confusion of its legal obligations with respect to service animals. *Compare Civil Rights Educ. and Enf't Ctr. v. Sage Hosp. Res., LLC*, 222 F. Supp. 3d 934, 958 (D. Colo. 2016) (discussing *prima facie* elements under Title III of the Americans with Disabilities Act ("ADA"), under the first of which plaintiff must show she is disabled) *with* 28 C.F.R. § 36.302(c) (prohibiting inquiries into a person's disability or requiring any documentation). The Department of Justice ("DOJ") promulgated these regulations[4] to prohibit any inquiries into the disability of an individual with a service animal at the time the individual with a disability attempts to enter the place of public accommodation with the service animal regardless of whether the place of public accommodation at issue is a medical office or a store such as a Walmart—neither a doctor at a medical office nor a store greeter may demand documentary proof of an individual's disability before allowing access to a service animal. Therefore, Defendant continues to put the cart before the horse: Plaintiffs concede for the purpose of this motion that they must prove Ms. Kolbe had a disability at the time she visited Dr. Khan, but she does not have to offer such proof until such time as she files a lawsuit or otherwise brings a complaint under the federal and state civil rights

Defendant to refile the exhibits "with only the information relevant to whether Plaintiff has diabetes *unredacted*." ECF No. 87. Defendant's redactions went too far, removing information related to Ms. Kolbe's prior medical history and medications indicating that she does have diabetes, including, e.g., records pertaining to her insulin usage. *Compare* ECF 85-1 through 85-3 *with* ECF 88-1 through 88-3. Although Defendant's redactions reflect their position that such information is not relevant to whether Plaintiff Kolbe has diabetes, all medical professionals, including Dr. Khan, agree that insulin use would lower an A1c result and therefore factor into the interpretation of such result. (OSUMF No. 4 (citing Whitmer Dep. 32:10-17; Millirons Dep. 17:8-18, 18:5-10, 20:6-10; Khan Dep. 31:24-32:5, 33:4-13).) By removing information that is clearly beneficial to Ms. Kolbe's position, Defendant has once again violated this Court's Order requiring that all "information relevant to whether Plaintiff has diabetes [be] *unredacted*." ECF No. 87.

[4] The Supreme Court has given significant deference to the DOJ's Title III regulations. *Colo. Cross Disability Coal. v. Hermanson Family Ltd. P'ship I*, 264 F.3d 999, 1004 n.6 (10th Cir. 2001). "As the agency directed by Congress to issue implementing regulations, *see* 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

laws protecting people with disabilities. She was not required to prove that she had a disability to Dr. Khan at the time of her visit.

BACKGROUND

Ms. Kolbe had lived in Pueblo for years before the incident giving rise to this case, during which time she received her primary care treatment from Cherie Millirons, PA-C, at the Pueblo Community Health Center ("PCHC").[5] In the spring of 2016, Ms. Kolbe moved from Salida back to the Pueblo area and again sought treatment from Ms. Millirons at PCHC. Ms. Kolbe notified Ms. Millirons that she had been diagnosed with diabetes while in Salida by her primary care provider there, Connie Gable. (OSUMF No. 5 (citing Millirons Dep. 10:5-25, 13:10-12, 20:11-18; Kolbe Dep. 51:5-9, 63:10-64:3, 10:1-17)).[6] Ms. Kolbe and Ms. Millirons reviewed Ms. Kolbe's glucometer readings and discussed[7] Ms. Kolbe's blood sugar highs and lows, and Ms. Millirons determined that she was uncomfortable treating such extreme highs and lows, so she ordered an A1c test and referred Ms. Kolbe to an endocrinologist. (OSUMF No. 5 (citing Millirons Dep. 10:5-25, 13:10-12, 20:11-18, 24:1-5, 33:6-11, 51:12-22 (discussion and referral); 28:22-29:13 (personally viewed glucometer)). PCHC then referred Ms. Kolbe to

[5] Plaintiffs have not inserted citations, either in this Response or in the OSUMF, for background facts that are neither material nor in controversy. Nevertheless, those facts come from the discovery responses, declarations and deposition testimony, and Plaintiffs would be happy to supplement this response with those citations should the Defendant indicate these facts are in dispute or if the Court so desires.

[6] Because OSUMF No. 5 spans six pages, Plaintiffs have attempted to highlight the specific portions of OSUMF No. 5 that support the given proposition.

[7] Defendant suggests that Ms. Kolbe's "self-reporting to her primary care provider" renders it unreliable. Motion at 4. As the Tenth Circuit has recognized, "a patient's statements to her physician are likely to be particularly reliable because the patient has a self-interested motive to be truthful: She knows that the efficacy of her medical treatment depends upon the accuracy of the information she provides to the doctor. Stated differently, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility." *U.S. v. Tome*, 61 F.3d 1446, 1449-50 (10th Cir. 1995) (emphasis added) (internal citations and quotation marks omitted).

Defendant and forwarded the notes from Ms. Millirons's May 12, 2016, appointment, the A1c test results, and a referral form into which Ms. Millirons personally typed "for consideration of insulin pump with historical severe highs and lows with little or no warning." *Id.* (citing Millirons Dep. 24:1-5); (MSUMF No. 3, 6; OSUMF No. 7.) Following that referral, someone from Defendant's office contacted Ms. Kolbe to schedule her first appointment with Dr. Khan, which was set for June 8, 2016.

On the morning of June 8, 2016, Ms. Kolbe, accompanied by her service dog Bandit, went to Defendant's office for her initial consultation with Defendant's principal and sole physician, Dr. Agha Khan. While in Defendant's waiting room, Ms. Kolbe informed Defendant's staff that Bandit is her service dog for diabetes, which Defendant's staff (excluding Dr. Khan, who had not yet entered the waiting room) did not question. As Ms. Kolbe sat in the waiting room filling out her new patient paperwork, Dr. Khan entered the room. When he saw Ms. Kolbe with Bandit, he approached her. Although Ms. Kolbe's and Dr. Khan's perceptions of their interaction differ, they agree on the following salient facts: Ms. Kolbe informed Dr. Khan that Bandit is her service dog for diabetes; Dr. Khan asserts that he believed that Ms. Kolbe did not have diabetes due to a single A1c test result; and Dr. Khan demanded that Ms. Kolbe take Bandit to her vehicle in order to be seen. (OSUMF Nos. 8, 10, 11.) After that interaction, Ms. Kolbe and Bandit left without Ms. Kolbe receiving services from Defendant and seeking a referral to a different endocrinologist. The referral department at PCHC then referred Ms. Kolbe to Parkview Endocrinology ("PE") where she has received the majority of her care from Allison Whitmer, APRN. Ms. Kolbe continues to receive her primary care services from Ms. Millirons at PCHC and she continues to receive ongoing diabetes care and management from Ms. Whitmer at PE.

STANDARD OF REVIEW

Plaintiffs agree with the applicable standard of review set forth in Defendant's Motion.

ARGUMENT

I. This Court Has Already Ruled Against Defendant Regarding the Same Facts and Evidence.

Both in its Response to Plaintiffs' MSJ (ECF No. 37) and in the instant Motion, Defendant's argument is exactly the same: Dr. Khan reviewed one Laboratory Data Report prior to Ms. Kolbe's appointment, and based on that one report, he arrived at the conclusion that Ms. Kolbe did not have diabetes, the disability for which she sought treatment. Defendant argues that because discovery is now closed, it is entitled to summary judgment because "there is no evidence for Plaintiff to present a diagnosis of diabetes as of June 8, 2016." Motion at 5. Defendant ignores the evidence the Plaintiffs provided prior to the discovery cutoff. (OSUMF No. 5.)

When reviewing a motion for summary judgment, this Court must construe all facts "in a light most favorable to the nonmoving party." *Kouzmanoff v. Unum Life Ins. Co. of Am.*, 374 F. Supp. 3d 1076, 1086 (D. Colo. 2019) (citing *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013)). Because this Court has already ruled that "[o]n this record, the Court finds there is evidence sufficient to create a triable issue of fact as to whether Ms. Kolbe has diabetes[,]" (ECF No. 60, p. 6), and even after the completion of discovery, Defendant has offered no new evidence or facts and makes no new arguments, this Court should deny Defendant's Motion. As Plaintiffs argue *infra*, there is more than sufficient evidence based on discovery and the depositions taken in this case that Ms. Kolbe has diabetes. (OSUMF 5.)

Construing the facts in the light most favorable to Plaintiffs, and with the lack of new evidence or arguments supporting Defendant's position, this Court should deny Defendant's Motion.

II. Ms. Kolbe Has Diabetes and Has a Record of Diabetes.

The ADA defines "disability" to mean, with respect to an individual: (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 ADA. 42 U.S.C. § 12102(1). These subsections are commonly referred to as the "actual disability" prong (Section 12102(1)(A)), the "record of" prong (Section 12102(1)(B)), and the "regarded as" prong (Section 12102(1)(C)).

Congress amended the ADA in 2008 to "ensure a broad scope of protection" under the Act. Pub. L. No. 11-325, § 2(b)(1), 122 Stat. 3554 (2008). *See also* 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals . . ."). Plaintiffs have presented evidence sufficient to show that Plaintiff Kolbe has an "actual disability" and has a "record of" disability and to defeat the Defendant's Motion. (OSUMF No. 5.)

Defendant argues that Plaintiffs have produced "no evidence [of] a diabetes diagnosis as of June 8, 2016." Motion at 5. Defendant is incorrect. *See generally* OSUMF No. 5. The only thing that has changed on that point since Plaintiffs' MSJ is that Plaintiffs have produced even more evidence supporting that Ms. Kolbe has diabetes and showing her record of diabetes. *Id*.

Nevertheless, Defendant hangs the entirety of its argument in its Motion on that one single A1c test result, ignoring the myriad evidence that has been elicited during discovery in this case, including Ms. Kolbe's deposition testimony, Ms. Milliron's deposition testimony, Ms.

Whitmer's deposition testimony, the medical records from Ms. Kolbe's treatment providers at Heart of the Rockies Medical Center in Salida, Colorado, her medical records from PCHC, and her medical records from PE. (OSUMF No. 5.) In contrast to the minimal probative value of the single A1c result upon which Defendant relies, the weight of evidence clearly depicts a years-long progression of Ms. Kolbe's diabetes diagnosis, treatment and management, begun at Heart of the Rockies, continued with Ms. Millirons, and ultimately transferred to Ms. Whitmer, who continues to treat Ms. Kolbe to this day.[8]

Plaintiffs provided Defendant with medical records from Heart of the Rockies Regional Medical Center that predate her visit to Defendant and include references to her insulin usage. (OSUMF Nos. 2, 5 (citing Ex. A).) Although those documents do not provide the precise date of the diabetes diagnosis or the lab work associated with the diagnosis, they are certainly evidence that Ms. Kolbe was being prescribed insulin from Heart of the Rockies in Salida prior to her move back to Pueblo in the spring of 2016. (OSUMF No. 5 (citing Ex. A, Heart of the Rockies records; Millirons Dep. 41:18-20, 43:8-14, 45:23-46:4 (diabetes diagnosis based on her medical history, her glucometer readings and her medications)).) In addition, Ms. Millirons testified that Ms. Kolbe "carr[ies] a diagnosis of Type 2 diabetes" based on records she reviewed from Heart of the Rockies. (OSUMF No. 5 (citing Millirons Dep. 41:18-42:15).)

Defendant also ignores Ms. Millirons's treatment of Ms. Kolbe's diabetes prior to her referral to Defendant. (OSUMF No. 5 (citing Millirons Dep.).) Prior to her referral to Defendant, Ms. Millirons spoke with Ms. Kolbe about the treatment and lifestyle changes that occurred after

[8] That treatment includes assisting Ms. Kolbe secure a Dexcom continuous glucose monitor via Medicaid. (OSUMF No. 5 (citing Whitmer Dep. 34:23-25, 35:24-36:15; Ex. H at 3 (P001465)).)

her diagnosis, personally reviewed the readings from Ms. Kolbe's glucometer, and felt comfortable listing both diabetes and diabetic neuropathy as diagnostic codes in her records. (OSUMF No. 5 (citing Millirons Dep. 10:5-25, 13:10-12, 20:11-18 (discussion with Ms. Kolbe about past treatment), 28:22-29:13 (viewed glucometer readings), 12:15-22 (entering diagnosis codes for diabetes and diabetic neuropathy); ECF No. 30 (PCHC records, including from April 26, 2016, listing diabetes and diabetic neuropathy)).)

Defendant further ignores Ms. Millirons's testimony that she referred Ms. Kolbe to an endocrinologist "[b]ecause [she] didn't feel comfortable treating [Ms. Kolbe's] extreme highs and lows . . . of her blood sugars." (OSUMF No. 5 (citing Millirons Dep. 51:20-22).) Defendant also had in its possession, but chose to ignore, the referral sheet into which Ms. Millirons personally (such personal attention to a referral is rare) typed "for consideration of insulin pump with historical highs and lows with little or no warning." (OSUMF No. 5 (citing Millirons Dep. 21:20-22:1 (Ms. Millirons only "sometimes" personally views referrals); 24:1-5 (Millirons personally typed quoted language into referral sheet sent to Defendant); 51:12-22 (Millirons recommended insulin pump to treat "extreme [blood sugar] highs and lows"); 33:6-11 (referral to Defendant noted irregular highs and lows).) Defendant, however, chose to ignore all of that evidence, including the effect that taking insulin would have on an A1c test result, in favor of a single A1c result. (OSUMF No. 11.)

Defendant's Motion incorrectly affords no weight to these and other medical records that should have informed Dr. Khan's assessment of that one A1c value, as they illustrated that Ms. Kolbe was being treated for and managing her diabetes with insulin during the time relevant to that A1c, which would have lowered her blood sugar, thus lowering her A1c test result into the

normal range. (OSUMF No. 4 (citing Khan Dep. 31:24-32:5 (use of insulin would lower A1c result), 33:4-13 (well controlled diabetes can result in A1c results within normal ranges); Whitmer Dep. 32:10-17 (diabetes treatment would lower blood glucose and lower A1c readings), 33:8-17 (A1c reading within ADAG range while on treatment does not mean a lack of diabetes), 34:13-15 (meeting glycemic targets does not mean Ms. Kolbe does not have diabetes); Millirons Dep. 17:8-18 (A1c of 5.6 means that Ms. Kolbe's "diabetes is under good control."), 18:5-10 (5.6 A1c is "considered excellent control overall."), 20:6-10 (5.6 A1c is "excellent" so continue same medications), 31:21-22 ("The A1c is strictly to determine overall control."), 53:8-54:6 (medical history and list of medications are evidence of diabetes even with A1c of 5.6)); OSUMF No. 12 (A1c provides average from past three months).) Defendant simply ignores the entirety of the discovery in this case, choosing to rely on the exact same evidence the Parties had in their possession at the time of Plaintiffs MSJ.

Defendant asks the court to ignore all of the foregoing evidence in favor of a single A1c result. (MSUMF No. 5). Although Plaintiffs believe that the quantum of evidence weighs strongly in favor of a finding that Ms. Kolbe had diabetes on the date of her visit to Defendant's office, as she alleges, it clearly illustrates that there is a significant dispute as to that fact precluding summary judgment. The mere scintilla of evidence arguably to the contrary[9] is the solitary A1c test result upon which Defendant based its actions on June 8, 2016, and upon which Defendant continues to rely, resting its entire Motion solely upon it. (OSUMF No. 4 (insulin use would lower A1c); No. 7 (Dr. Khan reviewed referral form and May 12, 2016 records from PCHC); No. 10 (Dr. Khan demanded Ms. Kolbe remove Bandit because he did not believe she

[9] *But see supra* note 3 (demonstrating that all medical professionals agree that the A1c would be affected by insulin).

had diabetes); No. 12 (A1c is an average from the prior three months).) Defendant's argument that "there is no evidence for Plaintiffs to present a diabetes diagnosis as of June 8, 2016" is irreconcilable with the weight of evidence Plaintiffs have produced. (OSUMF No. 5.)

In addition to demonstrating a diagnosis of and treatment for diabetes, there is a record of diabetes treatment, records that have been made available to the Defendant, indicating Ms. Kolbe had diabetes prior to, during and after her visit with Dr. Khan. (OSUMF No. 5.) In addition, Ms. Kolbe's treating medical professionals regarded her as being an individual who has diabetes. (OSUMF No. 5 (citing Whitmer Dep. 14:24-15:2 ("I was treating [Ms. Kolbe] for Type 2 diabetes."); Millirons Dep. 12:15-22 (PCHC treating Ms. Kolbe for Type 2 diabetes), 41:18-20, 45:23-46:4 (Ms. Kolbe carries a Type 2 diabetes diagnosis based on her medical history, her glucometer readings and her medications)).) Finally, the referral to Dr. Khan itself was for the purposes of treating her diabetes. (OSUMF No. 5 (citing Millirons Dep. 24:1-5 (personally typed "for consideration of insulin pump with historical highs and lows with little or no warning" on referral sheet sent to Defendant), 51:12-22 (recommended insulin pump to treat "extreme [blood sugar] highs and lows"), 33:6-11 (referral to Defendant noted irregular highs and lows); 51:20-22 (referred to endocrinologist because not "comfortable treating [Ms. Kolbe's] extreme highs and lows" herself)).) It simply does not make sense that the Defendant would rely on one test result, ignoring the other records that demonstrated that Ms. Kolbe had been in treatment for or had been treating her diabetes, to show that she does not have diabetes. Defendant's Motion should be denied for this reason as well.

III. Defendant Continues To Ignore the Law and DOJ Guidance Regarding Service Animals.

There is a larger problem with Defendant's argument that goes to the heart of this case: Defendant continues to confuse Plaintiffs' *prima facie* burden of proof with its own legal obligations related to service animals in its day-to-day operation. Defendant's obligations to Ms. Kolbe and Bandit on June 8, 2016 were clear, and Defendant did not comply with the law. *Compare* 28 C.F.R. § 36.302(c) (prohibiting any inquiries into a person's disability or requiring any documentation) *with* OSUMF Nos. 8-10 (not asking permitted questions, but requiring a diagnosis of diabetes and making a legal determination as to disability before allowing Plaintiff Kolbe's service animal to remain with her).

Defendant, as a public accommodation, was permitted to ask Ms. Kolbe whether Bandit was her service animal and, if she responded affirmatively, to ask what tasks Bandit performed for her. 28 C.F.R. § 36.302(c)(6). Defendant was not permitted to inquire into the nature or extent of Ms. Kolbe's disability and was not permitted to require documentation of her disability. *Id.*

As Defendant admits, Dr. Khan did not ask Ms. Kolbe the two questions it is permitted to ask. (OSUMF Nos. 8, 9.) Rather, in direct violation of the DOJ regulations and guidance, Dr. Khan made the legal conclusion that Ms. Kolbe did not have a disability permitting him to exclude Bandit based on just one factor—that he did not believe Ms. Kolbe when she said she had diabetes. (OSUMF No. 10 (citing Khan Dep. 40:15-22).) Dr. Khan jumped to that mistaken belief by relying on a single lab result to the exclusion of the other evidence Defendant admitted it had at the time of Ms. Kolbe's visit (and that Defendant admitted would affect interpretation of

that lab test result, *see supra* note 3), as discussed above. (MSUMF No. 6; OSUMF Nos. 7, 10.) More to the point, however, and as argued in Plaintiffs' MSJ and Plaintiffs' pending Motion to Strike Fed. R. Civ. P. 26(a)(2) Disclosures and Report and to Exclude Testimony of Michael McDermott, M.D. (ECF No. 64), the law does not permit Defendant to exclude Bandit based on his subjective belief and specifically prohibits him from inquiring into Ms. Kolbe's disability at the time of the visit. The fact that Defendant is a medical doctor does not provide him with any additional leeway.[10] The question of whether Ms. Kolbe was an individual with a disability at the time she sought services from Defendant's clinic is one that must be determined by this Court or the fact finder in this case, not one that Dr. Khan was permitted to investigate at the time Ms. Kolbe sought services at his office. Ultimately, the question of whether Ms. Kolbe had diabetes on the date of her visit to Defendant's office is irrelevant to whether Defendant discriminated against her on the basis of her disability on the date of her visit.

The DOJ regulations implementing the ADA are abundantly clear regarding what inquiries Dr. Khan was allowed to make at the time of Ms. Kolbe's visit to his office:

> Inquiries. A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

28 C.F.R. § 36.302(c)(6). Furthermore, the guidance and analysis the DOJ provides with respect to service animals in places of public accommodation clarify the distinction between what Dr.

[10] This is particularly true where Dr. Khan had evidence at the time that he acknowledges would affect the very reading upon which he based his belief, but which he chose to ignore. *See* n.3, *supra* (all medical professionals in agreement that an A1c lab test result would be lower for a person taking insulin).

Khan was allowed to ask and the fact that Ms. Kolbe only needs to meet the burdens of her *prima facie* case at the time she raises a complaint:

> Inquiries about service animals. The NPRM proposed language at § 36.302(c)(6) setting forth parameters about how a public accommodation may determine whether an animal qualifies as a service animal. The proposed section stated that a public accommodation may ask if the animal is required because of a disability and what task or work the animal has been trained to do but may not require proof of service animal certification or licensing. Such inquiries are limited to eliciting the information necessary to make a decision without requiring disclosure of confidential disability-related information that a public accommodation does not need.

28 C.F.R. pt. 36, app. A at 808 (2019) (emphasis added). The DOJ's Title III "guidance is entitled to deference because it represents the DOJ's authoritative interpretation of its own regulations." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 957 F. Supp. 2d 1272, 1280 (D. Colo. 2013), *aff'd in part, rev'd in part on other grounds*, 765 F.3d 1205 (10th Cir. 2014). In addition, the DOJ has made available online numerous additional guidance regarding service animals.[11]

Simply put, Defendant denied Ms. Kolbe the benefits of Defendant's goods, services, facilities, privileges, advantages, and accommodations in violation of the ADA's mandate. 42 U.S.C. § 12182(b)(1)(A)(i) ("It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges,

[11] *See, e.g.,* U.S. Dep't of Justice, Civil Rights Division, Disability Rights Section, *Frequently Asked Questions about Service Animals and the ADA*, https://www.ada.gov/regs2010/service_animal_qa.html (July 2015) (last visited Dec. 8, 2019); U.S. Dep't of Justice, Civil Rights Division, Disability Rights Section, *Service Animals*, https://www.ada.gov/service_animals_2010.htm (July 12, 2011) (last visited Dec. 8, 2019).

advantages, or accommodations of an entity.").[12] Defendant admits that Ms. Kolbe sought Defendant's healthcare services. (OSUMF No. 13.) Defendant admits that Ms. Kolbe identified Bandit as a service animal. (OSUMF No. 8.) Defendant admits that Bandit was not out of Ms. Kolbe's control. (OSUMF No. 14.) Nevertheless, Defendant did not ask Ms. Kolbe the two permitted questions. (OSUMF Nos. 8, 9.) Instead, Defendant admits that it required Ms. Kolbe to remove Bandit from its office to her car because Dr. Khan did not believe Ms. Kolbe had diabetes. (OSUMF No. 10.) Even assuming that Defendant would have permitted Ms. Kolbe to receive services in the absence of Bandit, the regulatory exception[13] does not apply in this situation.

Defendant's refusal to permit Ms. Kolbe to enjoy its goods, services, facilities, privileges, advantages, and accommodations with Bandit present violated the ADA, Section 504 of the Rehabilitation Act and the Colorado Anti-Discrimination Act. Despite Dr. Khan's belief that Ms. Kolbe did not have diabetes, Defendant violated the law on June 8, 2016, regardless of Plaintiffs' *prima facie* elements. Nevertheless, as discussed *supra*, there is a plethora of evidence to support Ms. Kolbe's claim that she had (and has) diabetes and a record of diabetes. Consequently, this Court should deny Defendant's Motion.

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendant's Motion

[12] The parties "agree that the standards for determining liability" under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Colorado Anti-Discrimination Act, C.R.S. §§ 21-34-601-605, 21-34-801-805, are the same. *See* Motion at 4. Plaintiffs brought suit under these laws as well. *See generally* Compl. (ECF No. 1).

[13] "If a public accommodation properly excludes a service animal under § 36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises." 28 C.F.R. § 36.302(c)(3) (emphasis added). Bandit was not properly excluded under Section 36.302(c)(2). That section permits exclusion of service animals in only two circumstances: "(i) The animal is out of control and the animal's handler does not take effective action to control it; or (ii) The animal is not housebroken." *Id.* § 36.302(c)(2)(i)-(ii).

and Order any other relief the Court deems just, proper and necessary.

Respectfully submitted December 10, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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