IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OFCOLORADO

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 REPLY IN SUPPORT OF MOTION FOR SMMARY JUDGMENT

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

I. INTRODUCTION

Defendant's Motion for Summary Judgment is properly granted because Plaintiffs have failed to provide any evidence that Wendy Kolbe had diabetes as of June 8, 2016 and was, at that time, protected pursuant to Title III of the Americans with Disability Act.

II. STANDARD OF REVIEW

Plaintiffs agree with the Standard of Review as set forth in Defendant's Motion for Summary Judgment.

When ruling on a Motion for Summary Judgment, the court may consider only admissible evidence. *Medina v. Davis,* Civil Action 14-cv-03037-CBS; *see also Johnson v. Weld Cnty,* 594 F. 3d 1202, 1209-10 (10th Cir. 2010). *See also Gross v. Burggraf Constr. Co.*, 53 F. 3d 1531, 1541 (10th Cir. 1995) (holding that it is well established only admissible evidence is considered when reviewing an order granting summary judgment.) While the party opposing summary judgment "need not produce evidence in a form that would be admissible at trial, ... the content or substance of the evidence must be admissible." *Wright-Simmons v. City of Oklahoma City*, 155 F. 3d 1264, 1268 (citations and internal quotation marks omitted). Under established precedent, the courts are to disregard hearsay on summary judgment when there is a proper objection to its use and the proponent of the testimony cannot identify an applicable exception to the hearsay rule. *Johnson v. Weld County, Colorado,* 594 F. 3d 1202, 1208 (Cir. 2010) citing Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1176 (10th Cir.2007). "Hearsay testimony cannot be considered because a third party's description of a witness' supposed testimony is "not suitable grist for the summary judgment mill." (citations and internal quotation marks omitted)." *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998).

"Material that is inadmissible will not be considered on a summary judgment motion because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." *Johnson v. Weld County, Colorado,* 594 F. 3d 1202, 1209 (Cir. 2010) citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2727, at 497-98 (3 ed. 1998).

III. ARGUMENT

The plaintiffs still cannot meet their burden of proof, as they cannot meet the first and primary element; whether Ms. Kolby suffered from diabetes on June 8, 2016. The plaintiffs have presented medical records before the June 2016 appointment with Endocrine Services and for several years after 2016. Yet, none of the records contain the diagnosis of diabetes. At best they show treatment based on passed down hearsay of diabetes. While Plaintiffs attempt to present a contrary conclusion, they do so on evidence that is inadmissible and therefore unable to meet the standard necessary to defeat this Motion for Summary Judgment.

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. The plaintiff has asserted she has diabetes.

The existence of diabetes on the date of Ms. Kolbe's visit to Endocrine Services, P.C. is fundamental to her claim. The sole piece of medical evidence that was presented to Endocrine Services, P.C. was the laboratory result dated April 26, 2016. The hemoglobin A1c test result was 5.6, which is in the non-diabetic range. (MSUMF No. 5.)

In addition to the lab test, Dr. Khan of Endocrine Services, P.C. was presented a referral letter, which also failed to contain a diagnosis of diabetes. (MSUMF No. 1.) Rather, it simply asked Dr. Khan of Endocrine Services, P.C. for an endocrine consult. Both documents provided to Dr. Khan failed to confirm Ms. Kolbe suffered from diabetes or created any record of this

disease. Therefore, the only prong of the ADA that Plaintiff can rely upon, or should rely upon, is subsection (A). Did Plaintiff have a physical impairment on June 8, 2016? The answer is no.

The only contrary evidence to the A1c test result are allegations in the pleadings and plaintiff's self-reporting to her primary care providers, Ms. Millirons and Ms. Whitmer. (OSUMF Exhibit B, C.)

Both of Ms. Kolbe's primary care providers, Ms. Millirons and Ms. Whitmer acknowledge the significance of the A1c test as the diagnostic standard for diabetes.

Ms. Millirons acknowledged in her deposition the significance of the A1c test she ordered. (MSUMF Nos. 2 and 3.) Ms. Millirons was specifically asked whether she could assess whether Plaintiff had diabetes or not in reference to her April 26, 2016 treatment note.

> "Q. Okay, we will check hemoglobin A1c and call with result.
> A. Yes.
> Q. Okay. So at that point, without that test, would you be able to assess whether or not she has diabetes.
> A. No. I don't think so. Did we check a blood sugar that day?
> Q. You did a lab test for that.
> A. I don't see where they did a blood sugar test at that visit."

(OSUMF Exhibit B 13:13-23.)

In addition, Ms. Whitmer refers to her treatment notes approximately six months after Ms. Millirons visit of April 2016. In her deposition, Ms. Whitmer stated:

> "A. The record states 11-2016, where indicating at the end of the HPI.
> Q. Okay. And what is the A1c rating in reference to the 11-2016 note.
> A. A1c 6.3.
> Q. Now, what is the significance of an A1c 6.3 reading for November 2016.

> A. It indicates that for the last three months her average blood sugar has been elevated above what's considered normal.
> Q. Alright. And does that put her in to a diabetes diagnosis range?
> A. It does not."

(OSUMF Exhibit B, 8:3-15.)

Because it was disclosed that Ms. Whitmer continued to treat Ms. Kolbe beyond the November 2016 date, Ms. Whitmer was asked:

> "Q. Okay. Did any of your workup reveal any evidence of type 1 diabetes.
> A. It did not.
> Q. Okay. Did any of your workup reveal a diagnosis of type 2 diabetes.
> A. Referring back to the ADA guidelines the patient did not have any lab results that would confirm a formal diagnosis of type 2 diabetes; however, she was never off of diabetes treatment, which would be a guiding principal to do—to make that formal diagnosis.
> Q. So I gather what you just said was that because she was taking insulin at occasion, does that form the basis of a diagnosis of diabetes?
> A. It does not."

(OSUMF Exhibit B, dep. 15:3-17.)

Plaintiffs only rely upon the use of insulin as proof that Plaintiff suffered from diabetes. (OSUMF Exhibit B, C.) Outside of Plaintiff's own allegations however, there is no evidence in the record as to who prescribed this insulin, when or where it was prescribed and why. The mere fact someone is on medication does not prove the underlying disease or condition. Reliance on medical records created subsequent to June 2016 are irrelevant and unrelated to the issue before the Court as they fail to prove or disprove whether, at the time of her presentation to Endocrine Services, P.C. (Dr. Khan) Plaintiff suffered from diabetes. In addition, the records from Heart of the Rockies Medical Center provided in October of 2019 do not support plaintiff's argument. (OSUMF Exhibit A.) Argument alone cannot create a factual or genuine issue.

The fact that Plaintiff claims she was on the insulin for diabetes is not sufficient evidence to create a genuine dispute of a material fact. (OSUMF Exhibit E 10:1-17.)

Considering only the admissible evidence, the medical record dated April 26, 2016 (MSUMF Exhibit No. 2), and the laboratory data (MSUMF Exhibit No. 3) they fail to confirm Plaintiff suffered from diabetes on June 8, 2016. Therefore, there is no genuine factual dispute preventing the granting of this Motion for Summary Judgment.

IV. ARGUMENT OUTSIDE SCOPE OF MOTION FOR SUMMARY JUDGMENT

Plaintiff spends an amount of time addressing an issue that was not even raised in the Motion for Summary Judgment; guidance regarding service animals. In fact, unless or until Plaintiff can prove she was disabled at the time she entered Defendant's medical office, Bandit is not a service dog. Without meeting the first element of the prima facie case that plaintiff is disabled, Bandit cannot be a service dog. If Bandit is not a service dog, then Defendant could not have violated the law as represented by Plaintiff.

The argument that "Defendant continues to confuse Plaintiffs' prima facie case burden of proof with its own legal obligations related to service animals . . ." (Plaintiff's Response to Defendant's Motion for Summary Judgment, p. 12) is not an appropriate response brief topic. Plaintiff has not sought leave to file a cross Motion or designated this argument as such, Defendant would ask this Court to not consider this argument.

V. CONCLUSION

Endocrine Services, P.C. filed this motion after discovery was concluded to force the plaintiff to present sufficient, competent evidence to establish a prima facia case. Even with the

October disclosure of medical records from Heart of the Rockies Medical Center, the plaintiff cannot present competent evidence to establish she has a diabetes diagnosis. When the respondent fails to present competent evidence for every element of her claim, entry of summary judgment in favor of the movant is appropriate. Endocrine Services, P.C. requests the court to enter summary judgment.

Dated this 24th day of December 2019.

s/ Michael R. Waters
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CERTIFICATE OF SERVICE

I hereby certify that on December24, 2019, I electronically filed the foregoing document on the following:

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