

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 17-cv-01871-STV

WENDY KOLBE, and

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

Plaintiffs,

v.

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

Defendant.

**RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON
LIABILITY**

Defendant Endocrine Services, P.C. by and through its attorneys, Waters, Kubik & Cassens, LLC, Michael Waters hereby responds to the Plaintiff's Motion for Summary Judgment on Liability.

SUMMARY OF ARGUMENT

The Defendant opposes the Plaintiff's Motion for Summary Judgment on liability because Ms. Kolbe is not an individual with diabetes, therefore is not disabled under Title III of the Americans with Disabilities Act.

INTRODUCTION

This introduction caption seems to be a statement of facts and will be treated as such in this response. The Defendant does not agree with the statement of facts in paragraphs 1 and 2.

The Defendant does not have a disagreement as to the statement of facts in paragraphs 3, 4, 5, 6, and 7.

The Defendant does not agree with the statement of facts in paragraphs 8, 9, and 10.

ARGUMENT

The standards of review set forth in the Plaintiff's Motion for Summary Judgment are accurate as to how a court considers motions for summary judgment.

CONFLICTING ISSUES OF FACT

When Wendy Kolbe came to Dr. Kahn's office that is known as Endocrine Services, P.C. Cherie Millirons, PA-C provided medical records pertaining to the endocrinology, diabetes and metabolism consultation. Included in those records was laboratory data of April 27, 2016 that showed various tests. The most significant test result is that of hemoglobin A1c. The result of this test was 5.6, normal range is 4.8–5.6. just below the finding is an explanation. "*Please Note: Pre-Diabetes: 5.7-6.4 Diabetes >6.4 Glycemic control for adults with diabetes <7.0.*" (**Defendant's Exhibit A**)

According to this laboratory data provided to Dr. Kahn near the time of Kolbe's appointment, Wendy Kolbe is not considered to have diabetes. The standards for determining whether a person has diabetes or not are not created by Dr. Kahn but are well publicized blood glucose levels that are frequently set forth by the American Diabetes Association. Ms. Kolbe is an individual who presented a laboratory test that showed her glucose level is not considered to be diabetes and therefore she cannot be an individual who is disabled with diabetes. (**Defendant's Exhibit B**)

ARGUMENT

Plaintiff correctly recites the ADA in so far as it states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination

by such entity.” 42 U.S.C. §§1232. What Plaintiff fails to acknowledge, however, is that the ADA only applies to individuals with a disability.

The ADA requires a plaintiff to prove: (1) she is a qualified individual with a disability; (2) she was either excluded from participation in or denied the benefits of some public entity's services, programs, activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of[f] benefits, or discrimination was by reason of the plaintiff's disability. *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999).

“Although the ADA is to be broadly construed to effectuate its purpose, *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002), courts must keep in mind that the purpose of the ADA is to place those individuals with disabilities on an equal footing, not to give them an unfair advantage. *Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir. 1996)(citations omitted). Moreover, the application of a neutral rule that applies to disabled and nondisabled individuals alike cannot be considered discrimination on the basis of disability. See, e.g., *Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999); *Sandison v. Michigan High School Athletic Assoc.*, 64 F.3d 1026, 1032, 1036 (6th Cir. 1995).” *J.H. ex rel. J.P. v. Bernalillo County, J.H. ex rel. J.P. v. Bernalillo County*, CIV 12-0128 JB/LAM.

For purposes of the ADA, an individual is disabled if she: (1) has "a physical or mental impairment that substantially limits one or more major life activities of such individual;" (2) has "a record of such an impairment;" or (3) is "regarded as having such an impairment." 42 U.S.C. § 12102(1) (2000)(amended 2008); 29 C.F.R. §1630.2(g) (2011). Under the ADA Amendments Act of 2008 ("ADAAA"), "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). Despite this expanded list, "the ADAAA left untouched the plaintiff's burden of proof; [s]he still has to prove [s]he has a disability." *Lloyd v. Montgomery Hous. Auth.*, 857 F.Supp.2d 1252, 1263 (M.D. Ala. 2012).” *J.H. ex rel. J.P. v. Bernalillo County*, CIV 12-0128 JB/LAM.

A plaintiff must first prove by a preponderance of the evidence that she has a disability

Berry v. T-Mobile USA, Inc. 490 F.3d 1211, 1216 (10th Cir. 2007).

Plaintiff has failed to prove she has a disability.

Through an interrogatory, Defendant asked Plaintiff to “[p]lease identify any and all disabilities Wendy Kolbe alleges to suffer from since April 8, 2015 to June 9, 2016.” Plaintiff responded as follows:

“Plaintiff objects to Interrogatory 1 on the grounds that it is overbroad and unduly burdensome. Defendant defined the work “disabilities” to include “being regarded as having [a physical or mental impairment that substantially limits one or more major life activities,]” which subject information in other individuals’ minds is not reasonably available to Ms. Kolbe. Plaintiff also objects to Interrogatory 1 on the grounds that it is vague and ambiguous in that Defendant has not defined the term “suffer from[,]” which is subject to multiple interpretations, rendering the Interrogatory both vague and overbroad. Without waving the foregoing Objections, Plaintiff states: Wendy Kolbe has a hard-to-control form of diabetes that causes her blood sugar level to unexpectedly and rapidly increase or decrease, and has also caused neuropathy. Ms. Kolbe has a lower spinal cord injury. Ms. Kolbe also suffers from migraine headaches. Each of these conditions and these conditions in combination with one another substantially limit Ms. Kolbe’s major life activities.”

However, test results provided to Dr. Khan do not confirm diabetes, let alone a hard to control form. (See Affidavit of Dr. Khan attached hereto as **Defendant’s Exhibit B**). And, according to plaintiff, her dog, Bandit, was “trained to detect and warn Ms. Kolbe when her blood sugar is unexpectedly increasing or decreasing based on odor that is undetectable to people. “(Plaintiff’s Answers to Defendant’s First Set of Discovery Requests attached hereto as **Defendant’s Exhibit C**).

If Plaintiff is not disabled, Defendant has no legal obligations to provide an accommodation under the ADA. See *Kaltenberger v. Ohio College of Podiatric Med.*, 162 F. 3d 432, 437 (6th Cir. 1998) (holding there is no obligation to provide an accommodation unless the plaintiff provides a proper diagnosis of a physical or mental impairment and requests an accommodation.) Plaintiff failed to provide any evidence that she had a disability when she presented herself to Dr.

Khan's office.

Defendant cannot violate a law that is not even applicable. Plaintiff has failed to establish beyond a preponderance of the evidence that she is disabled. Until the Plaintiff proves she is disabled she cannot qualify for the protections of the ADA. And without those protections or exceptions, Plaintiff has no basis for her claims.

Defendant's Policy Does Not Violate Title III and Section 504

Defendant's policy does not violate the applicable statutes. Plaintiff reaches a contrary conclusion by assuming the policy places the onus on the individual with a disability. There is nothing in the Defendant's policy that even suggests the patient is responsible for initiating the discussion. While not identical to the regulation, the Defendant's policy does comply with the two inquiries that are permissible. First question, is it a service animal? Defendant's policy states that the pet must be identified as a service animal. Logically, this identification would occur in response to the first permissible question. Second question, what tasks it performs. Again, Defendant's policy complies – patient/owner provides reasons for the presence of pet during medical office visit. While not word for word, the Defendant's policy is seeking information regarding the tasks being performed by the animal.

The dispute between the two interpretations is an appropriate ground to deny the Motion for Summary Judgment.

In addition, in paragraph 12 of the Plaintiff's declaration in support of plaintiff's motion, she reported "I informed Dr. Kahn that Bandit is my service animal, and I presented Dr. Kahn with a copy of Bandit's certification card, a true and correct copy of which is attached hereto as Exhibit B. This certification card was neither presented to Dr. Kahn on the date of Ms. Kolbe's visit, nor was it disclosed with the Rule 26 Disclosure. In addition, the Service Dog Registration of America card can be obtained through the website of Service Dog Registration of America under www.servicedogregistration.org. (**Defendant's Exhibit D**). The registration one may purchase from the Service Dog Registration of America enables the purchaser to complete a short form providing ones name, email address and allows the applicant to list what disability they believe they are afflicted with. In this case, the Plaintiff entered the service type as diabetes. It is not known

which kit the Plaintiff purchased which includes the plastic tag she identifies as Exhibit B to Exhibit 2 for the price of \$54.95.

Also, the press release provided by the Colorado Cross Disability Coalition to the newspaper in Pueblo, Colorado does not mention the display of a certification tag or certificate. **(Defendant's Exhibit E)**. Under each of the claims in which the Plaintiff seeks summary judgment on liability whether it is through the Americans with Disability Act of the Rehabilitation Act the Plaintiff is required to be able to verify she has a disability from a particular ailment. In this case she has presented an argument that she has diabetes, when in fact the lab tests she presented to Dr. Khan did not substantiate a diagnosis of diabetes.

A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion. *Robertson v. Board of City Commissioners of the City of Morgan*, 78 F.2d 1142, 1146 (D Colo. 1999) A fact is “material” if it pertains to an element of a claim or defense; a factual dispute is “genuine” if the evidence is so contradictory that if the matter went to trial, a reasonable jury could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 US 248 (1986). In considering whether summary judgment is appropriate the facts must be considered in a light most favorable to the non-moving party *Cillo v. City of Greenwood Village*, 739 F. 3d 451, 461 (10th Cir. 2013).

In this case, the defendant was presented with a lab report from the referring medical provider that showed that Wendy Kolbe did not meet the criteria of having diabetes. The diagnosis of such a disease is a necessity with regards to her record of disability. The absence of the underlying disease undercuts her entire claim that she was entitled to bring her dog she claimed to be necessary for her visit and exam by an endocrine specialist.

Dated this 9th day of February, 2018.

s/ Michael R. Waters
Waters, Kubik & Cassens, LLC
707 S. Tejon Street, Suite 200,
Colorado Springs, CO 80903

Telephone: (719) 633-6303
Email: mike@lawfirmwkc.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on February 9th, 2018, 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:

Andrew C. Montoya
amontoya@ccdonline.org

/s/Dawn Palma _____