IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

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

Defendant.

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Plaintiffs, by and through undersigned counsel, hereby submit their Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment on Liability (ECF No. 37).

INTRODUCTION[1]

Defendant argues in response to Plaintiffs' Motion for Summary Judgment on Liability ("Motion") (ECF No. 28) that "Plaintiff has failed to prove she has a disability." Resp. to Pl.'s [sic] Mot. for Summ. J. on Liab. ("Response"), at p. 4. Defendant bases its argument on the results of a single blood test known as an "A1C" test that it received from Ms. Kolbe's primary care provider. *Id. See also* Exs. A-B to Response. Defendant, however, ignores the definition of

[1] Because Defendant did not observe the Court's practice standards, requiring a Separate Statement of Undisputed Material Facts, it is unclear whether the Introduction in Defendant's Response corresponds to Plaintiffs' proffered Facts or to the Introduction section of Plaintiffs' Motion. *See Zahourek Sys., Inc. v. Balanced Body Univ., LLC*, 13-CV-01812-RM-CBS, 2017 WL 1197286, at *1 (D. Colo. Mar. 31, 2017). Accordingly, Plaintiffs have attempted to capture Defendant's disputes and lack of disputes in the middle column of the undisputed facts table filed herewith (ECF No. XX), and have attempted to provided citations to the record. Plaintiffs have italicized the portions of the center column of that document that Plaintiffs have supplied attempting to capture Defendant's disputes and lack of disputes to clarify that it was Plaintiffs that completed the sections.

"disability" in the Americans with Disabilities Act ("ADA"), 42 U7.S.C.§ 12101 *et seq*., which explicitly includes individuals who have a record of having a disability and individuals who are regarded as having a disability. 42 U.S.C. § 12102(1)(B)-(C). That is, even if Defendant were correct that Ms. Kolbe does not have Diabetes, which is erroneous, Ms. Kolbe remains protected by the ADA due to her record of her disability. Defendant also artificially inflates the import of an A1C test.

I. Ms. Kolbe has a Disability under the ADA.

"The term 'disability' means, with respect to an individual--(A) a physical or mental impairment that substantially limits[2] one or more major life activities[3] of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1). "The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." *Id.* at (4). *See also*, 28 C.F.R. §36.105(a)(2)(i) ("The definition of 'disability' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA."). The United States Department of Justice regulations[4] implementing the ADA further explain:

> An individual may establish coverage under any one or more of the three prongs of the definition of "disability" in paragraph (a)(1) of this section, the "actual disability" prong in paragraph (a)(1)(i) of this section, the "record of" prong in

[2] "Diabetes substantially limits endocrine function." 28 C.F.R. § 36.105(d)(2)(iii)(H).

[3] Major life activities include "endocrine . . . functions." 42 U.S.C. § 12102(2)(B).

[4] "This guidance is entitled to deference because it represents the DOJ's authoritative interpretation of its own regulations. As the Supreme Court has held, an agency's interpretation of its own regulation is controlling . . . ." *Colorado Cross-Disability Coal. v. Abercrombie & Fitch Co*., 957 F. Supp. 2d 1272, 1280 (D. Colo. 2013), aff'd in part, rev'd in part sub nom. *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co*., 765 F.3d 1205 (10th Cir. 2014) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted); *accord Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 212 (2011); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations.").

> paragraph (a)(1)(ii) of this section, or the "regarded as" prong in paragraph (a)(1)(iii) of this section.

28 C.F.R. 36.105(a)(2)(ii).

This preference for expanded coverage under the ADA is a direct result of the ADA Amendments Act of 2008 ("ADAAA"), in which Congress expressly conveyed its intent that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis[.]" ADA AMENDMENTS ACT OF 2008, PL 110–325, September 25, 2008, 122 Stat 3553. *See also*, 28 C.F.R. § 36.101(b) ("The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of 'disability.' The question of whether an individual meets the definition of 'disability' under this part should not demand extensive analysis."). "An individual may establish coverage under any one or more of the three prongs of the definition of "disability": the "actual disability" prong, the "record of" prong, or the "regarded as" prong." 1 Americans with Disab.: Pract. & Compliance Manual § 2:2 (Disability—Tripartite definition).

Although Defendant disputes whether Ms. Kolbe actually has diabetes, that dispute is not genuine. It is also irrelevant to the question of whether Ms. Kolbe meets the definition of disability under the ADA, as Ms. Kolbe indisputably has a record of diabetes.

a. Defendant's Dispute as to whether Ms. Kolbe has Diabetes is not genuine.

Defendant disputes whether Ms. Kolbe has Diabetes, but that dispute is not genuine. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute is genuine "if the evidence

is such that a reasonable jury could return a verdict for the nonmoving party."). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Libertarian Party of New Mexico v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "If the movant meets this initial burden, the burden then shifts to the nonmovant to set forth specific facts from which a rational trier of fact could find for the nonmovant." *Id*. (quotation marks omitted).

Here, Defendant argues that Ms. Kolbe does not have Diabetes solely on the basis of a single A1C test that shows her blood glucose at 5.6, which Defendant argues is within normal ranges. Defendant further submits that the American Diabetes Association's objective standards govern whether an individual has Diabetes. *See* Response at p. 2 ("The standards for determining whether a person has diabetes or not are not created by Dr. Kahn [sic] but are well publicized blood glucose levels that are frequently set forth by the American Diabetes Association."). Defendant neglects to mention, however, that the A1C test is "a test that measures a person's average blood glucose level over the past 2 to 3 months." American Diabetes Association Common Terms, http://www.diabetes.org/diabetes-basics/common-terms/ (last visited Feb. 21, 2018). *See also* Nat'l Institute of Health: Nat'l Institute of Diabetes and Digestive and Kidney Diseases ("NIDDK"), A1C Summary, https://medlineplus.gov/a1c.html (last visited Feb. 21, 2018) (A1C test "measures your average blood glucose, or blood sugar, level over the past 3 months."); Mayo Clinic, A1C Test, https://www.mayoclinic.org/tests-procedures/a1c-

test/about/pac-20384643 (last visited Feb. 21, 2018) ("The A1C test result reflects your average blood sugar level for the past two to three months.").

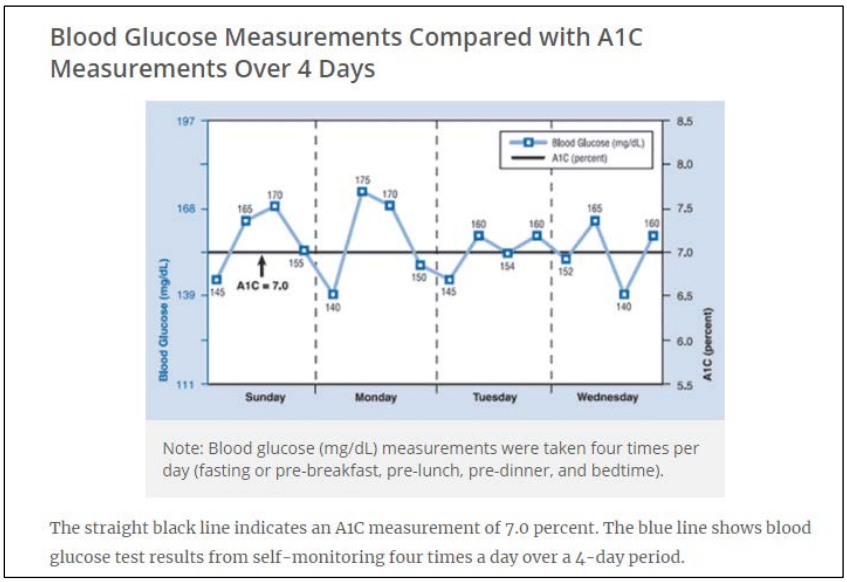
The A1C test, in fact, is not the standard method of diagnosing Diabetes, but is merely a guide to assist in Diabetes management. NIDDK, The A1C Test & Diabetes, https://www.niddk.nih.gov/health-information/diabetes/overview/tests-diagnosis/a1c-test#3 (last visited Feb 21, 2018). As the NIDDK states, "[t]he standard blood glucose tests for diagnosing type 2 diabetes and prediabetes-the fasting plasma glucose (FPG) test and the OGTT—are still recommended." *Id.* As the NIDDK continues:

> a blood glucose test may indicate a diagnosis of diabetes while an A1C test does not. The reverse can also occur—an A1C test may indicate a diagnosis of diabetes even though a blood glucose test does not. Because of these variations in test results, health care providers repeat tests before making a diagnosis.

Id. The NIDDK further indicates that an "A1C test result can be up to 0.5 percent higher or lower than the actual percentage. This means an A1C measured as 7.0 percent could indicate a true A1C anywhere in the range from ~6.5 to 7.5 percent." Defendant, however, mistakenly relies on a single A1C test, that shows Ms. Kolbe's reading at 5.6, which is one tenth of one percentage point within "normal" range, to argue that Ms. Kolbe does not, in fact, have Diabetes.

Moreover, Ms. Kolbe alleges that she "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." Response at p. 4 (citing Pl. Wendy Kolbe's Responses to Def.'s 1st Set of Written Disc. Requests, Interrog. 1). Because the A1C test results in an average for the prior three months, a "normal" reading does not establish that Ms. Kolbe does not have diabetes. An average is merely a "single value that summarizes or represents the general significance of a set of unequal values." Merriam-Webster, Definition of Average, https://www.merriam-

webster.com/dictionary/average (last visited Feb. 21, 2018). As the NIDDK illustrated in the following graph, an A1C reading remains static while blood glucose test results vary, potentially (as in Ms. Kolbe's case) drastically.



NIDDK, The A1C Test & Diabetes, *supra*. Defendant's reliance on a single A1C test to argue that Ms. Kolbe does not, in fact, have Diabetes, in the face of medical records that diagnose her with Diabetes from her treating professionals, *see* Ex. A to Ex. 2 to Motion and Ex. A to Ex. 3 to Motion, does not rise to the level of being a genuine dispute.

b. Defendant does not and cannot dispute that Ms. Kolbe has a record of having Diabetes.

Even if this Court finds that Defendant's dispute as to whether Ms. Kolbe has Diabetes is genuine, Defendant cannot and does not dispute that Ms. Kolbe has a record of Diabetes, which also qualifies her for coverage under the ADA and Section 504. In support of its Motion, Plaintiffs filed copies of Ms. Kolbe's medical records, which unequivocally state that she has Diabetes. *See* Ex. A to Ex. 2 to Pls.' Mot. (ECF No. 29) (letter from primary care professional

stating that Ms. Kolbe has Diabetes), Ex. A to Ex. 3 to Pls.' Mot. (ECF No. 30) (records from primary care clinic stating that Ms. Kolbe has Diabetes). In addition, the initial "Referral Communication Form" Defendant received from Ms. Kolbe's primary care provider indicates that she has been diagnosed with Diabetes, and lists the date of the diagnosis. *See* Ex. A to Ex. 1, filed herewith. Defendant also appears to acknowledge as much in its terse Introduction.[5]

c. Defendant regarded Ms. Kolbe as an Individual with Diabetes.

Defendant Endocrine Services, P.C. is a physician's office that provides services for Diabetes and some other endocrine related issues. Facts 1 (Def's Resp. to Interrog. 1). Defendant's President and only treating physician, Dr. Khan, is an endocrine specialist. Response at p. 6, Ex. B to Response at ¶ 3 (ECF No. 37-2) (Dr. Khan is "the only treating physician employed by Endocrine Services, P.C."). Ms. Kolbe sought health care services from Defendant following a referral from her primary care provider. Facts 6. (Def's Resp. to RFA 1). *See also* Motion at p. 2, ¶ 3 ("Ms. Kolbe's primary care provider referred her to Defendant's practice for endocrine services."), Response at p. 1 ("The Defendant does not have a disagreement as to the statement of facts in paragraphs 3, 4, 5, 6, and 7."). Defendant had access to, and reviewed records from Ms. Kolbe's primary care provider that state her diagnosis of Diabetes. *See* Response at p. 2 ("When Ms. Kolbe came to Dr. Kahn's [sic] office that is known as Endocrine Services, P.C. Cherrie Millirons, PA-C provided medical records pertaining to the endocrinology, diabetes and metabolism consultation."). Defendant, therefore, regarded Ms. Kolbe as an individual with a disability.

[5] *See* n.1, *supra*. Regardless, Defendant admitted paragraph 3, *see* Response at p. 1, which, in the Facts, states that Ms. Kolbe has a record of Diabetes, and, in the Motion, states that Ms. Kolbe was referred to Defendant's practice for endocrine services by her primary care provider. Review of the "Referral Communication Form" Defendant provided with its initial disclosures, filed herewith, further records Ms. Kolbe's diagnosis.

Because Defendant failed to respond to Plaintiffs' Corrected Separate Statement of Undisputed Material Facts (ECF No. 32-1) ("Facts"), it is unclear whether Defendant admits or denies that Defendant regarded Ms. Kolbe as an individual with a disability. Nevertheless, simply disagreeing with certain facts without providing any evidentiary basis does not rise to the level of creating a "genuine issue of material fact" in dispute. *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("opponent must do more than simply show that there is some metaphysical doubt as to the material facts"); *Harris v. Denver Health Med. Ctr.*, 11-CV-01868-REB-MEH, 2013 WL 5890576, at *2 (D. Colo. Nov. 1, 2013). Even if this Court construes Defendant's argument to signify its dispute that it regarded Ms. Kolbe as disabled, it remains undisputed that Ms. Kolbe has a record of Diabetes. *See* Section I.b., *supra*.

II. Defendant's Policy Violates the ADA.

Defendant submits that its policy does not violate the applicable law. Response at p. 5. Even if Defendant were correct, the content of its policy is immaterial with respect to Ms. Kolbe, as Defendant admits both that "Ms. Kolbe mentioned that her dog is a service animal" and that Ms. Kolbe was "not seen at [Defendant's] office after she was asked to take her dog to her vehicle parked outside the front of the office." *See* Facts 7 (Def's Resp. to RFA 4), and 9 (Def's Resp. to Interrog. 2). Those undisputed facts establish that Defendant's actions violated the ADA and Section 504 regardless of whether its policy also violates the law. Accordingly, Defendant's argument that "[t]he dispute between the two interpretations is an appropriate ground to deny the Motion for Summary Judgment" is incorrect. The dispute is not about a material fact, as Defendant's actions amounted to discrimination against Ms. Kolbe in violation of the ADA and Section 504 regardless of whether Defendant was following its policy at the time or not. "A fact

is material if under the substantive law it is essential to the proper disposition of the claim." *Wright ex rel. Tr. Co. of Kansas v. Abbott Laboratories, Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (quoting *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998) (internal quotations omitted).

Nevertheless, Defendant is mistaken in its assertion, because its policy is also violative of the ADA and Section 504.

a. Defendant's policy requires the service animal owner to "provide reasons for the presence of pet [sic] during medical office visit."

Defendant's policy violates the ADA because it requires individuals to provide "reasons for the presence of pet [sic][6] during medical office visit[.]" Facts 5 (Def's Resp. to Interrog. 3) (emphasis added). This is in stark contrast to the governing regulatory requirements, which require that "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go." 28 C.F.R. § 36.302(c)(7). In other words, the problem with Defendant's policy is not that it "is seeking information regarding the tasks being performed by the animal" albeit in different phraseology, but that it is seeking additional information that is beyond the tasks the animal performs: specifically, why it is necessary for the dog to do that task during the office visit. Many service animals may not actually be called upon during a particular medical office visit to perform their various tasks for the individual with a disability. For instance, as discussed in the DOJ commentary to its ADA's Title III regulations:

Psychiatric service animals can be trained to perform a variety of tasks that assist

[6] A service animal is not a "pet."

> individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding individuals to take medicine, providing safety checks or room searches for individuals with PTSD, interrupting self-mutilation, and removing disoriented individuals from dangerous situations.

28 C.F.R. pt. 36, App. A. That example is analogous to Ms. Kolbe and her dog, Bandit, in that Bandit is trained to detect unanticipated changes in Ms. Kolbe's blood sugar levels and alert her so that she may ameliorate the effects. None of those tasks may be required during a particular office visit, but they might. The purpose of having a service dog is to promote the individual with a disability's independence, not solely to guard against anticipated problems. *See Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1087 (N.D. Cal. 2013) ("Discriminatory deprivation of a service animal is irreparable harm."), *Sullivan By & Through Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 961 (E.D. Cal. 1990) ("injury suffered by plaintiff to both her working relationship with her dog and her dignity and self-respect" supported grant of preliminary injunction). That Bandit's services related to Ms. Kolbe's endocrine function and Ms. Kolbe was at an endocrinologist's office is no response. *See Lentini v. Calif. Ctr. for the Arts, Escondido*, 370 F.3d at 837, 845 (9th Cir. 2004) ("although the Center contends that its staff is specially trained to assist disabled individuals, the record fails to support the conclusion that these specially-trained ushers could and would provide the same assistance to Lentini that [plaintiff's service animal] Jazz does.").

That Defendant's policy requests identification of an animal as a service animal, and that Defendant's policy inartfully requests identification of the services the animal performs is not the problem. Defendant's policy violates the law because it goes one step further by requiring information about why it is necessary for the animal to perform the particular task during the

visit. *See* Response at p. 6 (concluding that single A1C lab report "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.").

b. Ms. Kolbe's presentation of a Bandit's credentials is immaterial.

Defendant also argues that Ms. Kolbe did not provide the registration card for her service dog to Defendant's agents, and that a press release regarding the case also fails to mention Bandit's registration card. Plaintiffs do not take issue with Defendant's dispute of those allegations. That is precisely why Plaintiffs do not rely on those allegations in their Motion. *See generally* Facts (presentation of registration card is not included in list of material facts). Even if Ms. Kolbe did not show Defendant Bandit's registration card, Defendant still discriminated against Ms. Kolbe. *See* 28 C.F.R. § 36.302(c)(6) ("A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal."). In short, much like Defendant's argument that its policy does not violate the ADA and Section 504 is immaterial to the question whether Defendant's actions violated the law, Defendant's argument that Ms. Kolbe did not present Bandit's registration card to Defendant is immaterial to the question of whether Defendant's actions violated the ADA and Section 504.

CONCLUSION

Defendant's argument that Ms. Kolbe does not have Diabetes, and therefore is not covered by the ADA or Section 504 is incorrect. Even if Defendant's assertion that Ms. Kolbe does not have Diabetes were accepted as true, Defendant cannot and does not dispute that Ms. Kolbe has a record of Diabetes. Ms. Kolbe, therefore, meets the statutory definition of "disability" under the law even if Defendant's assertion is accepted as true. *See* 42 U.S.C. §

12102. Nevertheless, Defendant's assertion is also not a genuine dispute, as it is based on a single A1C report that provides a three-month average blood sugar level, which methodology and conclusions are not supported by even the most scant review of the NIKKD and American Diabetes Association material that Defendant asserts is controlling on the question. Accordingly, Defendant's submission of that single A1C test does not create a genuine dispute as to whether Ms. Kolbe truly has Diabetes. Even if it did, there can be no dispute that Ms. Kolbe has a record of Diabetes. Accordingly, Ms. Kolbe has a disability under the law.

Furthermore, Defendant's actions – requiring Ms. Kolbe to remove Bandit to her vehicle after she identified him as a service animal to Defendant's staff in order to be seen – violate the law. Plaintiffs, therefore, are entitled to summary judgment on liability.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order Granting Plaintiffs' Motion for Summary Judgment on Liability, and any other relief this Court deems just and equitable.

Dated this 23 day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 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:

Michael R. Waters
Email: mike@lawfirmwkc.com

s/ Tram Ha
Legal Program Assistant
Colorado Cross-Disability Coalition