IP 01-0997-C K/T Breece v. Americare Living Centers
Judge Tim A. Baker Signed on 9/25/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BREECE, DAVID,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
AMERI CARE LIVING CENTERS,	)	CAUSE NO. IP01-0997-C-T/G
	)	
Defendant.	)	

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Plaintiff,	)	
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vs.	)	CAUSE NO. IP 01-0997-C-K/T
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Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In August 2000 Plaintiff David Breece was a maintenance supervisor at EagleCare convalescent center in Anderson, Indiana. At that time, Breece and his fellow employees were notified that Defendant AmeriCare Living Centers LLC ("Defendant") had purchased the lease for EagleCare. During the transition period in late August, Breece requested a meeting with Defendant's administrator, Sue Terry. During the meeting, Breece requested permission to use an electric cart due to difficultly in walking. In response, Terry questioned whether he could perform his job. Although Breece assured her he could, Terry informed him he would not be retained as an employee. Other than an EagleCare administrator who elected to stay with EagleCare at a different facility, Breece was the only employee not retained by Defendant.

Breece claims that Defendant failed to provide him a reasonable accommodation in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et. seq. Defendant contends that it is not an "employer" for ADA purposes. Alternatively, Defendant contends that Breece's disability was not a motivating factor in its decision not to hire him. Rather, Defendant claims that Breece was ineligible for hire based on alleged performance problems with his

previous employers at the Anderson facility.

I. Background

The facts viewed in a light most favorable to Breece reveal the following. In September 1997, Breece began his employment with Anderson Healthcare as a maintenance supervisor. [SOMF ¶ 23; Pl.'s Br., p. 2]. Anderson Healthcare and the subsequent owners of the facility in Anderson, Indiana operated a convalescent center. Breece's duties included general maintenance of the physical plant. [SOMF ¶ 26].

Breece is a Vietnam veteran and is classified as disabled American veteran by the Veteran's Administration ("V.A."). He has diabetes and other health conditions, including peripheral neuropathy and coronary artery disease. He also has scar tissue in the upper part of his lungs, and has been diagnosed with post traumatic shock syndrome. [SOMF ¶¶ 29-31; Breece Affid., ¶ 3]. Due to difficulty in walking caused by his diabetic condition, Breece wears an orthopedic boot. [Id. at ¶¶ 32-33].

Approximately two years into his employment, the Anderson facility changed its name to EagleCare, Inc. [Breece Affid., ¶ 9]. In the summer of 2000, the Anderson facility went through another change in its ownership. For instance, in late August 2000, EagleCare employees were informed that there was going to be a change in management commencing September 1, 2000, and that the Anderson facility was going to be known as "AmeriCare Living Centers," the Defendant in this action. As is discussed in greater detail below, prior to that, the Anderson facility was leased to Anderson Healthcare LLC, a corporation owned and/or operated by an investment group headed by Larry New and John Bartle, both of whom also have an ownership

interest in Defendant. Sue Terry, director of operations of consulting group First Health Corporation ("First Health") (also a related corporation to Defendant), was sent to the Anderson facility to assist Defendant in the transition. As part of the transition, Terry and Bartle, president of First Health, met with former EagleCare employees and expressed Defendant's intent to retain them once the transition concluded. [Id. at ¶¶ 16, 40]. After the transition, Terry became the Defendant's administrator. [Id. at ¶¶ 28, 38-39].

In the meantime, in early August, Breece's health care providers encouraged him to use an electric cart while at work to ease his pain from walking. The V.A. offered to provide him with the cart. [Id. at ¶ 35]. Breece originally provided medical documentation from his physician to EagleCare requesting permission to use the electric cart, but he never received a response. [Id. at ¶¶ 36-37].

On August 29, 2000, during Defendant's transition, Breece approached Terry about the use of the electric cart. Breece told Terry that he understood that the prior administration had informed her of his request to use the electric cart, and that his employer must authorization its use before the V.A. would provide it to him. [Id. at ¶¶ 47, 50]. Terry responded that if he needed an electric cart, he was not physically fit to work for Defendant. Breece responded that he did not need the cart to do his job, but it would help him. When Terry asked Breece how he was going to crawl into spaces and get on the roof, Breece responded that the V.A. would provide him further assistance with a hydraulic lift. [Id at ¶¶ 53-56; Breece Affid., ¶ 20]. When Terry inquired as to whether Breece could pass a physical exam, Breece responded that he could. [SOMF ¶¶ 57-58].

In the August 29 meeting, Terry also set forth the job responsibilities of the maintenance

supervisor. Breece told Terry that he had performed these very duties the previous three years, and that he could continue to do so. [Id. at ¶ 58]. As the meeting progressed, and as she reviewed his personnel file which included his medical information, Terry told Breece: "I don't know why [EagleCare] allowed you to work for them." [Id. at ¶ 59; Breece Affid., ¶ 20]. When the meeting concluded, Terry told Breece that he would not be retained as an employee. At no time during the meeting did Terry discuss any aspect of Breece's job performance other than her observations and doubts as to his physical ability to perform his job. [SOMF ¶¶ 27, 60-61]. Breece's final day of work was August 31, 2000. Throughout his tenure at the Anderson facility, Breece was employed by Anderson Healthcare and EagleCare, but never by Defendant. [Id. at ¶ 65].

On September 5, 2000, Breece filed a charge of discrimination with the Equal Employment Opportunity Commission alleging discrimination based on disability. Upon receiving notice of the charge on September 29, Bartle called the EEOC investigator assigned to Breece's charge, Michelle Ware, and stated there had been a "misunderstanding" between Defendant and Breece. Bartle told Investigator Ware that if Breece believed he was qualified for the maintenance supervisor position, he was entitled to an evaluation. [Id. at ¶¶ 89-90]. Therefore, since all of the department supervisors had been interviewed before being hired, Defendant offered Breece an interview. [Id. at ¶¶ 91-92].

Investigator Ware contacted Terry on October 2 to arrange an interview with Breece. However, Terry advised Ware that Breece's former job was no longer available. The next day, after consulting with Bartle, Terry called back Investigator Ware and told her that in fact Breece's former job was still available. In reality, the position had been filled two weeks

previously. [SOMF ¶¶ 95-98, 112; Exs. 14-15].

On October 6, Breece attended an interview with Defendant in which Terry and Bartle were present. [SOMF ¶¶ 99, 101]. During the interview, Bartle presented Breece with a job description for the position of maintenance supervisor. When Bartle asked Breece if he could perform these duties, Breece stated he could. [Id. at ¶¶ 102-103]. As the interview progressed, Bartle presented Breece with three copies of fire drill reports for Defendant's physical facility bearing Breece's signature. [Id. at ¶¶ 105-107]. Bartle accused Breece of falsifying the reports and demanded an explanation. In response, Breece asked to see the original reports which he had hole punched and placed in a loose leaf notebook. Breece was suspicious of the reports because one of them appeared to have white-out on portions of it. However, Bartle denied him access to the notebook. Breece denied falsifying any fire drill reports. [Id. at ¶¶ 108-10; Breece Affid., ¶ 26].

On October 18, Investigator Ware contacted Terry to inquire whether Breece was going to be hired. Terry told Ware that she had sent paperwork to "corporate" and were awaiting an answer. However, on October 17, Bartle had already sent Breece a letter that stated, in part: "AmeriCare does not employ individuals whom we know have a record of gross insubordination to management, making inappropriate sexual comments to employees, or falsification of records." [SOMF ¶¶ 116-17; Ex. 17]. Defendant claims in its motion for summary judgment that it did not hire Breece because of: (1) insubordination to prior management; (2) a pattern of inappropriate workplace behavior for which Breece had been reprimanded by his previous employer; (3) Breece's nonchalant responses during the interview when confronted by alleged inappropriate behavior regarding alleged comments he made toward women, thereby creating a

potential liability risk for future complaints of sexual harassment; (4) falsification of fire drill information; and (5) Breece's reaction when confronted with the fire drill information. [Def.'s Br., pp. 3-4].

Breece filed suit under the ADA, alleging that Defendant "refused to accommodate his disability," and that his disability "was a motivating factor in Defendant's decision to terminate." [Compl. ¶ 10]. Defendant filed a motion for summary judgment seeking dismissal on two grounds. First, Defendant claims that it does not fall within the ADA's definition of "employer" under 42 U.S.C. § 12111(5)(A). Second, Defendant claims that Breece's ADA claim fails as a matter of law because the Defendant did not act unlawfully in its decision not to hire Breece. For the reasons set forth below, Defendant's motion for summary judgment is DENIED.

II. Discussion

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Butera v. Cottey, 285 F.3d 601, 605 (7th Cir. 2002). To determine whether any genuine fact exists, the Court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. First Bank & Trust v. Firstar Information Services, Corp., 276 F.3d 317, 322 (7th Cir. 2001); Fed. R. Civ. P. 56(e) (advisory committee's notes). The Court construes all facts and draw all reasonable inferences in the light most

favorable to the nonmoving party, Breece. Demos v. City of Indianapolis, _ F.3d _, 2002 WL 1991347, *2 (7th Cir. Aug. 30, 2002), citing Albiero v. City of Kankakee, 246 F.3d 927, 931-32 (7th Cir. 2001). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific facts showing that there is a genuine issue for trial. See Michael v. St. Joseph County, 259 F.3d 842, 845 (7th Cir. 2001). To successfully oppose the motion for summary judgment, the non-movant must do more than raise a "metaphysical doubt" as to the material facts. See Wolf v. Northwest Ind. Symphony Soc'y, 250 F.3d 1136, 1141 (7th Cir. 2001). A scintilla of evidence in support of the non-movant's position is not sufficient to defeat a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 250.

B. Local Rule 56.1 Deficiencies

Local Rule 56.1[1] governs the summary judgment process in this district. As the party moving for summary judgment, in responding to Breece's statement of additional material facts, Defendant must comply with the provisions of Local Rule 56.1 (f)(3), which provides:

> Format of Objections to Asserted Material Facts or Cited Evidence: Objections to material facts and/or cited evidence shall (to the extent practicable) set forth the grounds for the objection in a concise, single sentence, with citation to appropriate authorities.

[1] On July 1, 2002, Local Rule 56.1 was significantly revised. However, since the motion for summary judgment was filed under the previous version, the Court will analyze the parties' compliance (or lack thereof) under the former version.

A moving party's failure to comply with this provision could result in damaging admissions. Local Rule 56.1(g) states in pertinent part: "The Court will assume for purposes of deciding the motion [for summary judgment] that any facts asserted by an opposing party are true to the extent they are supported by the depositions, discovery responses, affidavits or other admissible evidence."

In this case, Defendant filed a "Reply to Plaintiff's Additional Material Facts" that is replete with Rule 56.1 violations. Defendant repeatedly responds to Breece's factual assertions without citation to the record. While the Court will not conduct a point-by-point analysis of all of Defendant's violations of the rule, a few examples are helpful.

In response to statement of material fact number 28, Defendant states that the fact is "undisputed," but then provides a factual assertion unsupported by record evidence. In these instances, the Court deems Breece's factual statement as undisputed, and ignores any additional factual statements unsupported by the record. Another one of Defendant's frequent, improper responses is evidenced by its reply to statement of material fact number 29, which states: "Without sufficient knowledge to admit or deny; however, immaterial." Similarly, the Court will treat this response as not disputing the statement. See, e.g., Metropolitan Life Ins. Co. v. Johnson, 297 F.3d 558, 562-63 (7th Cir. 2002) (court deemed admitted statements in which the response "insufficient knowledge to admit or deny" was given); Woodward v. Ameritech, 2000 WL 680415, *4 (S.D. Ind. Mar. 20, 2000) (the response "This does not state a material issue of fact" is an improper response, and thus operates as an admission to the factual statement). In several other responses, Defendant refers the Court to one of its responses to a factual statement which itself was not compliant with the rules. For instance, see response to statement of material

fact number 35, which refers the Court to Defendant's response to statement of material fact number 23, where Defendant responds without citation to the record.

As a result of Defendant's failure to comply with Rule 56.1, the Court must accept many of Breece's factual statements as true. This results in the Court adopting a version of the facts less favorable than it may have if Defendant complied with the rule. As will be apparent below, these procedural deficiencies doom Defendant's motion for summary judgment.

Failure to follow the local rules is not a mere technicality, but may result in material harm. See, e.g., Citicorp Vendor Finance, Inc. v. WIS Sheetmetal, Inc., 206 F. Supp.2d 962, 963 n.1 (S.D. Ind. June 18, 2002) (court adopted the provisions of S.D. Ind. L.R. 56.1(g) where "Defendants did not provide a Response to Statement of Material Facts as required by Local Rule 56.1(f)."); Bordelon v. Chicago Sch. Reform Bd. of Trustees, 233 F.3d 524, 527 (7th Cir. 2000) (Seventh Circuit has "consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules governing summary judgment."); Caldwell-Gadson v. Thomson Multimedia, S.A., 2001 WL 1388052, *1-2 (S.D. Ind. 2001) (same). The fact-intensive nature of employment discrimination cases such as this does not oblige the Court to "scour the record" for factual disputes to help the plaintiff avert summary judgment. See, e.g., Greer v. Bd. Of Ed. Of the City of Chicago, 267 F.3d 723, 727 (7th Cir. 2001); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Accordingly, where Defendant fails to comply with Local Rule 56.1, and where Breece's statements of material fact are properly supported by the record, the Court shall treat them as undisputed, and therefore deemed admitted.

C. "Employer" Under the ADA

1. Corporate Presence at the Anderson Facility

To determine whether Defendant falls within the ADA's definition of "employer," it is necessary to track the corporations or other entities that owned, operated, or leased the Anderson facility during the events leading to Defendant not hiring Breece for employment. This requires the Court to untangle a seemingly endless web of Defendant's corporations, shell corporations, and the various transfers of the Anderson facility's lease between corporations owned by Larry New and John Bartle during the summer of 2000. Defendant's failure to comply with Local Rule 56.1 has made this a particularly difficult task.

When Breece was hired in 1997, the facility was owned and operated by an entity known as Anderson Healthcare. Two years later, the facility changed its name to EagleCare, Inc., which leased and operated 18 to 20 health care facilities, including Breece's employer. [Breece Affid., ¶ 9]. Subsequently, on April 18, 2000, EagleCare's lease was terminated, and the facility was leased to an entity known as Anderson Healthcare LLC. [SOMF ¶ 73; Pl. Exs. 1, 10]. The Anderson Healthcare LLC's lease provided that it would begin paying rent on the date it admitted its first patient or July 1, 2000, which ever came earlier. [SOMF ¶ 75; Pl. Ex. 10]. However, on June 7, 2000, Anderson Healthcare LLC transferred its lease to another entity, Defendant AmeriCare Living Centers, LLC. [Id. at ¶¶ 79-80; Pl. Ex. 11]. Anderson Healthcare LLC and Defendant were owned by the same investor group headed by New and Bartle. [SOMF ¶ 74].

Pursuant to Defendant's lease, Defendant was to assume control of the Anderson facility on September 1, 2000. New and Bartle freely assigned and transferred health facility leases between their entities to suit their business purposes. The reason for the June transfer of the lease

and the name change was because Defendant wanted to build a business enterprise recognizable anywhere in the state under the name "AmeriCare." In fact, the entity "AmeriCare Living Centers LLC" was, and still is, the licensee and operator of at least six other health facilities located in Wabash, Liberty, Evansville, New Castle, Westfield, and Monticello. [SOMF ¶¶ 86-88; Affid. of Custodian of the Records, ¶ 2].[2]

A common link exists between Anderson Healthcare, LLC, Defendant, and an entity known as First Health in that they were owned by the same investor group, which included New and Bartle. [Id. at ¶¶ 43, 74]. For instance, New was the president of both Anderson Healthcare LLC and Defendant. [Pl. Exs. 10-12]. Although Bartle's status with these corporations is not well-developed in the record, he clearly had ownership interests in Defendant. For instance, shortly before Defendant took control, and during a visit at Anderson facility, Bartle represented himself as the "president" of Defendant. [Breece Affid., ¶ 16]. Bartle was also the president of First Health, a company which provided management services to Defendant during the transition from EagleCare to Defendant. [SOMF ¶¶ 15, 43; Bartle Dep., p. 93].

New and Bartle were frequent players in the health care field. They created and set up 30 to 40 shell business entities which were kept "on the shelf" and used whenever a promising investment opportunity materialized. [SOMF ¶ 84; New Dep., pp. 25-26]. In fact, the business entities set up by New and Bartle were so numerous and complex that they could not remember whether a certain corporation was active or not. [SOMF ¶ 74; New Dep., pp. 25-27; Bartle Dep.,

[2] Defendant took control of the Anderson facility on September 1 pursuant to yet a different lease agreement. [See Pl. Ex. 11 (second lease)]. New testified that he could not recall why this second lease agreement was entered into or why it was necessary. In any event, it kept the same corporation name as the June transfer. [New Dep., p. 14; SOMF ¶¶ 81-82].

pp. 107-09].

In late August 2000, the employees at the Anderson facility were informed of the change of management which would take effect on September 1, 2000. [SOMF ¶ 38]. Days before September 1, Defendant's "corporate office" sent its representative, Sue Terry, to prepare for the transition. [Id. at ¶ 39]. Terry was the director of operations for First Health, and later became the administrator of Defendant. [Id. at ¶ 38]. During the transition period, the employees at the Anderson facility were informed that it was Defendant's intention to retain all employees. [Id. at ¶ 40]. In fact, Defendant retained all employees except Breece and the facility's administrator, Carole Maymon, who was replaced by Terry and continued to work for EagleCare at another one of its facilities. [Id. at ¶ 83].

Defendant's management gave the department heads a list of "corporate office" employees and phone numbers they could use to contact in the event any operational questions arose during the transition. [SOMF ¶ 41; Terry Dep. Exs. A, B]. These handouts suggest that Terry was acting on behalf of Defendant rather than First Health. For instance, on August 30, 2000, Terry circulated a memo indicating she was from "AmeriCare Living Centers." [SOMF ¶ 42; Terry Dep. Ex. B]. To make matters even more confusing, it was later revealed to Breece that the "corporate office" was First Health. First Health's name was later changed to AmeriCare Consulting Group. [SOMF ¶¶ 43-44].

2. Does Defendant Meet the Definition of "Employer" Under the ADA?

Pursuant to 42 U.S.C. § 12111(5)(A), an "employer" is defined under the ADA as "a person engaged in an industry affecting commerce who has 15 or more employees for each

working day in each of 20 or more calendar weeks in the current or preceding calendar year...." Smith v. Deitsch & Royer MD, Inc., 2000 WL 1707964, *1 (S.D. Ind. 2000). The determination of whether a corporate entity constitutes an "employer" under the ADA is a question of federal law. See Carver v. Sheriff of LaSalle County, 243 F.3d 379, 382 (7th Cir. 2001) (Title VII context).

In this case, Breece contends that Anderson Healthcare LLC and Defendant are "single employers" for purposes of determining whether Defendant meets the ADA's definition of "employer." [Pl.'s Br., pp. 11-16]. In response, Defendant concedes that the Anderson facility employed more than 15 employees. [SOMF ¶ 25].[3] As a result, this case is not about the "tiny employer" exception. Rather, the issue in this case is whether the employees at the Anderson facility prior to September 1, 2000 should be counted in determining whether Defendant had 15 or more employees for a minimum of 20 weeks between January 1, 1999 to December 31, 2000. See, e.g., Komorowski v. Townline Mini-Mart and Restaurant, 162 F.3d 962, 965 (7th Cir. 1998) (under substantially similar language in Title VII, "current calendar year" means the calendar year in which the alleged discrimination occurred, not the first full calendar year commencing after the act of discrimination or the calendar year in which the discrimination charge was filed); Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 580 (7th Cir. 1994) (under substantial similar language in the Age Discrimination in Employment Act, "current calendar year" refers to the year in which the alleged violation occurred and includes the calendar year from January 1

[3] In its statement of material facts, Defendant vigorously disputes that Anderson Healthcare LLC and Defendant were the same corporation and/or were owned by the same investment group. However, due to Defendant's Local Rule 56.1 deficiencies, the Court cannot take into account many of its explanations.

through December 31).

In Papa v. Katy Industries, Inc., 166 F.3d 937, 940-41 (7th Cir.), cert. denied, 528 U.S. 1019 (1999), the Seventh Circuit adopted a new test to determine whether affiliated corporations are considered a "single employer" under the anti-discrimination statutes. Kinsey v. E & G Pizza Corp., 2000 WL 1911885, *2 (S.D. Ind. 2000). To make this showing, a plaintiff must establish either: (1) the traditional conditions for piercing the corporate veil are present; (2) an enterprise splits itself into a number of corporations, each with fewer than the statutory minimum number of employees, for the express purpose of avoiding liability under the discrimination laws; or (3) the parent corporation might have directed the discriminatory act of which the employee of the subsidiary is complaining. See Worth v. Tyer, 276 F.3d 249, 259-60 (7th Cir. 2001) (adopting Papa); Jackowski v. Seoco, Inc. Northern, 2001 WL 709485, *1 (N.D. Ill. 2001) (same).[4] If one of these three exceptions applies to this case, Breece would be permitted to link Anderson Healthcare LLC and Defendant, and therefore satisfy the 20 calendar weeks requirement. See Kinsey, 2000 WL 1911885, at *2.

Breece creates issues of material fact as to whether Anderson Healthcare LLC and Defendant constituted a single employer. Under the alter-ego doctrine, a corporation is precluded "from gaining an unearned advantage in its labor activities simply by altering its corporate form."

[4] Previously, the Seventh Circuit utilized the four factor "integrated enterprise" test to determine affiliate liability. Under this test, a plaintiff had to show: (1) interrelation of operations; (2) common management; (3) common ownership; and (4) centralized control of labor relations and personnel. Due to the vagueness of these factors, and the fact that they were unweighed, this approach was explicitly rejected in Papa. See Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 678 (7th Cir. 1998); Rogers v. Sugar Tree Prods., Inc., 7 F.3d 577, 582 (7th Cir. 1994).

Chicago Dist. Council of Carpenters Pension Fund v. R&R Flooring, Inc., 2000 WL 336515, *4 (N.D. Ill. 2000), quoting NLRB v. Dane County Dairy, 795 F .2d 1313, 1321 (7th Cir. 1986). See also Trustees of Pension, Welfare, and Vacation Fringe Benefit Funds of IBEW Local, 701 v. Favia Elec. Co., Inc., 995 F.2d 785, 789 (7th Cir. 1993) (alter-ego doctrine often used to ferret out the "disguised continuance of a former business"). If a corporation "splits itself up into a number of corporations, each with fewer than the statutory minimum number of employees, for the express purpose of avoiding liability under the discrimination laws, then the corporations should be aggregated to determine how many employees each corporation had." Kinsey, 2000 WL 1911885, at *2 (internal citations and quotations omitted).

A reasonable jury could conclude that Defendant was attempting to gain an unfair advantage in its labor activities through its numerous transfers of the Anderson facility's lease to avoid the 20 calendar week requirement. In the year 2000, during just a five month period, New and Bartle set up at least two corporations with common ownership for the purpose of operating the Anderson facility. For instance, on April 18, EagleCare, the corporation which operated the Anderson facility, had its lease terminated. Thereafter, the facility was leased to an entity known as Anderson Healthcare LLC. [SOMF ¶ 73; Pl. Exs. 1, 10]. However, on June 7, Anderson Healthcare LLC transferred its lease to Defendant AmeriCare Living Centers, LLC, which was to assume control of the Anderson facility on September 1, 2000. [Id. at ¶¶ 79-80; Pl. Ex. 11]. Both Anderson Healthcare LLC and Defendant were owned by the same investment group headed by New and Bartle, with New serving as the president of both. [SOMF ¶¶ 73-74; Pl. Exs.

10-12].[5] The lease was transferred and the name changed because Defendant wanted to build a business enterprise recognized as "AmeriCare" throughout the state of Indiana. Therefore, it appears that the same investment group continued to operate with more than 15 employees without interruption throughout most of the year 2000. Only the name of the facility and its administrator changed. In addition, Anderson Healthcare LLC and Defendant operated the same business, and with two exceptions (Terry and Breece), retained the same employees after Defendant took over on September 1.

In sum, Defendant may not avoid liability under the ADA by simply changing its corporate formation, corporation name, or assigning leases between corporations with common ownership. As a result of the frequent changes in corporate form with the same group of owners, issues of material fact exist as to whether Breece was in fact employed by Anderson Healthcare LLC and Defendant for a twenty-week period in the year 2000. See, e.g., Farfaras v. Citizens Bank & Trust Co. of Chicago, 2002 WL 1008473, *4 (N.D. Ill. May 15, 2002) (issues of material fact existed as to whether three different business entities constituted a single employer because of "questionable scheme" of "common ownership.").

Accordingly, with regard to Defendant's status as an "employer" under the ADA, Defendant's motion for summary judgment is DENIED.

D. ADA Failure to Accommodate Claim

[5] Although New signed the leases in his capacity as "president" of Defendant, in a visit to the Anderson facility the week before September 1, Bartle represented himself as the "owner" of Defendant. [Breece Affid., ¶ 16; Pl. Exs. 10-12].

Under the ADA, an employer discriminates against a qualified individual with a disability by "not making a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business" U.S. Airways, Inc. v. Barnett, _ U.S. _, 122 S. Ct. 1516, 1519 (2002), quoting 42 U.S.C. § 12112(b)(5)(A). See also Hoffman v. Caterpillar, Inc., 256 F.3d 568, 572 (7th Cir. 2001) ("failure to accommodate" claims stem from 42 U.S.C. § 12112(b)(5)(A)).

To state a prima facie case of failure to accommodate disability discrimination, Breece must demonstrate that: (1) he was or is disabled; (2) the Defendant was aware of his disability; (3) he was otherwise qualified for his job; and (4) adverse action was taken against him because of his disability. Hoskins v. Northwestern Memorial Hosp., 2002 WL 1424562, *5 (N.D. Ill. June 28, 2002), citing Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999).[6] Here, Defendant concedes the first two prongs of the test (i.e. that Breece was disabled and that it had knowledge of such disability). The Court will address two remaining contested prongs in detail below.[7]

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[6] The Seventh Circuit has also adopted a modified test for a failure to accommodate claim. For instance, in E.E.O.C. v. Sears, Roebuck & Co., 233 F.3d 432, 437 (7th Cir. 2000), the court set forth a three-part, rather than a four-part test in which a plaintiff must show: (1) he was or is disabled; (2) his employer was aware of his disability; (3) he was a "qualified individual" for the position he held. See also McPhaul v. Board of Com'rs of Madison County, 226 F.3d 558, 563 (7th Cir. 2000) (same). However, the Court finds that the four-pronged approach is more appropriate, and will analyze Breece's case as such.

[7] The parties' briefs demonstrate some confusion on the proper standard for analyzing Breece's ADA claim. The ADA protects against two distinct categories of disability

1. “Qualified individual”

A “qualified individual” is defined in relevant part as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” Dvorak v. Mostardi Platt Associates, Inc., 289 F.3d 479, 484 (7th Cir. 2002), citing 42 U.S.C. § 12111(8). A plaintiff must therefore show he has “the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.” and is able to “perform the essential functions of the position held or desired, with or without reasonable accommodation.” Haschmann v. Time Warner Entertainment Company, L.P., 151 F.3d 591, 599 (7th Cir. 1998), quoting 29 C.F.R. § 1630.2(m). See also E.E.O.C. v. R.R. Donnelley & Sons Co., 2002 WL 1750946, *2 (N.D. Ill. July 29, 2002) (same). The plaintiff bears the burden of proof to show he is a “qualified individual.” See McPhaul v. Board of Com'rs of Madison County, 226 F.3d 558, 563 (7th Cir. 2000).

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discrimination: failure to accommodate (addressed above), and discriminatory discharge. See Wright v. Illinois Dept. of Corrections, 204 F.3d 727, 730 (7th Cir. 2000). If Breece wanted to proceed under a discriminatory discharge theory, the McDonnell Douglas burden-shifting approach would be appropriate. See Pohl v. United Air Lines, Inc., 194 F. Supp.2d 840, 846-47 (S.D. Ind. 2002), citing Hoffman, 256 F.3d at 571; Nawrot v. CPC Intern., 277 F.3d 896, 905 (7th Cir. 2002).

From the facts presented to the Court, it is abundantly clear that Breece’s claim is presented as a failure to accommodate claim. However, both parties address the issue of pretext as if it were a necessary component in the failure to accommodate analysis. This analysis is erroneous. See Massey v. Rumsfeld, 2001 WL 1397309, *9 (S.D. Ind. 2001), citing Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1283 (7th Cir. 1996) (McDonnell Douglas method of proof does not apply to a failure to accommodate claim under the ADA). In any event, a disparate treatment claim asserted by Breece would not survive a summary judgment motion because he fails to show that similarly situated employees received more favorable treatment, a necessary step in establishing a prima facie case.

Defendant states Breece could not perform the essential functions of his job because of his alleged past record of poor work performance, rendering him an unattractive candidate for hire. [Def.'s Br., pp. 13-14]. See Haswell v. Marshall Field & Co., 16 F. Supp.2d 952, 963 (N.D. Ill. 1998) (indicating that poor job performance results in one unable to perform essential functions of a job). However, viewing the facts in a light most favorable to Breece, no other factors other than his physical condition were taken into account when Defendant decided not to hire him for employment.

Breece creates issues of material fact that he was "qualified" for the job as the maintenance supervisor. Breece, who suffers from various health conditions which stem from a diabetic condition and his military service, approached Terry about the use of an electric cart in late August during the transition. [SOMF ¶ 47]. During their meeting, as Terry reviewed Breece's personnel file, Terry told Breece she did not believe he was physically able to perform his job if he needed an electric cart. [Id. at ¶ 53].[8] When Terry inquired as to whether he could perform duties such as climb on the roof, Breece stated he could with the assistance of a hydraulic lift that would be provided by the V.A. In addition, when Terry asked Breece if he could pass a physical, he stated he responded in the affirmative. [Id. at ¶¶ 55-58]. In declining to hire Breece, Terry stated "I don't know why [EagleCare] even allowed you to work for them." [Id. at ¶ 59]. Throughout the meeting, Breece's job performance was never discussed other than

[8] The personnel file Terry reviewed improperly contained Breece's medical information. [SOMF ¶¶ 124-25]. The ADA requires that medical information obtained by an employer be collected and maintained in separate medical files and that it be treated as a confidential medical record. See Tice v. Centre Area Transp. Authority, 247 F.3d 506, 510 (3rd Cir. 2001), citing 42 U.S.C. § 12112(d)(4)(C). However, Breece has not asserted an independent claim on this point.

Terry's observations of his physical condition. [Id. at ¶¶ 49, 61].

With three years of experience as the maintenance supervisor at the Anderson facility, Breece demonstrates he possessed the requisite employment experience and skill, and that he could perform the essential functions of that job with or without reasonable accommodation. [Id. at ¶¶ 34, 58]. Defendant's refusal to allow Breece to use an electric cart and not hiring him provides compelling evidence that Defendant failed to accommodate Breece's disability. See Tyler v. Ispat Inland Inc., 245 F.3d 969, 973 (7th Cir. 2001), citing 42 U.S.C. § 12111(9) (the ADA requires employers to provide reasonable accommodations for qualified employees, such as job restructuring, modification of equipment, or reassignment to a vacant position, to enable employees to perform the essential functions of their jobs).

In fact, the evidence suggests that Terry never seriously attempted to determine whether Breece was a "qualified individual." Terry's actions evidence a blatant disregard for the interactive process contemplated by the ADA. The Seventh Circuit has repeatedly held that the accommodation process is "interactive," under which both parties must put forth "serious efforts." Dvorak v. Mostardi Platt Associates, Inc., 289 F.3d 479, 485 (7th Cir. 2002). Terry's conclusions about whether Breece was a "qualified individual" were based on: (1) one meeting with Breece to discuss his accommodation request; (2) her refusal to speak any further with him about his request for an accommodation; (3) a review of his personnel file that impermissibly included his medical information; and (4) deciding not to hire him the same day he requested his accommodation. See, e.g., Cleveland v. Prairie State College, 208 F. Supp.2d 967, 978 (N.D. Ill. 2002) ("The function of the ADA is to force an employer to have an ongoing dialogue with a disabled employee that enables the employer to both "accommodate" the employer's policies and

job requirements and yet meet the needs of a "qualified individual.").

As a result, Breece has met his burden to establish he is a qualified individual under the ADA.

2. Adverse Action Taken Because of Disability

Breece must also present evidence that it was his disability, and not some other reason that, resulted in Defendant's decision not to hire him. "An employee cannot state a cause of action for disability discrimination where his employer terminated him for reasons unrelated to (i.e., not because) of his disability. Accordingly, to state a prima facie case of disability discrimination for failure to accommodate the disability, a plaintiff must demonstrate all four of the elements . . . including the claim that she was discharged because of her disability." Lusk v. Chrsit Hosp. and Medical Center, 2000 WL 263975, *8 -9 (N.D. Ill. 2000), quoting Foster, 168 F.3d at 1032-33 (citations omitted). See also Martini v. A. Finkl & Sons Co., 2000 WL 286796, *6 (N.D. Ill. 2000), citing Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 933 (7th Cir. 1995) (an employee cannot state a cause of action for disability discrimination where his employer subjected him to an adverse employment action for reasons unrelated to disability) (internal quotations omitted).

To meet his burden of demonstrating he was not hired "because of" his disability, Breece need not show his disability was "the" motivating factor. Rather, at the summary judgment stage, all Breece must do is raise an issue that his disability was a motivating factor. See Foster, 168 F.3d at 1033, citing Fields v. New York State Office of Mental Retardation & Dev. Disabilities, 115 F.3d 116, 120 (2d Cir. 1997) ("A" motivating factor, as opposed to "the"

motivating factor obviously means that the discriminatory factor, need not be the employer's only reason for the adverse employment action).

Defendant contends that Breece’s disability was not the reason it did not hire him. Although Terry did not discuss Breece’s alleged poor work performance during his employment with EagleCare at the August 29 meeting, Defendant states that Breece was “ineligible” for employment because of: (1) insubordination to prior management; (2) a pattern of inappropriate workplace behavior for which Defendant had been reprimanded by his previous employer; (3) Breece’s nonchalant response during the interview when confronted by alleged inappropriate behavior regarding comments towards women, and resulting potential liability risk for future complaints of sexual harassment; (4) falsification of fire drill information; and (5) Breece’s reaction when confronted with the fire drill information. [Def.’s Br., p. 3].

These arguments fail for three reasons. First, in the August 29 meeting, Terry never mentioned any of these factors as the reasons why Defendant did not hire him. To the contrary, the focus of the meeting was Breece’s physical condition and her perception that he could not perform the essential functions of the maintenance supervisor with or without an accommodation. Second, in his deposition, Bartle testified that the “main factor” Defendant considered in not hiring Breece was the alleged falsification of the fire drill reports. [SOMF ¶ 111; Bartle Dep., p. 38]. However, the fire drill reports were not discovered until after the decision not to hire Breece was already made. [SOMF ¶¶ 72, 96, 126]. In any event, the fire drill reports fail to establish any wrongdoing on behalf of Breece. [Id. at ¶¶ 127-41]. Although pretext is not a relevant inquiry in this case, this apparent inconsistent reason given for Defendant for not hiring Breece calls into question Defendant’s credibility in the reasons it gave for not

hiring him. Finally, Terry's comments in the August 29 meeting provide evidence that Defendant's decision was based on Breece's physical condition. As noted previously, Terry opined that if Breece needed an electric cart, she did not believe he was physically fit enough to work for the company. [SOMF ¶ 53]. Also in the August 29 meeting, while going through Breece's employment file which included his medical documentation, Terry commented "I don't know why [EagleCare] even allowed you to work for them." [Id. at ¶¶ 59, 124-125].

Breece creates issues of material fact as to whether his medical condition was a motivating factor in Defendant's decision not to hire him. Accordingly, Defendant's motion for summary judgment is DENIED.[9]

III. Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is DENIED. The parties are ORDERED to appear by counsel for a telephonic status conference on **October 8,**

[9] As previously noted, the McDonnell Douglas burden-shifting analysis is not appropriate in this circumstance. All Breece must do is establish the four-pronged test to create a material issue of fact for trial.

2002, U.S. Courthouse, 46 East Ohio Street, Indianapolis, Room 234 at **4:00 p.m.** The parties shall call the Court at (317) 229-3660 for this conference, the purpose of which is to discuss settlement and trial-related issues.

So ordered.

DATED this 25th day of September, 2002.

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Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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