IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE, Plaintiff, v. CONDOLEEZZA RICE and TRIPLE CANOPY, INC., Defendants.	:	Case: 1:08-CV-01678-PLF

MOTION OF DEFENDANT TRIPLE CANOPY, INC. TO DISMISS

Pursuant to Fed. R. Civ. P. 12 (b)(6) and Rule 7 of the Rules of this Court, Defendant Triple Canopy, Inc. ("Triple Canopy"), by and through its attorneys, Epstein Becker & Green, P.C., hereby moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

Defendant Triple Canopy, Inc. submits the attached Memorandum of Law in support of this Motion.

Respectfully Submitted,

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January 9, 2009

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
OF DEFENDANT TRIPLE CANOPY, INC.

INTRODUCTION AND OVERVIEW

This case challenges the terms of a government contract of the United States Department of State ("State"), the World Personal Protective Services ("WPPS") Contract, to provide security and personal protective services to American embassies, consulates, Foreign Service personnel, diplomats, foreign officials and facilities in high threat environments throughout the world.[1] Defendant Triple Canopy, Inc. ("Triple Canopy") is one of three contractors that provide services under the terms of the WPPS Contract. The WPPS Contract is a Task Order contract, requiring rapid re-deployment of personnel from country to country and assignment to assignment as directed by State on short notice; thus individuals assigned initially to one post may be subject to transfer with little or no notice to another post. At the time the claim in this case arose, Triple Canopy was working under WPPS Task Orders to provide security and

[1] A brief though comprehensive overview and history of the use by State of private contractors to provide protective services is contained in the Statement of Ambassador Richard J. Griffin, Assistant Secretary of State, dated October 2, 2007, presented to the House Committee on Oversight and Government Reform (hereinafter "Ass't Sec'y Griffin Statement"). *See* Ex. A hereto, *available at* http://www.state.gov/m/ds/rls/rm/93191.htm. The Court may take judicial notice of such public matters. *See Fowler v. District of Columbia*, 122 F. Supp. 2d 37, 40 (D.D.C. 2000).

protective services in Iraq, Haiti and Israel, though the Task Orders related to deployment in Haiti terminated shortly thereafter, *see* Exhibit A, and thus any deployment to Haiti under the contract would have been terminated.

In recognition of the fact that the WPPS Contract provides for protective services in high threat environments, the Contract contains certain job specifications and qualifications, including physical performance criteria and other job-related requirements. The claim against Triple Canopy is that it allegedly violated the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq*., when it complied with the terms of the WPPS contract and declined to deploy John Doe under the WPPS Contract due to his conceded HIV-positive status.

Plaintiff John Doe alleges that he was fully qualified to perform the personal protective services Triple Canopy was obliged to provide under the WPPS Contract, and that he submitted letters from his physicians stating he was in good health and had no medical conditions that would bar him from being deployed overseas. (Compl. ¶¶ 16, 25.) He admits however that he is HIV-positive, (Compl. ¶ 3), and claims that HIV is a "disability recognized under" the ADA. (Compl. ¶ 6.) He also states that under the WPPS, State strictly monitors each contractor's hiring of personnel, (Compl. ¶ 21), that all personnel are required to produce a valid negative HIV result within six months of their report dates, and that the WPPS Contract contains "suggested physical standards" that include a requirement that contractor personnel be "free from communicable disease." (Compl. ¶ 22.) He claims that Triple Canopy pulled him from training for deployment under the WPPS contract because he was HIV-positive, and that it provided no individualized assessment of whether he was able to perform the essential job functions. (Compl. ¶¶ 29, 32.) He claims that Triple Canopy did not offer him other positions or identify

other opportunities, (Compl. ¶ 21), though notably he does not claim that he applied for other open positions.

Triple Canopy moves to dismiss the Complaint with regard to it pursuant to Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief can be granted. For purposes of this motion only, Triple Canopy will accept the allegations of the Complaint as true, as it must, with the exception of the claim that John Doe was not offered other positions and/or opportunities within the Company. Triple Canopy moves for summary judgment pursuant to Fed. R. Civ. P. 56 in that limited regard.

Specifically, Triple Canopy moves to dismiss for the following reasons:

1. Even assuming that Plaintiff is alleging a disability within the meaning of the ADA,[2] he cannot show that he was "otherwise qualified" to perform the essential functions of the job under the WPPS Contract. His Complaint alleges that State determined that one of the basic qualifications for protective personnel assigned to high threat environments is that they be free of communicable disease, and specifically, all personnel are required to produce a valid negative HIV result. John Doe, an admittedly HIV-positive individual, is not able to satisfy this job-related criterion. He thus was not qualified to perform essential job functions under the contract.

2. Even assuming that John Doe could establish he is disabled within the meaning of the ADA, Triple Canopy is compelled to comply with the terms of the WPPS Contract and to provide a safe working environment to its employees. The law does not require an employer to violate applicable law and contract requirements in order to comply with the ADA. The terms of the WPPS contract, as alleged in the Complaint, are not unreasonable or otherwise known or recognized to violate applicable law. Indeed, they are entirely consistent with applicable military

[2] Triple Canopy further submits that Plaintiff has failed to allege facts sufficient to establish that he is disabled within the meaning of the ADA, and thus has not alleged a *prima facie* case of disability discrimination, as discussed *infra*.

regulations (specifically, Army Regulation 600-110, "Identification, Surveillance and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV)", as well as Navy and Marine regulations) which prohibit the deployment of HIV-positive individuals outside of the United States. Triple Canopy thus, in entering into the WPPS contract, and in complying with its terms, acted reasonably and in full compliance with the law, within a recognized exception to the ADA, even if John Doe is an otherwise qualified individual.

3. Even assuming that John Doe is disabled within the meaning of the ADA, the deployment of an HIV-positive individual to provide security services in high threat environments would pose a direct threat to the safety and health of other individuals. Specifically, due to the hazardous conditions in which personnel employed under the WPPS contract work, the danger of bloodshed and the consequent threat to the safety and health of other individuals, the deployment of John Doe on the WPPS contract would pose a direct threat to other individuals (as well as to himself), as defined by the ADA, and thus such deployment was not required under the ADA. Further, if Plaintiff were deployed and wounded, his colleagues would face the choice of either refusing to render aid to him or doing so without the ability to comply with Center for Disease Control ("CDC")-approved procedures[3] for treatment of HIV-positive individuals. Thus the direct threat is to both Plaintiff and his protective service colleagues and the U.S. diplomats and others they are to protect.

4. Even if John Doe were otherwise qualified, an individualized assessment of his ability to provide protective services in a high threat environment leads to the inevitable conclusion that he could not be deployed under the WPPS contract, given the particular nature of his contagious

[3] *See* Guidelines of the Center for Disease Control, "*Recommendations for the Prevention of HIV Transmission in Health Care Settings"* Ex. B hereto and World Health Organization, "*Prevention of HIV Transmission in Health Care Settings"* Ex. C hereto. The WHO procedures for prevention of transmission of HIV are similar to those of the CDC.

disease, and the risk of transmission of a deadly disease. The individualized assessment necessarily takes into account the particular nature of Plaintiff's disease and the working conditions under which he would be employed if hired. An HIV-positive individual, deployed in a high threat environment or the equivalent, presents a direct threat to the health and safety of himself and others.

5. Further, Triple Canopy satisfied any obligation it may arguably have had to provide an individualized assessment, inasmuch as it both considered the impact of John Doe's HIV-positive status on his qualification for deployment under the WPPS contract, and requested that John Doe apply for other openings within the Company where his employment would not cause a direct threat and would not place Triple Canopy in violation of the terms of its State contract.

BACKGROUND

A. The WPPS Contract.

Under the Diplomatic and Antiterrorism Act of 1986, the Bureau of Diplomatic Security ("DS") of the United States Department of State has a broad range of responsibilities with regard to providing protection of individuals and facilities. *See* Ex. A, Ass't Sec'y Griffin Statement. Given that many parts of the world to which State deploys diplomatic personnel, as a result of conflicts, wars, political unrest, and more recently, terrorist activity, have become extremely dangerous places in which to work and live, the mandate of DS to provide protective services on a broad scale and expedited basis is substantial. The Worldwide Personal Protective Services initiative is part of DS's effort to meet those responsibilities by contracting out with private companies to plan, organize, set up and deploy operatives to provide protection of both American and, in some cases, high-level, foreign officials. *Id.* To ensure the safety and security of U.S. diplomats and other government personnel, DS began using civilian contract personal

security specialists in 1994, initially during a period of political unrest in Haiti, and later in Bosnia, Afghanistan, Israel, and Iraq. DS uses the contract mechanism to enable it to quickly hire skilled security professionals for emergency needs "as world events unfold, usually with little notice," *id.,* and to rapidly expand or reduce the level of security personnel deployed at various locations based on rapidly changing needs. *Id.*

Triple Canopy, as one of three WPPS contractors, is responsible, in compliance with the terms of the WPPS Contract, for selection, screening and training of highly qualified personnel to provide the protective services detailed above, some of whom report directly to DS personnel.

B. The WPPS Contract Terms Are Consistent With Longstanding Military Regulations Prohibiting Deployment of HIV-Positive Individuals Overseas.

Army Regulation 600-110 (Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV)), first adopted in 1988, and amended several times since that date, is attached hereto as *Exhibit D*. This regulation makes it clear that HIV-infected soldiers may not be deployed anywhere (with limited exceptions) in any capacity overseas. *See* Ex. D. ¶¶ 4-2, 4-7, 5-10. The Army limitation, unlike the WPPS provision, is not limited to high threat areas. Likewise, Navy and Marine regulations prohibit the deployment of HIV-positive individuals outside of the United States, again not limited to high threat areas as is true under WPPS. *See* Ex. E hereto at 18.

C. The History of Injuries to WPPS-Deployed Individuals.

In testimony provided to the House Committee on Oversight and Government Reform, *see* Exhibit A hereto, Assistant Secretary of State for the Bureau of Diplomatic Security of the Department of State, detailed the escalating need for highly qualified security contractors and the need to sustain high performance standards once employed. In Iraq alone, contractors provide security under the WPPS contract for nearly one thousand embassy personnel in addition to other

government officials and visitors, in a climate where there is an average of over 6000 attacks per month (or 208 per day). Between 2004 and October, 2007, Assistant Secretary Griffin reported that forty security contractors had lost their lives and an additional 76 had been wounded in Iraq, Afghanistan and Israel while protecting State Department personnel. It is thus clear that the risk of bloodshed in assignments under WPPS is substantial. Indeed, Company employees deployed under the WPPS contract often have been involved in situations involving explosives, IEDs, gunfire, and hand-to-hand combat. When injuries occur in the field, Company employees are required to administer emergency first aid treatment to each other, to diplomats and to other injured parties without the benefit of protective clothing such as masks or rubber gloves or the ability to follow CDC and WHO Guidelines, *supra* n.3.

D. John Doe's Inability to Qualify for Deployment Under the WPPS Contract.

John Doe asserts in his Complaint that the WPPS Contract mandates that all personnel working under the contract produce a "[v]alid negative result within six (6) months of their report date to [Federal Deployment Center]," (Compl. ¶ 21), and that WPPS also provides "suggested physical standards" that include a requirement that contractor personnel be "free from communicable disease." (*Id.* ¶ 22.)

John Doe asserts that he failed to qualify under the WPPS contract solely because of his HIV status. (Compl. ¶ 31.) He asserts that if he had been hired for the position for which he was being trained, his first assignment would have been as a Shift Leader in Haiti. (Compl. ¶ 24.) He alleges that as a Shift Leader, his assignment would have been to lead teams to protect personnel working at the American Embassy in Haiti (as noted, the Task Order related to Haiti was discontinued) as they traveled in motorcades from the Embassy to their residences or other locations in Haiti and to provide security for the Embassy itself.

John Doe states that during the process of his pre-employment training, he submitted letters from his physicians, *(id. ¶ 25),* informing Triple Canopy of his HIV status, but also contending he was in good health and had no medical conditions that would bar him from being deployed overseas. He alleges he was pulled from training because he was HIV positive, (*id. ¶ 27),* and that Triple Canopy provided no individualized assessment of whether Plaintiff was able to perform the essential job functions, (*id. ¶ 29).* Finally, he erroneously claims that Triple Canopy did not offer him any other positions or identify any other opportunities. (*Id. ¶¶ 31,* 32.) Significantly, he does not claim that he applied for any of the open positions within the Company which did not require overseas deployment.

E. The "Accommodation" Requested by John Doe.

As detailed in the Complaint, the only accommodation requested by John Doe was a waiver of State's contract requirement that deployed individuals be free of communicable disease, and in his case, that his HIV-positive status be ignored, as well as the inherent risk to co-workers, to diplomats and to himself. He does not allege that he applied for any of the open positions posted on Triple Canopy's website at the time of Triple Canopy's decision not to deploy him or at any time thereafter. As established in the attached Declaration of Alan C. Buford, attached hereto as Exhibit F, after being advised that he could not be deployed under the WPPS Contract, John Doe was invited by Triple Canopy to apply for other openings within the Company for which he was qualified, interested and available. At the time, there were several positions at Company headquarters for which he was qualified, which were posted on the Triple Canopy website. Though John Doe was specifically invited to apply for those positions, he said he was not interested, and does not allege that he applied for any open positions. *See* Buford Decl. Ex. F ¶ 4. Though the domestic positions were not eligible for foreign service, work

schedule, or danger/hardship pay premiums, *id.*, John Doe cannot show he was not offered a reasonable accommodation. An individualized assessment of his background and capabilities indicated he could be accommodated in this manner. Although Plaintiff now generally denies that he was invited to apply for such positions, there can be no legitimate dispute that the jobs were posted and he did not apply for any other openings within the Company.

THE APPLICABLE LEGAL STANDARDS

A. Rule 12(b)(6) Standard of Review.

A complaint must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted if it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 n.5 (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Although Fed. R. Civ. P. 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Twombly*, 127 S. Ct. at 1965, the court "need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations," *Kowal v. MCI Comm'cns. Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), or a "formulaic recitation of the elements of a cause of action." *Twombly*, 127 S. Ct. at 1964-65*; see also Papasan v. Allain*, 478 U.S. 265, 286 (1986). To survive a motion to dismiss, the factual allegations of the plaintiff "must be enough to raise a right to relief above the speculative level." *Twombly*, 127 S. Ct. at 1965.

B. Rule 56 Summary Judgment Standard of Review.

The standard for a summary judgment motion is well established. *See Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006). A party is entitled to summary judgment if the pleadings, depositions, and affidavits demonstrate that there is no genuine issue of material fact in dispute and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Although a court should draw all inferences from the supporting records submitted by the nonmoving party, the mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). Further, the adverse party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, once the movant identifies those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-movant to "come forward with `specific facts showing that there is a genuine issue for trial.'" *Id.* at 587 (citing Fed. R. Civ. P. 56(e) (emphasis in original).

"Summary judgment is not a `disfavored procedural shortcut,' but is an integral procedural tool which promotes the speedy and inexpensive resolution of every case." *Marshall v. James*, 276 F. Supp. 2d 41, 47 (D.D.C. 2003) (quoting *Celotex Corp.*, 477 U.S. at 327).

For the reasons set forth below, based on the undisputed facts, Plaintiff fails to state a claim and lacks sufficient evidence to support his claims. Accordingly, Defendant Triple Canopy is entitled to judgment as a matter of law.

ARGUMENT

A. Defendant Triple Canopy Acted in Accordance With the Requirements of the WPPS Contract and With Applicable Law, and Thus Has a Valid Legal Defense To the Claims in This Case, Even if Plaintiff is a Qualified Individual With a Disability.

While the ADA is intended to promote employment opportunities for individuals with disabilities, it is not intended to do so at the risk of their own health or safety or that of others. 42 U.S.C. § 12113(b); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 570-72 (1999). Nor is an employer required to violate federal safety standards or other federal requirements in order to comply with the ADA. 29 C.F.R. § 1630.15(e).

In this case, the Complaint alleges that defendant Triple Canopy acted in full compliance with the terms of its WPPS contract. Indeed, the Complaint makes it clear that Triple Canopy would be in default of its contract if it deployed individuals under the contract who were known to be HIV-positive. The actions alleged to have been taken by Triple Canopy are also precisely those that would be required of the U.S. Army, Navy or Marines, pursuant to applicable regulations. Individuals who are HIV-positive may not be deployed overseas by the Army, Navy or Marines, precisely because such deployment presents a direct threat to the safety and health of others, as well as to themselves. While those regulations are not directly applicable to Triple Canopy in fulfilling its WPPS obligations, they are regulations which were known to Triple Canopy to exist, applying under similar deployment circumstances, to protect the safety and health of others. Finally, the actions alleged to have been taken by Defendant Triple Canopy are consistent with duties of employers under by the Occupational Safety and Health Act ("OSHA"), to protect co-employees from exposure to deadly diseases in the workplace. 29 U.S.C. § 654(a) (imposing a duty on employers to provide employees a workplace which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees).

This is therefore not just a simple case of "the government made me do it." While reliance on the contract terms, and government standards in general is well-justified as a matter of law, as detailed, Triple Canopy also had independent reasons for believing the contract terms to be entirely legal, based on compelling and applicable safety obligations. The Supreme Court, in similar circumstances, held that an employer was justified in denying employment to a disabled individual, based on safety standards issued by the federal government. In *Albertson's,* in the context of determining whether a former employee, a truck driver with monocular vision, was a "qualified individual" with a disability under the ADA, the Supreme Court held the employer was justified in pointing to its compliance with applicable Department of Transportation safety regulations to justify its visual-acuity job qualification standards. In this regard, the Court stated as follows:

> It is crucial to its position that Albertson's here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable. The job qualification it was applying was the [federal safety standard for visual acuity]. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.

Albertson's, 527 U.S. at 570. Ultimately, the Court held that an employer is not required to establish the validity of an "existing and otherwise applicable safety regulation issued by the Government itself." *Id.* Thus, applicable governmental regulations are necessarily job-related and consistent with business necessity. *See also, Bay v. Cassens Transport Co.,* 212 F.3d 969 (7th Cir. 2000)(holding that a truck driver was not a "qualified individual" under the ADA because he did not have federal certification that he was physically qualified for the position).

Just as the DOT safety regulations at issue in Albertson's were held to have the force of law, so too should the WPPS contract requirements, OSHA requirements, and co-existing military regulations be deemed to have the force of law.

EEOC implementing regulations and interpretive guidance make it clear that an employer may rely on the requirements of other Federal laws or requirements in making decisions that otherwise might be impacted by the ADA. In this regard, the regulations provide as follows:

> *Conflict with other Federal laws.* It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

29 C.F.R. § 1630.15(e). *See also, Wilson v. MVM, Inc.*, 475 F.3d 166 (3d Cir. 2007).

In this case, the Complaint alleges that Triple Canopy was required by contract to decline to deploy HIV-positive individuals under the WPPS contract. Such action is consistent with applicable implementing EEOC regulations (specifically, section 1630.15(e)). It also is entirely consistent with applicable U.S. military regulations, detailed above, with OSHA, and with health and safety standards generally in areas where there is a high risk of bloodshed.[4] Thus, the WPPS

[4] This is in accord with a long line of government-contractor defense cases, which though not directly applicable, establish legal precedent for protecting contractors who act entirely in accord with terms of government contracts. It is well-established that when a contractor acts in accord with the terms of a federal government contract and the government's directives to provide services or supplies to the government under that contract, that contractor is protected from liability to the extent harm may result from such compliance with government directives. *Boyle v. United Technologies, Inc.*, 487 U.S. 500 (1988). Though the government contractor defense is largely applied to provide an affirmative defense to state tort claims where there may be a conflict between a "uniquely federal interest" and state law, and to situations involving supply contracts with detailed specifications, many lower courts assessing the defense have concluded that contractors are protected by the government contractor defense as long as governmental discretion is exercised. *See, e.g., Hudgens v. Bell Helicopter/Textron,* 328 F.3d 1329, 1334 (11th Cir. 2003)(applying government contractor defense to a lawsuit resulting from allegedly improper helicopter maintenance by government contractor, inasmuch as the "design specifications and the articulation of maintenance protocols involve the exercise of the very same [governmental] discretion as was meant to be protected by the government contractor defense); *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007) (denying summary judgment to defendant whose employees were not acting under direct military order and granting summary judgment to defendant whose employees were acting under direct military orders); *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 422-23 (D.S.C. 1994)(property damage suit by landowner against a

requirement appears to have been fully in accord with applicable Defense Department protocol and regulation as well as consistent with a general mandate to protect the health and welfare of all employees to the maximum extent possible.

Finally, Plaintiff himself alleges he was not hired because HIV-positive individuals could not be deployed under the contract. Therefore, for these purposes, it is clear that Triple Canopy's decision was based on contract terms and Plaintiff's presentation of a direct threat, not because he was disabled. There is no allegation that Triple Canopy viewed Plaintiff to be disabled or that it took any action against him because of an alleged disability. The evidence is strongly to the contrary. *See Wilson v. MVM, Inc.*, 475 F.3d 166 (3d Cir. 2007) (employee discharged because he did not meet the medical qualification standards under a United States Marshall Service contract to provide security services to the federal courts, not because he was disabled or viewed to be disabled; medical qualifications are an essential job function); *Leitch v. MVM, Inc.*, 538 F. Supp. 2d 891 (E.D. Pa. 2007)(employee medically disqualified by terms of United States Marshall Service contract to provide security services could not make out *prima facie* case of discrimination under the ADA; "if a CSO does not meet the medical qualifications established by the USMS, he is not permitted to work under the contract as a CSO"); *McGovern v. MVM, Inc.*, 545 F. Supp. 2d 468 (E.D. Pa. 2008) (holding contractor was not vicariously liable for discrimination, though noting a contractor cannot hide behind the terms of a contract, and also granting summary judgment to employer based on lack of evidence that it perceived CSO to be disabled).

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contractor employed to clean up a hazardous waste site for the Environmental Protection Agency is barred due to "uniquely federal interest in the subject matter of the contract;" because the EPA approved the site for clean-up, determined the best method for clean-up and determined the location of the stockpile, precise specifications required of *Boyle* government contractor defense test were met).

B. Plaintiff's Admitted HIV-Positive Status Rendered Him Unqualified for Deployment Under the WPPS Contract and Constituted a Direct Threat to the Health and Safety of Others and Himself in the "Work Environment" Contemplated by the WPPS Contract.

1. Plaintiff Cannot Establish a *Prima Facie* Case of Discrimination.

Defendant Triple Canopy submits that Plaintiff cannot establish a prima facie case of disability discrimination under the ADA because, even if he could sufficiently allege he was disabled within the meaning of the ADA,[5] he cannot establish that he is a qualified individual with a disability. The law is clear that an employer does not violate the ADA by using qualification standards, including safety standards, that are job-related and consistent with business necessity.

[5] Plaintiff has not sufficiently alleged facts to prove that he is disabled. Indeed, he has asserted that he was fully capable of performing all functions of the job at issue. Though he alleges he is HIV-positive, HIV is not a *per se* disability, and Plaintiff has not identified any major life activity substantially limited by his HIV status. It is well-established that the definition of disability does not apply to a class of people, but to each individual separately, and must be determined based on "whether an impairment substantially limits the 'major life activities' of such an individual." *Sutton v. United Airlines,* 527 U.S. 471 (citing *Bragdon v. Abbott,* 524 U.S. 624 (1998)).

The law is equally clear that HIV-positive status is not a *per se* disability. In *Bragdon*, the Supreme court stated that it "need not address whether HIV infection is a *per se* disability," *Bragdon,* 524 U.S. at 642. Rather, the plaintiff in that case alleged that the HIV infection impaired the major life activity of reproduction, and because her testimony in that regard was uncontroverted, the Court noted that the issue of disability was conceded. The Court, however, expressly declined to hold that HIV was a *per se* disability, leaving it for a case by case analysis. Thus, read together, *Bragdon* and *Sutton* require an individualized inquiry into whether HIV in any single case is a disability within the meaning of the ADA. In this case, though Plaintiff alleges that he is HIV positive, he does not assert facts to show substantial limitation of a major life activity, an element essential to an ADA claim. A showing that a person has a disorder, by itself, does not automatically mean that the person is disabled under the ADA. Indeed, the courts which have considered this issue have held that HIV-positive status is not a *per se* disability. In *Bragdon*, the Supreme Court expressly declined to hold that HIV was a *per se* disability, *id*. at 642, noting that Bragdon's own testimony in that regard was uncontroverted. *See EEOC v. Lee's Log Cabin*, 546 F.3d 438 (7th Cir. 2008) (expressly declining to find that HIV is a *per se* disability); *Waddell*; *Solorio v. American Airlines, Inc.*, No. 00-3780-CIV, 2002 WL 485284, at *1 (S.D. Fla., Feb. 28, 2002); *Teachout v. New York City Dep't of Educ.*, NO. 04 CIV. 945 (GEL), 2006 WL 452022 (S.D.N.Y. Feb. 22, 2006); *Davis v. Chao*, NO. 06 C 1066, 2008 WL 905184 (N.D. Ill. March 31, 2008)(noting case by case analysis for determination of HIV as a disability); *St. John v. NCI Bldg. Systems, Inc.*, 537 F. Supp. 2d 848 (S.D. Tex. 2008). To the extent that the D.C. Circuit in *Adams v. Rice, 451 F.3d 898 (D.C. Cir. 2006)* stated in *dicta* that "the Supreme Court held [in *Bragdon*] that asymptomatic HIV constitutes a disability under the ADA because it is a physical impairment that substantially limits the major life activity of reproduction," it must be noted that the Court did not hold that HIV is a *per se* disability, and indeed in *Adams* there was a stipulation with regard to disability.

The ADA prohibits discrimination against a "qualified individual with a disability *because* of the disability of such individual in regard to …the hiring, advancement, or discharge of employees. . . ." 42 U.S.C. § 12112(a) (emphasis added). The ADA categorizes as a discrete form of discrimination the use of qualification standards or other selection criteria "that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, *unless* the standard. . .or criteria, as used by the covered entity, is shown to be *job related for the position in question and is consistent with business necessity*." 42 U.S.C. § 12112(b)(emphasis supplied).

On the threshold determination as to whether an ADA claim can go forward, a plaintiff must establish that he is a qualified individual with a disability *and* that an adverse action was taken against him *because of his disability*. *Duncan v. Wash. Metro. Area Transit Auth.,* 240 F.3d 1110, 1114 (D.C. Cir.), *cert. denied*, 534 U.S. 818 (2001) (emphasis added),(quoting *Swanks v. Wash. Metro. Area Transit Auth.,* 179 F.3d 929, 934 (D.C. Cir.), *cert. denied*, 528 U.S. 1061 (1999);[6] *Stumbo v. Dyncorp Tech. Servs., Inc.*, 130 F. Supp. 2d 771 (W.D. Va. 2001)(rejecting plaintiff's ADA claims and granting summary judgment to employer who rejected plaintiff for deployment under WPPS contract in war zone, based on medical qualification standards; finding plaintiff was not disabled or regarded as disabled, and no reasonable accommodation could be provided for war zone duty).

An ADA claim is analyzed under the legal framework established by *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993); *Taylor v. Rice*, 451 F.3d 898 (2006); *Swanks*, 179 F.3d at 934. The initial burden is on the plaintiff to

[6] Moreover, under *Duncan* and *Swanks*, Plaintiff would have to establish he was disqualified from a broad range or class of jobs to establish a "regarded as" claim under the ADA, and he in any event does not claim that he was "regarded as" disabled. Plainly, the number of jobs where the threat of explosives, being shot, etc., create the risk of bloodshed and threat to one's self, to co-workers and others is extremely limited and would never meet the *Duncan* and *Swanks* requirements for disqualification from a broad range or class of jobs.

produce evidence making out a *prima facie* case of discrimination. If the plaintiff does so, the burden (of production, not proof) shifts to the employer to present evidence to support its claim that it had a non-discriminatory reason for the personnel action. If the employer articulates a legitimate non-discriminatory reason for its action, the plaintiff must prove that the employer's explanation is a pretext for discrimination and that intentional discrimination occurred. *Id.*

To prove a prima facie case of discrimination, a plaintiff in an ADA case must prove: (1) that he is an individual with a disability within the meaning of the ADA; (2) that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) that he was not hired "because of" his disability. *Id.*

A "qualified individual with a disability" means "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…." 42 U.S.C. § 12111(8). In making a determination as to whether an individual is a qualified individual with a disability, the ADA instructs that consideration should be given to the employers' judgment as to what functions of a job are essential. *Id.* An individual is disabled under the ADA if he shows that he (a) has a physical or mental impairment which substantially limits one or more "major life activities;" (b) has a record of such an impairment, or (c) is regarded as having such an impairment. 42 U.S.C. § 12102(2); *Sutton v. United Air Lines, Inc.* , 527 U.S. 471 (1999); *Mack v. Strauss*, 134 F. Supp. 2d 103, 110 (D.D.C. 2001). In this case, Plaintiff does not allege that he was regarded as disabled.

In this case, Plaintiff admits that he did not meet the medical qualification standards under the WPPS contract, which standards he admits were required under the contract. There is no evidence that the medical standards were pretextual or otherwise not legitimate safety

standards. Therefore, Plaintiff cannot as a matter of law show that he is a qualified individual with a disability.

2. Plaintiff Was Not Qualified for the Position Because He Posed a Direct Threat to the Health and Safety of Others and to Himself.

A closely related and overlapping issue relates to the ADA's "direct threat" qualification standard. In *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.16 (1987), in deciding a Rehabilitation Act case, the Supreme Court held that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." That case sets the standard for the "direct threat" provision in the ADA, and makes it clear that the issue of threat to others as posed by an employee with a communicable disease was properly analyzed as a question of whether the employee was "otherwise qualified." *See EEOC v. Amego, Inc.*, 110 F.3d 135 (1st Cir. 1997), citing legislative history of ADA, H.R. Rep. No. 101-485, pt. 3 at 34 (1990) and 1990 U.S.C.C.A.N. 457.

Even if Plaintiff had been qualified under the standards set out in the WPPS contract, Defendant Triple Canopy nevertheless would have been justified in declining to hire him to be deployed under the WPPS contract because such deployment would have presented a direct threat to the health and safety of others and of plaintiff, as established by Supreme Court precedent as well as the statutory provisions of the ADA. The law is clear that an employer may require, as a "qualification standard" that an individual not pose a direct threat to the health or safety of others or himself, 42 U.S.C. § 12113(b), and also may apply qualification standards that otherwise screen out disabled individuals as long as such standards are job related and consistent with business necessity. 42 U.S.C. § 12113(a). A separate statutory section labeled "defense"

essentially restates the built in exception for job related standards consistent with business necessity, as follows:

> (a) In general. – It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be *job-related and consistent with business necessity,* and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.
>
> (b) Qualification Standards. – The term "qualification standards" may include a requirement that an individual shall not pose a *direct threat* to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113 (emphasis supplied). *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 86-87 (2002); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006). Further, according to implementing EEOC regulations, qualification standards include "personal and professional attributes including the skill, experience, education, *physical, medical safety,* and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position." 29 C.F.R. § 1630.2(q)(emphasis supplied).

Direct threat "means a significant risk of substantial harm to the health or safety of the individual…that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630(r); *see also* 42 U.S.C. § 12111(3); *Chevron*, 536 U.S. at 86-87 (holding that direct threat to one's own health and safety is encompassed within the meaning of "direct threat"); *Taylor v. Rice*, 451 F.3d at 390-91.

While it is well-established that HIV-positive status does not present a direct threat to the safety and health of others in a *normal working environment* where there is little danger of bloodshed or other transfer of bodily fluids, case law fully acknowledges the direct threat defense in connection with HIV-positive individuals where there is a threat of exposure to blood

and bodily fluids. The regulatory standard for assessing the existence of a direct threat requires generally an assessment of the following factors:

- the duration of the risk
- the nature and severity of the potential harm
- the likelihood that the potential harm will occur
- the imminence of the potential harm.

Chevron, 536 U.S. at 86-87; *Arline*, 480 U.S. at 287-88. In *Onishea v. Hopper*, 171 F.3d 1289, 1299 (11th Cir. 1999)(*en banc*) the Eleventh Circuit, sitting *en banc*, elaborated on the direct threat test in an HIV case. It examined the meaning of "significant risk" and held that "when transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease." Thus when the adverse event is a deadly disease, the risk of transmission is deemed significant even if the probability of transmission is low. In devising this test, the Court expressly accepted proof of a theoretical risk of transmission to protect individuals from "well-founded worries that death can result from a ruling that an HIV-positive plaintiff is otherwise qualified [thus avoiding] the absurd conclusion that Congress has decreed even a few painful deaths in service of the Act's noble goals." *Id. See also, Mauro v. Borgess Med. Ctr.*, 886 F. Supp. 1349 (W.D. Mich. 1995), *aff'd*, 137 F.3d 398, 402 (6th Cir.), *cert. denied*, 119 S. Ct. 51 (1998)(HIV-positive individual employed as surgical technician presented a direct threat to the health and safety of others that could not be eliminated by reasonable accommodation); *Doe v. Univ. of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995)(neurosurgical resident's performance of exposure-prone invasive procedures using needles and other sharp instruments posed significant risk to health and safety of patients that could not

be eliminated by reasonable accommodation); *Bradley v. Univ. of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993) (*per curiam*), *cert. denied*, 510 U.S. 1119 (1994); *Waddell v. Valley Forge Dental Assocs. Inc.*, 276 F.3d 1275 (11th Cir. 2001)(affirming summary judgment for employer in case by dental hygienist who was discharged as "direct threat" to the health and safety of patients for whom she performed "exposure prone" procedures, and finding that "even though the risk is small, the uncontroverted evidence is that a dental worker sometimes does stick or cut himself or herself during treatment….blood to blood contact providing opportunity for transmission theoretically could happen, even though the risk is small and such an event never before has occurred"), relying on *Onishea; Scoles v. Mercy Health Corp.*, 887 F. Supp. 765 (E.D. Pa. 1994) (Rehabilitation Act decision, holding orthopedic surgeon who failed to advise patients of his positive HIV status was properly prevented from further invasive surgical procedures; medical condition posed a direct threat to patients which could not be eliminated by reasonable accommodation). *See also Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (reversing judgment in Rehabilitation Act case in favor of would-be nursing student because her hearing problems could impede her performance in emergency situation and endanger patients).

Though this Circuit has not squarely decided which party bears the burden of proof with regard to direct threat, *see e.g., Taylor v. Rice*, 451 F.3d at 906, n.14, several circuit courts have addressed this issue in the context of proving direct threat where safety considerations are inherently bound up in the essential functions of the job, and thus effectively merge with the issue of whether the plaintiff is a "qualified individual." The circuit courts which have considered the issue in this context, consistent with *Arline*, have placed the burden of proof on the plaintiff, a result which Defendant Triple Canopy submits should apply here.

The First Circuit, in *EEOC v. Amego, Inc.*, 110 F.3d at 144, held that where the issue of direct threat and a plaintiff's qualifications for an inherently dangerous job overlap, the burden remains on the plaintiff to prove that he is otherwise qualified to perform the inherently dangerous essential functions of the job. Likewise the Eleventh Circuit, in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied,* 535 U.S. 1096 (2002), held that an employee with epilepsy had the burden of proving that he did not pose a direct threat when working in precarious positions above, below, and next to dangerous industrial machinery. In *Waddell v. Valley Forge Dental Assocs.*, 276 F.3d 1275, 1280 (11th Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), the Court held that the plaintiff, an HIV-positive dental hygienist, had the burden of proving she did not present a direct threat where the dental procedures involved inherent danger of blood exchange and open wounds.

In this case, of course, individuals deployed under the WPPS contract face an undoubtedly far greater chance of injury and bloodshed than in the controlled working environments discussed above. The risk of infection of a deadly disease, to fellow security guards, diplomats and others, unquestionably is substantial. Applying the criteria specified by EEOC regulations, the risk is great:

> First, the duration of the risk is as long as the individual is deployed under the WPPS contract. It is not a short-term risk and is inherent in postings under WPPS.
>
> Second, the nature and severity of the potential harm is also extreme. The disease is life-threatening, unfortunately and despite years of research, without any cure.
>
> Third, the likelihood that potential harm will occur, in a war zone, is reasonably high, certainly much higher than in the controlled medical environments where HIV has uniformly been held by the courts to present a direct threat.
>
> Fourth, the imminence of the potential harm, also weighs in favor of finding a direct threat. While this factor is not as substantial as the first three factors, given the day to day job duties of individuals deployed under the WPPS contract, this factor is not insubstantial.

Accordingly, due to the direct threat that Plaintiff would present to the health and safety of others and himself, he is not a qualified individual within the meaning of the ADA.

3. Plaintiff Did Not Request a Reasonable Accommodation and Rejected Suggestions of Triple Canopy That He Apply for Other Open Positions at Its Corporate Headquarters.

The ADA defines discrimination as, among other things, a failure to make *reasonable* accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of the covered entity, 42 U.S.C. § 12112(b)(5)(A), or using qualification standards other selection criteria that screen out individuals with a disability "unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be *job-related for the position in question and is consistent with business necessity."* 42 U.S.C. § 12112(b)(6) (emphasis supplied).

"Reasonable accommodation" under the ADA "may include" such things as making facilities readily accessible to and usable by individuals with disabilities, job restructuring, reassignment to a vacant position, or modification of equipment or devices. 42 U.S.C. § 12111(9).

In this case, Plaintiff alleges that Triple Canopy should have made an individualized assessment of his needs and evaluated his case accordingly. However, Plaintiff admits that the terms of the WPPS Contract precluded his deployment thereunder, and thus a request that the medical requirements be waived was both outside of Triple Canopy's control, as acknowledged by Plaintiff, and not reasonable. Once the assessment of his contagious disease included the identification of that disease as HIV, the conclusion was that he could not be deployed under the WPPS contract, both because the contract prohibited it and because he would pose a direct

threat. *See Flemmings v. Howard Univ.*, 198 F.3d 857, 861 (D.C. Cir. 1999). Further, an employer is not required to waive an essential job function as a form of reasonable accommodation. *See, Barth,* 2 F.3d at 1187 (accommodation imposes an undue burden if it requires a fundamental alteration in the nature of employer's program); *Peters v. City of Mauston*, No. 01-C-0247-C, 2001 WL 1753497, at *8 (W.D. Wisc. Dec. 20, 2001)(holding an employer is not required to waive the essential functions of the job). Plainly, as the decisions cited in the preceding sections show, if an accommodation was not possible in secure, State-side medical facilities for HIV-positive individuals, none could be provided in hostile areas where employees served under WPPS.

The United States District Court for the Western District of Virginia decided a similar case involving an ADA challenge to the WPPS contract and held that the Court "cannot conceive of any reasonable manner in which Defendant could have accommodated the working conditions of Bosnia to the medical needs of the Plaintiff." *See Stumbo*, 130 F. Supp. 2d at 774 (former police officer with fully correctable hypertension did not show that he was disabled or regarded as disabled, and could not show that accommodation could be provided in a war zone under the WPPS contract).

Accordingly, Triple Canopy submits that to the extent that Plaintiff's request for an accommodation related solely to a waiver of the contagious disease prohibition, and specifically to the HIV prohibition, that request was not reasonable. Significantly, Plaintiff does not allege that he applied for any open positions at Triple Canopy's corporate headquarters, as he was urged to do. Such application would certainly have been a request for a reasonable accommodation, and one which could have been made. Having failed to follow up on the

request however, Plaintiff cannot reasonably be heard to complain that any limitations he may suffer were not accommodated.

Plaintiff thus has not identified a reasonable accommodation which he alleges he requested, and thus, even if he were an otherwise qualified individual with a disability, and even if Triple Canopy rejected his application for that reason, he cannot establish an essential element of his case. Plaintiff has never suggested how a waiver in his case could have solved the direct threat problem given the dangerous conditions on the WPPS contract.

Thus, there is no evidence, and indeed no allegation, that Triple Canopy refused to make a reasonable accommodation. Indeed, in the absence of Plaintiff's application for a job for which he was qualified, e.g., at corporate headquarters, the accommodation claim must fail.

CONCLUSION

For the foregoing reasons, Triple Canopy respectfully requests that the Court enter a judgment dismissing this case under Fed. R. Civ. P. 12(b)(6) and/or Rule 56.

Respectfully Submitted,

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