IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JOHN HARRISON, Plaintiff v. BENCHMARK ELECTRONICS HUNTSVILLE, INC., Defendant.	)	CASE NO. CV-07-J-0815-NE

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

For the reasons stated below, Benchmark's motion is due to be denied.

II. RESPONSE TO MOVANTS' ALLEGED UNDISPUTED FACTS[1]

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted as stated but denied that Benchmark was not Harrison's employer within the meaning of the ADA.

[1] Facts admitted are admitted for summary judgment purposes only.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Disputed and Irrelevant. In his deposition, Anthony asserted two different explanations for stopping the offer letter to Harrison: 1) because employees reported that Harrison had made threats, [Pl. Ex. A. (Anthony Dep.) at 126-27, 128, 193-94], and 2) because of an audit that was due to take place several weeks later, [Anthony Dep. at 104-06, 128]. After being confronted with problems with both

rationales, Anthony stated he could not actually recall why he stopped the offer letter. [Anthony Dep. at 194-95] Anthony admitted that it made no sense to say that the audit was the reason since he did not have to do anything other than let human resources do the offer letter. [Anthony Dep. at 194, 199-200] Moreover, the audit was not mentioned by Anthony or anyone else as a reason for stopping the offer letter until this lawsuit. Anthony made no mention of it in his after-the-fact email, [Pl. Ex. 12], and Benchmark did not mention it in its EEOC position statement, asserting an entirely different (and equally false) reason. [Pl. Ex. 4 at 4].

22. See response to Def. Fact ¶ 21.

23. See response to Def. Fact ¶ 21.

24. See response to Def. Fact ¶ 21. Additionally, the affidavit testimony of Anthony only identifies a single employee, Tim Brown, as expressing concerns, not multiple employees. [Def. Ex. C (Anthony Dep.) at ¶ 15] Anthony does not state when Brown expressed his concerns. [Anthony Aff. at ¶ 15] Therefore, the cited testimony cannot establish that Anthony was aware of any concerns expressed by Brown. Moreover, Anthony did not testify the concerns of Brown were a reason he stopped the offer letter. See response to Def. Fact ¶ 21. Finally, Brown claimed he told Anthony not to hire Harrison within a few days or a week of Harrison's termination on August 18, 2006, long after Anthony stopped the offer letter in July

2006. [Def. Ex. H (Brown Dep.) at 28, 110, 159]

25. Disputed. While early in his deposition Brown claimed to have worked closely with Harrison and described in vivid language Harrison's poor performance, by the end of the deposition he had retracted most of his claims. Specifically, Brown conceded that after a training period in March/April 2006 and a period in April/May 2006 in which Brown was available for Harrison's questions, Harrison learned the job and became Brown's replacement as the primary debug tech in Galaxy while Brown moved to a different area, hardly saw Harrison, and had no dealings with Harrison. [Brown Dep. at 155-59; Anthony Dep. at 65, 72-73, 75; *see also* Brown Dep. at 62-63, 112, 114-15; Def. Ex. A (Harrison Dep.) at 85]

While both Brown and Anthony claim Brown told Anthony not to hire Harrison, a jury does not have to believe this is what happened or that Anthony relied on anything Brown may have said. Anthony admitted he would only have relied on Brown if he could provide "reliable" information. [Anthony Dep. at 102-03] Anthony's testimony shows he had no reliable information from Brown. Anthony admitted knowing that Brown would have had only limited knowledge of Harrison's work because it had been months since Brown had been working with Harrison. [Anthony Dep. at 65, 72-73, 75] Anthony admitted Brown provided no details concerning the basis for his alleged opinion. [Anthony Dep. 101-02] Anthony claims

that he just "took Brown's word for it" despite Brown's lack of knowledge. [Anthony Dep. at 93]

Significantly, Anthony's after-the-fact email, contrary to his testimony, claims extensive dealings between Brown and Harrison at the end of Harrison's employment. [Def. Ex. K] A reasonable jury can find Anthony, in order to justify the unjustifiable after the fact, misrepresented Brown's dealings with and statements concerning Harrison in order to make his action in stopping the job offer sound reasonable to the HR persons to whom he was reporting.

Moreover, there is ample evidence Harrison performed well as a debug tech. Anthony referred Harrison for permanent hire. [Anthony Dep. at 232] Only temporary employees who have performed well are referred for permanent hire as Benchmark employees. [Pl. Ex. 2 (Robinson Dep. II) at 378; Little Dep. at 19; Def. Ex. B (McSherry Dep.) at 67] The temporary workforce is used to identify qualified candidates for permanent hire. [Little Dep. at 19; McSherry Dep. at 67] If there were any concerns about Harrison's performance, Harrison would not have been selected for permanent hire. [Robinson Dep. II at 378; Little Dep. at 19; McSherry Dep. at 67] Anthony even admitted he would not have referred Harrison for permanent hire if Harrison had performance issues. [Anthony Dep. at 234-35] Teresa McDowell, a team leader identified as a person with knowledge of Harrison's allegedly poor

performance, [Brown Dep. at 87-88, 98-99, 107-08], said she was aware of no issues with Harrison's job performance, [McDowell Dep. at 31, 33]. Moreover, Harrison had daily communications with Anthony regarding the work to be done, but neither Anthony nor anyone else told Harrison there was any issue with his job performance. [Harrison Dep. at 41, 66-67, 156-57]

26. Disputed. See response to Def. Fact 25.

27. Disputed. See response to Def. Fact 25.

28. Admitted that Brown says he did not tell Anthony anything about Harrison's alleged incompetency prior to Anthony's decision to hire Harrison but Brown's motive is disputed. Brown conceded Harrison learned the job. [Brown Dep. at 159] Thus, the real motive would have been Harrison's good performance. Also, Anthony testified the only comment made by Brown about Harrison after the drug test was Brown's unsupported opinion that it would be a mistake to hire Harrison. [Anthony Dep. at 100-02]

29. Disputed. Harrison denies making any threat. [Harrison Dep. at 91] Moreover, there is substantial evidence beyond Harrison's denial that no threats were made. Defendant's position statement to the EEOC did not mention the alleged threats, not as a reason for stopping the offer letter or even as a reason for the termination. [Pl. Ex. 4 at 1-5] Rather, in that letter Benchmark claimed that Harrison

was not hired after clearing the drug test and background check because Benchmark was waiting on authorization from headquarters. [Pl. Ex. 4 at 4] The claim that Benchmark was waiting on authorization was restated by Benchmark's corporate representative and human resources director. [Robinson Dep. at 76] Robinson was later forced to admit Bechmark had authorization in May 2006. [Robinson Dep. II at 328, 375-76]

Further, while Anthony claims he learned of alleged threats from Brown, McDowell, Annette Smith, and Robin Gary, Brown and Smith both say that they only heard rumors that Anthony had fired Harrison because of an alleged threatening comment. [Brown Dep. at 151; Pl. Ex. 3 (A. Smith Dep.) at 40]. As for Gary, there is no documentation from her, and she is unavailable to testify. However, Robinson refutes Gary as a source for the threat allegations. She says Anthony came to her in August and told her Gary (and Brown) had made complaints about Harrison's job performance that did not include any claim by Gary (or Brown) that Harrison made threats. [Robinson Dep. I at 77, 88-89] According to Robinson, Anthony is the only person she is aware of that is making any threat allegation. [Robinson Dep. I at 72-73, 77, 88-89, 124-26; Robinson Dep. II at 376-77] Thus, the documentation by Anthony and by Aerotek regarding the alleged threats by Harrison do not identify a source for the claim. [Pl. Ex. 6; Def. Ex. K] A reasonable jury can conclude the threat claim was

manufactured by Anthony.

The alleged threats cannot be a basis for waiting to offer Harrison a permanent position after he passed the background check and drug test. Anthony conceded (and documented in the email) that he did not have any information about alleged threats until approximately a week before Harrison's termination. [Anthony Dep. at 236] He stopped the offer letter in July. [Anthony Dep. at 111, 128; Def. Ex. K]

30. Disputed and irrelevant. Robinson claims her conversation with Anthony regarding alleged performance issues occurred in August. [Robinson Dep. I Dep. at 213] Therefore, even if Anthony told Robinson that Harrison had performance issues, this would not be a basis for stopping the job offer from being made to Harrison in July. Further, a reasonable jury can conclude the poor performance allegations by Anthony were false. As discussed in response to Def. Fact ¶¶ 25-28, the truth of Brown's claims and Anthony's reliance on them are disputed. As for Gary, Anthony said Gary complained Harrison was "shotgunning" parts. [Anthony Dep. at 94-95, 103, 157-60] Anthony and other witnesses made clear that the "shotgunning" allegation is a standard complaint made by repair operators like Gary that is not considered significant. [Anthony Dep. at 58-59; McDowell Dep. at 38-39; A. Smith Dep. at 63-65] Anthony admitted he did not know if Harrison's alleged shotgunning of parts was any greater than any other debug tech's. [Anthony Dep. at 58-59]

31. Disputed and irrelevant. See response to Def. Fact ¶30.

32. Disputed and irrelevant. Because the decision not to offer Harrison a Benchmark position was made in July, [Anthony Dep. at 111, 128], revocation of a requisition on August 10 is irrelevant. Thus, the alleged revocation was omitted from Benchmark's response to Harrison's EEOC charge, [Pl. Ex. 4], Anthony's testimony, and Anthony's after-the-fact email justification for his actions, [Def. Ex. K]. Moreover, Benchmark provided no documentation showing that the requisitions were actually closed on August 10, [Robinson Dep. II at 325-26], and the records produced by Benchmark show at least one person hired after August 10 (August 14) and another person brought in on a closed requisition, [Robinson Dep. II at 328-29].

33. Admitted that various versions of the "hot board" incident that have been described but otherwise disputed. Anthony's email concerning the incident and Benchmark's EEOC position statement identify Teresa McDowell, Harrison's team leader, [McDowell Dep. at 6-7], by title and by name as the source for the claim. [Pl. Ex. 4; Def. Ex. K]. McDowell, however, denies there being any such "hot board" incident and says she was not aware of any performance issues with Harrison. [McDowell Dep. at 31, 33, 61] Moreover, the "hot board" incident as described by Anthony under oath, the version that matters, shows Harrison did nothing wrong. Harrison at most made an unfunny joke by pretending he had x-ray vision to see

whether a circuit board was bad by looking at the box. [Anthony Dep. at 143-50] Finally, when informing Aerotek of the reasons for Harrison's termination, Anthony made no mention of any hot board issue. [McSherry Dep. at 45-46; Pl. Ex. 6] Robinson said Anthony would have had no reason not to tell Aerotek the truth about Harrison's termination. [Robinson Dep. I at 148] A reasonable jury, therefore, can conclude Anthony manufactured the hot board issue. Additionally, even if there was a "hot board" incident, Anthony's email makes clear that if Harrison had been hired in July the incident would have been handled as a matter of progressive discipline under Benchmark policy, meaning Harrison would have been written up and given an opportunity to improve. [Def. Ex. K; Anthony Dep. at 13].

34. Disputed. See response to Def. Fact ¶ 29 regarding the alleged threats and response to Def. Fact ¶ 33 regarding the "hot board" incident.

35. Disputed. See response to Def. Fact ¶ 29 regarding the alleged threats and response to Def. Fact ¶ 33 regarding the "hot board" incident.

36. Admitted.

37. Admitted but irrelevant.

38. Admitted but irrelevant.

39. Admitted but irrelevant.

40. Admitted but irrelevant.

41. Admitted that Harrison identified no behavior changes but disputed that there is no factual basis for Harrison's belief that Anthony decided not to hire Harrison for a permanent Benchmark position based on Harrison's epilepsy. See Pl. Fact ¶¶ 1-12 and response to Def. Fact ¶¶ 21-35.

42. Admitted.

43. Admitted.

44. Admitted but irrelevant. Harrison denies any actual disability.

45. Admitted but irrelevant. Harrison denies any actual disability.

III. ADDITIONAL DISPUTED FACTS IN THE LIGHT MOST FAVORABLE TO HARRISON

1. Harrison cleared the pre-hiring process, including a drug test and a background check, on Wednesday, July 19, 2006, and on this same date Lena Williams in HR told Anthony that Harrison was cleared for hiring. [Def. Ex. E (Williams Dep.) at 52]

2. The next step in the process is that human resources personnel send Harrison an offer letter. [Anthony Dep. at 127]

3. Once an employee clears the drug test and background check the offer letter goes out unless the hiring manager (Anthony) instructs human resources not to send it. [Anthony Dep. at 128]

4. The offer letter is prepared by Robinson on Thursday or Friday so the employee can start on the next Monday. [Robinson Dep. II at 300, 307, 343-44, 357] In this case the next Monday was July 24, 2006. [Robinson Dep. II at 343]

5. On either July 19, 20, or 21, Anthony told human resources not to prepare an offer letter for Harrison. [Anthony Dep. at 111, 128; Robinson Dep. II at 344-45] Robinson "has no idea" why Anthony stopped the offer letter. [Robinson Dep. at 352] Anthony does not recall why he stopped the offer letter. [Anthony Dep. at 194-95]

6. Anthony admitted an audit scheduled for a month later was not a reason for stopping the offer letter. [Anthony Dep. at 194, 199-200] Moreover, the audit was not mentioned as a reason for stopping the offer letter by Anthony in his after-the-fact email, [Def. Ex. K], or by Benchmark in its EEOC position statement, [Pl. Ex. 4 at 4].

7. Even under Anthony's version of events he did not have any information about alleged threats until August 2006, more than two weeks after he had stopped the offer letter in July. [Anthony Dep. at 194, 236; Def. Ex. K]

8. Not one of Anthony's allegations of poor performance or misconduct against Harrison is supported by any contemporaneous documentation. The only documents stating the basis for Benchmark's actions are Anthony's August 23, 2006

email, [Def. Ex. K], and Benchmark's November 2006 EEOC position statement, [Pl. Ex. 4].

9. At the time Anthony had slated Harrison for hire, skilled debug techs like Harrison were a valuable commodity in the local market. [Robinson Dep. I at 158]

10. Anthony has no explanation for Harrison's deterioration from good employee to employee who needs to be fired after he was cleared for permanent hire in late July 2006. [Anthony Dep. at 230]

11. A reasonable jury can conclude Anthony's learning that Harrison had epilepsy was what caused Anthony to stop the offer letter.

12. After Harrison's termination, Harrison's wife, who continued to work at Benchmark, observed Annette Smith speaking with Anthony in Anthony's office after Smith finished speaking with the EEOC investigator on the phone. [Def. Ex. L (L. Harrison Dep.) at 48-49] Smith said to Anthony that if Harrison's case went to court Benchmark would not have a leg to stand on. [L. Harrison Dep. at 48] In response, Anthony nodded his head "yes." [L. Harrison Dep. at 49]

IV. ARGUMENT

A. Harrison Is Not Making an Actual Disability Claim.

Harrison did not plead and does not claim an actual disability.

B. A Reasonable Jury Can Conclude Benchmark Violated the ADA by Inquiring about Harrison's Epilepsy Before Offering Him a Job and Then Refusing to Hire Harrison and Terminating His Employment Based on the Information Obtained.

1. An ADA Medical Inquiries Claim Can Be Made by a Person Who Does Not Have a Disability Within the Meaning of the ADA.

The ADA and its implementing regulations prohibit covered employers from making pre-offer medical inquiries of applicants. *See* 42 U.S.C. § 12112(d)(2)(A) ("a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability"); *see also* 29 C.F.R. § 1630.14. The Eleventh Circuit has not decided whether a private right of action exists under § 12112(d)(2). *Bennett v. Dominguez*, 196 Fed. Appx. 795, 793 (11th Cir. 2006). Other courts have. *See Posey v. Alternative Home Health Care of Lee County, Inc.*, 2008 WL 2047935 at *2 (M.D.Fla. May 13, 2008)(unpublished). Likewise, other courts have specifically held that medical inquiries claims can be asserted by persons without disabilities. *See Conroy v. New York State Department of Correctional Services*, 333 F.3d 88, 94

(2d Cir. 2003) (citing cases). In fact, every other circuit to address these issues has 1) found a private right of action for applicants, and 2) held that individuals without disabilities who can show injury as a result of a violation have standing.

The *Conroy* court stated as follows regarding identical language in (d)(4) (regarding "employees" rather than "applicants"):

> We agree with our sister circuits that a plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under 42 U.S.C. § 12112(d)(4)(a). In contrast to other parts of the ADA, the statutory language does not refer to qualified individuals with disabilities, but instead merely to "employees." 42 U.S.C. § 12112(d)(4)(A). Moreover, we agree with the Tenth Circuit that "[i]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability." *Roe*[*v. Cheyenne Mountain Conference Resort, Inc.*], 124 F.3d [1221,] 1229 [(10th Cir. 1997)]. We also note that EEOC enforcement guidance supports this interpretation. *See Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, (EEOC, July 27, 2000), available at http://www.eeoc.gov/ docs/guidance-inquiries.html ("This statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities."). Even when they are not formally promulgated as regulations, such agency publications are "at least a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 48 (2d Cir.2002) (internal quotation marks omitted).

Id. at 95-96.

Therefore, Harrison does not have to prove he was perceived as having a disability by Benchmark, though he can, as explained below.

2. A Reasonable Jury Can Conclude Benchmark's Decisionmaker Made Prohibited Medical Inquiries of Harrison Concerning His Prescription Medication and Epilepsy.

After Harrison tested positive for barbiturates, Benchmark's decisionmaker, Anthony, called Harrison into his office, questioned him, had him go get his prescription bottle at home, and then listened as Harrison told the Medical Review Officer about his prescription and his epilepsy. [Harrison Dep. at 70-72] At the time Anthony knew he was prohibited from asking Harrison about his medical conditions. [Anthony Dep. at 201] He also knew it was improper for him to be present while the MRO interviewed Harrison regarding his positive drug test, the medication he was taking, and the condition(s) for which the medication was prescribed. [Anthony Dep. at 201] Thus, by sitting in with Harrison as Harrison was questioned by the MRO, it was no different than Anthony personally asking Harrison the questions. It is well-established that employers are prohibited from using a drug testing program to obtain information concerning prescription medications and the conditions for which they are prescribed. *See Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230-31 (10th Cir. 1997) (holding drug testing policy that required disclosure of prescription drug information was disability-related inquiry that violated the ADA).

3. Harrison Has Established a Prima Facie Case by Showing that Anthony Instructed Human Resources Personnel Not to Offer Harrison the Job within Days of Learning from Harrison that Harrison Was an Epileptic.

The Eleventh Circuit has applied the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in ADA cases. *Durley v. APAC, Inc.*, 236 F.3d 651, 657 (11th Cir. 2002). Because timing is so often critical in evaluating retaliation cases, the fact situation in this case is appropriately analyzed using a prima facie case like the one for retaliation, which requires a plaintiff to show (1) that she engaged in statutorily protected activity, (2) she suffered an adverse employment action, and (3) the adverse action was causally related to the protected activity. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1328 (11th Cir. 1998). Close proximity between the protected conduct and the adverse employment action ordinarily establishes the causal link. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1337 (11th Cir. 1999); *Donnellon v. Fruehauf Corporation*, 794 F.2d 598, 600-01 (11th Cir.1986) (one month sufficient).

Modifying these retaliation principles for this case, Harrison has established a prima facie case by showing (1) Benchmark made a prohibited medical inquiry regarding his epilepsy, (2) he suffered adverse employment actions, and (3) close proximity between the epilepsy disclosure on July 19 and Anthony's stopping of the

offer letter within 2 days and Anthony's decision to terminate Harrison 30 days later.

D. Benchmark Cannot Meet Its Burden of Production on Harrison's Medical Inquiries Claim.

Once the plaintiff has established a prima facie case, the defendant must rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the challenged action. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir.1997), *cert. denied*, 522 U.S. 1045 (1998). An employer can rebut the inference of discrimination created by a plaintiff's prima facie case by clearly articulating in a reasonably specific manner a legitimate non-discriminatory reason for the adverse employment action that would motivate a reasonable employer. *Chapman v. AI Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc). It is well-established that an employer articulating a non-discriminatory reason cannot satisfy that burden by offering a justification that it either did not know or did not rely on at the time the decision was made. *Turnes v. AmSouth Bank, NA*, 36 F.3d 1057, 1062 (11th Cir. 1994). After acquired evidence cannot satisfy the employer's burden. *Id.* at 1061-62.

Anthony's deposition testimony and the email created by Anthony after the termination in order to justify it to human resources personnel shows Anthony cannot offer any explanation for why he stopped the offer letter from going out to Harrison. [Pl. Fact ¶¶ 5-9] Anthony's affidavit claims he was too busy to move forward with

hiring Harrison because of an audit. [Anthony Aff. at ¶ 14] In his deposition, under cross-examination, however, when pressed about whether the audit was the reason (after he had backed off a claim threats were the reason), he stated he did not recall. [Anthony Dep. at 196-97][2] Anthony cannot now contradict his sworn testimony with a sham affidavit to obtain summary judgment for Benchmark.

E. A Reasonable Jury Can Conclude the Nondiscriminatory Reasons Offered by Benchmark Are Not Worthy of Credence.

If the defendant satisfies its burden of production, the burden shifts to the plaintiff to show pretext. The elimination of the prima facie case and its "mandatory

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[2]Q. If other people testify clearly that the alleged threat issue, whether to your body or to sue the company, didn't come up until August 2006 close to Mr. Harrison's termination, do have you any explanation for canceling Mr. Harrison's offer letter in July 2006?
MS. MOON: Object to the form.
A. I don't recall.
Q. You don't have any -- I am asking you not just if you recall something, but if you have any explanation?
A. Other than the audit coming, that is all I can think about.
Q. But you can't really imagine that an audit that is not scheduled until the end of -- until August is going to cause you to cancel Mr. Harrison's offer letter in July, are you?
MS. MOON: Object to the form.
A. Sure.
Q. So is that now the reason?
MS. MOON: Object to the form.
A. I don't recall.
Q. That is the reason you think -- that you can come up with now?
MS. MOON: Object to the form.
A. I don't recall.

presumption" of discrimination, however, "does 'not imply that the trier of fact no longer may consider evidence previously introduced to establish a prima facie case.'" *Combs*, 106 F.3d at 1528. Instead, that evidence survives, and may alone even be sufficient to avoid summary judgment in favor of the defendant. *Id*. at 1530.

To survive a motion for summary judgment a plaintiff must present evidence sufficient to demonstrate a genuine issue of material fact as to the truth or falsity of the employer's legitimate, nondiscriminatory reasons. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 147 (2000); *Combs*, 106 F.3d at 1530-32. "To satisfy this threshold showing of pretext, a plaintiff may discredit the employer's proffered legitimate reasons by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employment decision, or (3) that they were insufficient to motivate the employment decision." *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1564 (11th Cir.1995) (Johnson, J., concurring) (discussed with approval in *Combs*, 106 F.3d at 1531). The question is "whether the plaintiff has demonstrated 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'" *Combs*, 106 F.3d at 1538 (citations omitted).

"[A]n employer's failure to articulate clearly and consistently the reason for an

employee's discharge may serve as evidence of pretext." *Hurlbert v. St. Mary's Health Care System, Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006). "[A]n employer's deviation from its own standard procedures may serve as evidence of pretext." *Id.* at 1299. That an alleged nondiscriminatory reason is not brought to a plaintiff's attention is support for a claim of pretext, as it suggests that the issue was not sufficiently serious to motivate the employer. *See Hinson v. Clinch County*, 231 F.3d 821, 831 (11th Cir. 2000). "Evidence of a post-hoc attempt to justify an employment decision may be evidence of pretext." *Keaton v. Cobb County*, 545 F.Supp.2d 1275, 1303 (N.D. Ga. 2008) (citing cases). Finally, a defendant's prevarication and shifting rationales give rise to an inference that discrimination was behind the articulated reason. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1195 (11th Cir.2004).

Even if Benchmark can meet its burden of production, plaintiff has introduced substantial evidence of pretext. This evidence includes that Anthony stopped the offer letter within 2 days of learning Harrison had epilepsy; Anthony's shifting reasons for stopping the offer letter; Anthony's failure to recall his reason for stopping the offer letter; Benchmark's falsely claiming in its EEOC response that no offer was made because corporate had not given its approval; Benchmark's corporate representative making the same claim in her deposition; Anthony's post-hoc attempt to justify Harrison's nonhiring and termination; Anthony's agreement with Annette Smith that

Benchmark did not have a leg to stand on regarding Harrison's claims; Harrison's history of good performance prior to the drug test; the rapid and unexplained deterioration in Harrison's performance; that Harrison went from employee worthy of being hired permanently to employee who needs to be terminated in a month; Benchmark's failure to discuss with Harrison any of the alleged issues it had with his performance or conduct; that the person who allegedly reported the "hot board" incident to Anthony (allegedly the "last straw" regarding Harrison's termination) denied there was such an incident or any issue with Harrison's performance; that Anthony gave Aerotek a different reason for the termination than the "hot board" incident; the complete lack of contemporaneous documentation to support Benchmark's claims of poor performance and misconduct; and falsified, contradictory, and exaggerated claims of poor job performance and misconduct.

C. A Reasonable Jury Can Conclude Benchmark Did Not Hire Harrison and Then Terminated His Employment Through Aerotek Based on a Perceived Disability.

In order for a plaintiff to establish that an employer regarded him or her as substantially limited in the major life activity of working, he or she must prove that the employer considered him or her as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. §

1630.2(j)(3)(I); *Standard v. A.B.E.L. Services., Inc.*, 161 F.3d 1318, 1327 (11th Cir.1998). The ADA protects employees and applicants with non-limiting impairments who are victims of an employer's speculative concerns and false assumptions. *See Taylor v. Pathmark Stores, Inc.*, 177 F.3d180, 193 (3d Cir. 1999); *Holiday v. City of Chatanooga*, 206 F.3d 637, 644-45 (6th Cir.2000).

Here, unlike the typical perceived disability case, Benchmark did not explicitly tell Harrison it was acting based on its knowledge of his epilepsy or a speculative concern about a seizure on the job. A reasonable jury, however, can easily conclude Harrison's epilepsy was the basis for its sudden change of heart concerning his fitness for employment with Benchmark. A reasonable jury can conclude Anthony perceived Harrison as generally disqualified from employment at Benchmark and in the general field of work in which Harrison had all of his training and experience.

While cases in which an employee or applicant has shown a perceived disability without evidence of statements by decisionmakers concerning the impairment are not numerous, they do exist, *see Ross v. Campbell Soup*, 237 F.3d 701, 708 (6th Cir. 2001), and in this case Anthony's actions speak as loud as any words could have.

The Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), is a reminder that circumstantial evidence is a valid method of defeating a motion for summary judgment in a discrimination case. The Court explained that

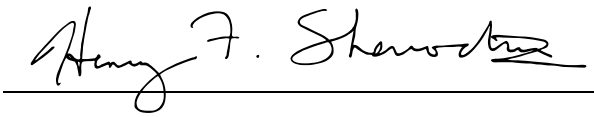
"[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *Id.* at 100 (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)). The Court also observed that circumstantial evidence is routinely used to support criminal convictions, even though a conviction requires proof beyond a reasonable doubt and that "juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.'" *Id.*

While this principle is more frequently applied to proof of intent, it is equally applicable here to prove how Anthony perceived Harrison. Benchmark should not get a free pass because Antony was careful not to say anything.

V. CONCLUSION

For the above stated reasons, the Court should deny BEHI's motion for summary judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: Michael L. Fees, Allen L. Anderson, and Stacy L. Moon.