NO. 04-CI-00113 OLDHAM CIRCUIT COURT
DIVISION 1

JOHN E. MORRIS PLAINTIFF

vs. **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

SHERIFF STEVE SPARROW, et al. DEFENDANTS

*** * * * * * * * * * ***

Comes the Plaintiff, John E. Morris, by counsel, and for his response to the motion of Defendants, Oldham County Sheriff Steve Sparrow, individually and in his official capacity, and the Oldham County Sheriff's Department's Motion for Summary Judgment, states as follows:

FACTS

The Plaintiff, John Morris ("Morris") is a 58 year old man with over thirty years of experience as a police officer both in New York State, as a Chief of Police, as well as in Oldham County, Kentucky, as a Deputy Sheriff. (See Plaintiff's Affidavit, Exhibit 1.) In November 2002, the Plaintiff suffered from a seizure while in a Wal-Mart store after not having slept the night before. (See Plaintiff's depo., p. 65-66). Plaintiff had last suffered from a seizure 32 years prior to the incident in Wal-Mart, when his daughter was born and he went two days without sleep. (Id. at p. 68). The Plaintiff suffered from a seizure while in high school after being knocked out playing football. (Id. at p. 96). After the seizure in the Wal-Mart, the Plaintiff was taken to the hospital and was told not to operate an automobile for 90 days. (Id. at p. 70). Plaintiff's physician recommended he return to work and could resume his regular duties except that he could not drive for ninety days. (Id. at p. 72-73). Plaintiff's physicians came to believe his seizure at Wal-Mart was triggered by a change in the Plaintiff's blood pressure medicine

and/or sleep deprivation. (Id. at p. 74).

In early January 2003, the Plaintiff attended a meeting with his superior, Defendant Sheriff Steve Sparrow, and Chief Deputy Ron Jones. (Id. at p. 77-78). At this meeting, the Plaintiff requested he be assigned light duty and receive three months off work without pay, returning to work when his driving restriction was lifted. During this meeting, the Plaintiff was asked what he would like to do in terms of his employment. (Id. at 79). Plaintiff stated he would prefer to stay on at the Sheriff's department. (Id.) Plaintiff also offered several alternative positions at the Sheriff's department which he would be willing to take, including patrol division and domestic violence officer. (Id. at p. 78-79). Plaintiff was denied these requests and advised that because these positions required the carrying of a service weapon, he would not be an eligible candidate. (Id.). Plaintiff expressed his belief that he could continue to carry out his duties as deputy sheriff and that he did not wish to take a position outside of the Sheriff's department. (Id. at p. 80, 83).

In January of 2003, the Plaintiff was ordered by the Sheriff's Office to undergo an independent medical examination with a neurologist, Dr. Fred Seifer. (Id. at p. 82). The Sheriff's office wanted to know, specifically, whether the Plaintiff could continue to safely perform his duties as a deputy sheriff. (See Correspondence from Oldham County Sheriff's Office to Dr. Seifer, Defendants' Exhibit B.) Dr. Seifer's report recommended the Plaintiff continue taking anticonvulsant medication and stated that patients with seizures are generally well controlled. (See Independent Medical Examination Report, Dr. Fred Seifer, Defendants' Exhibit C.) Dr. Seifer's report also indicated that although stressful situations could *potentially* make seizure control more tenuous, he felt discharge of a weapon in an inappropriate situation would be "very rare" and noted that no specific literature on the matter existed. (Id.).

Plaintiff received a letter of termination from Sheriff Sparrow on March 6, 2003. (Plaintiff's depo. at p. 88). The letter stated the basis of the termination was a "medical inability to safely perform essential functions of the job, including operation of a vehicle in pursuits and emergency circumstances, use and discharge of a firearm in law enforcement circumstances, and effecting a forceful arrest." (See Letter of Termination, Defendants' Exhibit D.)

In his deposition, Dr. Fred Seifer testified that anticonvulsant medication is generally very effective for patients suffering from seizures or seizure disorders, especially when a patient is taking the correct medication and dosage. (See Dr. Seifer's depo. at p. 19-20.) Dr. Seifer also testified that regarding the Sheriff's specific concerns relating to the Plaintiff's ability to carry out essential duties as a deputy sheriff, he believed if the Plaintiff's seizures were under control with medicine, it would not be a problem for the Plaintiff to use firearms or to affect a forceful arrest. (Id. at p. 21). Dr. Seifer also testified that there is no direct correlation between stress levels and seizures. (Id. at p. 23). Concerning the Plaintiff's medication, Dr. Seifer testified that medication taken for seizures sometimes takes a while to perfect. (Id. at p. 35). Also, the longer a patient goes without having a seizure, the less likely they are to have another seizure. (Id. at p. 44). Assuming that a patient is taking a proper dosage of medicine as prescribed and has not had a seizure for over a year, there is a low likelihood that he would have a repeat seizure. (Id.). As a physician, Dr. Seifer does not place limits on his patients' activities, including driving and work activities, if their seizures are under control with medication. (Id. at p. 45). The Plaintiff has not experienced another seizure in over two years. (See Plaintiff's Affidavit attached hereto as Exhibit 1.)

ARGUMENT

I. SUMMARY JUDGMENT

Kentucky law dictates that summary judgments are to be granted cautiously and are appropriate only when it appears impossible for the non-movant to prove facts establishing a right to relief. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W. 2d 476 (Ky., 1991). See also *Deaton v. Connecticut General Life Ins. Co.*, 17 S.W.3d 896, 898 (Ky. App., 2000). Kentucky imposes the burden on the moving party to show the non-existence of any genuine issue of material fact. *Robert v. Davis*, 422 S.W.2d 890 (Ky., 1968). Accordingly, a party moving for summary judgment bears the burden of demonstrating entitlement to such relief. When a Court would is required to draw inferences or find facts, summary judgment is not appropriate. *Murphy v. Bank One,* 52 S.W.3d 540 (Ky., 2001).

Employment discrimination cases are rarely subject to the grant of summary judgment. In considering a motion for summary judgment, Courts are "cautioned that 'summary judgment should seldom be granted in employment discrimination cases'" and that "[o]nly in rare cases when there is no dispute of fact and there exists only one conclusion should summary judgment be granted." *EEOC v. General Motors Corp.*, 11 F.Supp.2d 1077, 1080 (E.D.Mo. 1998) (copy attached), citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (emphasis added) (copy attached). *See also DiLaurenzio v. Atlantic Paratrans, Inc.*, 926 F. Supp. 310, 314 (E.D.N.Y. 1996) (holding that the severity and pervasiveness of harassing conduct "is the sort of issue that is often not susceptible of summary resolution")(copy attached). The court in *EEOC v. General Motors Corp., supra*, relied on the Eighth Circuit's reasoning that "because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support ***any*** reasonable inference for the nonmovant." *Crawford, supra,* 37 F.3d at 1341 (emphasis added).

Under the rule and cases noted, a moving party must convince the Court the evidence in the record presents no material fact at issue. The existence of a factual dispute precludes courts

from granting summary judgment. The moving party cannot succeed "unless the right to summary judgment is shown with such clarity that there is no room left for controversy." *Commonwealth v. Whitworth,* 74 S.W.3d 695, 698 (Ky., 2002).

II. THE PLAINTIFF SUFFERED DISCRIMINATION BECAUSE OF HIS DISABILITY AND IN VIOLATION OF KRS § 344.010, *ET SEQ*.

It is an unlawful practice for an employer: (1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because… the person is a qualified individual with a disability. KRS § 344.040(1). A Federal appellate court interprets Kentucky's protections for the disabled consonant with the federal Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq. *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001) (copy attached to Defendants' Memorandum). When interpreting the Kentucky Civil Rights Act, Kentucky courts will look to decisions interpreting the federal law. *Noel v. Elk Brand Manufacturing Co.*, 53 S.W.3d 95, 106 (Ky. App., 2000) (copy attached to Defendants' Memorandum). In order to establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) that he or she is "disabled" within the meaning of the ADA; (2) that he or she is "otherwise qualified" to perform the requirements of the job, with or without reasonable accommodation; and (3) that he or she has suffered an adverse employment decision because of the disability. *Henderson, supra,* 247 F.3d at 649.

III. PEOPLE WITH EPILEPSY ARE WITHIN THE CLASS OF PERSONS CONRESS INTENDED TO PROTECT WHEN IT ENACTED THE AMERICANS WITH DISABILITIES ACT.

The legislative history of the ADA makes clear that Congress intended that person persons with epilepsy would fall within the definition of disability under the Act. In fact, epilepsy is repeatedly cited throughout the legislative history as an example as a covered

disability. *See e.g.,* S. Rep. No. 101-116, at 22, 31, 39, 62 (1989); H.R. Rep. N. 101-485(II), at 51-51, 62, 72, 79-80, 104 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 303; H.R. Rep. No. 101-485(III), at 28-29, 33, 42 50 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 445. Notably, Congress was aware that many people with epilepsy use medication to control its effects. *See, e.g.,* H.R. Rep. No. 101-485(II), at 52; H.R. Rep. No. 101-485(III), at 28, 29; *see also* 135 Cong. Rec. E1575(1989) (statement o Rep. Coelho, testifying that an overwhelming majority of people with epilepsy use medication to control the condition). Clearly, Congress was recognizing that, while the effects of epilepsy could be mitigated by medication, the underlying impairment itself is a disability under the ADA. To reject Mr. Morris's seizure disorder as a disability would undermine Congress' intent in enacting the ADA to protect people with epilepsy and other disabilities from discrimination.

IV. THE PLAINTIFF WAS REGARDED AS DISABLED BY DEFENDANTS WITHIN THE MEANING OF THE KENTUCKY CIVIL RIGHTS ACT AND THE AMERICANS WITH DISABILITIES ACT.

Being "disabled" for the purposes of the Kentucky Civil Rights Act and for the purposes of the ADA requires: a) a physical or mental impairment that substantially limits one or more of [his] major life activities ...; b) a record of such an impairment; or c) being regarded as having such an impairment. KRS § 344.010(4), 42 U.S.C. § 12102(2).

A. Plaintiff Was Regarded As Substantially Limited In One Or More Major Life Activities.

The Equal Employment Opportunity Commission regulations (codified at 29 C.F.R. § 1630.2(j)(1) (2000)), include among major life activities "those basic activities that the average person in the general population can perform with little or no difficulty." The EEOC's illustrative, but not exhaustive, list of such activities includes "sitting, standing, lifting, reaching," and "functions such as caring for oneself, performing manual tasks, walking, seeing,

hearing, speaking, breathing, learning and working," *Kiphart v. Saturn Corp.*, 251 F.3d 573, 582 (6th Cir. 2001) (copy attached). Whether a major life activity is substantially limited is an individualized and fact-specific inquiry. *Land v. Baptist Med. Ctr.*, 164 F.3d 426, 425 (8th Cir. 1995) (copy attached).

Plaintiff agrees with Defendants that having an impairment alone does not make one disabled for purposes of the Kentucky Civil Rights Act. *Howard Baer, Inc. v. Schave*, 127 S.W.3d 589, 592 (Ky., 2003). Instead, the employee must prove that the impairment limits a major life activity and that such limitation is substantial. *Id.* However, a combination of limitations related to an impairment may, in their entirety, be taken into account to conclude that such limitations are substantial. *See Rowles v. Automated Production Systems, Inc.*, 92 F. Supp.2d 424 (M.D. Pa. 2000) (copy attached). In *Rowles*, the court found compelling evidence that in addition to occasionally experiencing seizures –which undisputedly limited the plaintiff's ability to walk, talk, speak, see, hear and work, the precautions he was forced to take in order to reduce the likelihood of seizures substantially limited him. *Id.* at 429. Taking the limitations cited by the plaintiff as a whole, the *Rowles* court held the record contained sufficient evidence to withstand summary judgment. *Id.*

The term "impairment" includes physiological disorders affecting neurological body functions, specifically including epilepsy. *See Otting v. J.C. Penney Co.*, 223 F.3d 704, 710 (8th Cir. 2000) (holding that a saleswoman with epilepsy who was terminated because of the restriction that she not climb ladders at work was disabled for the purposes of the ADA, because she suffered from epilepsy, which substantially limited several major life activities, not because climbing ladders was a major life activity; also recognizing that epilepsy is a physical impairment under the ADA). As a person with epilepsy, during a seizure a plaintiff has

difficulty sitting, standing, lifting, climbing, caring for one's self, thinking, concentrating, communicating, driving, learning, seeing, performing manual tasks, walking, reaching, speaking, breathing, working, etc. 29 C.F.R. § 1630.2(h)(1) & (2).

In their Motion for Summary Judgment, the Defendants claim it is "undisputed" that the Defendants never regarded the Plaintiff as having an impairment for purposes of the Kentucky Civil Rights Act. The Defendants also stated there "exists no evidence the Defendants regarded the Plaintiff as substantially impaired in either a class of jobs or broad range of jobs." (See Defendants Memorandum in Support of Motion for Summary Judgment, at p. 10 & 11). This is false. In his deposition testimony, Defendant Sparrow stated that in his opinion Plaintiff's seizure disorder ***limits him in terms of a broad range of jobs*** within the Sheriff's Department. (Steven Sparrow depo. at p. 72-73).

Indeed, as discussed more fully below, the Departments' termination letter itself clearly evidences that Defendant Sparrow regarded the Plaintiff as substantially limited in a class of jobs. That is, Defendants regarded Plaintiff's condition as preventing him from performing in all law enforcement jobs.

Defendants rely heavily on *Hallahan v. The Courier-Journal,* 138 S.W.3d 699 (Ky. App., 2004), in their argument that Plaintiff's discrimination claim fails because he does not satisfy the third prong of KRS 344.010(4)(c), the "regarded as" prong. Specifically, the *Hallahan* court ruled "[a]s with actual impairments, the perceived impairment under the 'regarded as' prong must be one that, if real, would substantially limit a major life activity of an individual." *Id.* at 707. Citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999) (copy attached to Defendants' Memorandum), the *Hallahan* court also held an individual may fall within the provision for being "regarded as" having a disability if: "(1) the employer mistakenly believes

that the person has a physical impairment that substantially limits one or more major life activities, or (2) an employer mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." *Id.* (quoting *Sutton*, *supra* at 489).

In a "regarded as" case, it is necessary that the defendant "entertain misperceptions about the individual--it must believe that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often 'result from stereotypic assumptions not truly indicative of individual ability.'" *Sutton*, 527 U.S. at 489 (quoting 42 U.S.C. § 12101(7)); see also *Plant v. Morton Int'l Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) (copy attached) (stating that a "regarded as" claim occurs when "an employee has an impairment that is not substantially limiting but is treated as substantially limiting"). *Henderson v. Ardo, Inc., supra at* 650. The ADA is intended to ensure that people such as Mr. Morris are not victimized by stereotypical assumptions and unfounded fears regarding a medical condition, whether or not that condition is by itself substantially limiting. *MX Group, Inc. v. City of Covington*, 293 F.3d 326, 338 (6th Cir. 2002) (copy attached).

Dr. Seifer commented in his deposition regarding the unreasonable stigma surrounding epilepsy:

Q: Tell me about what you know about that stigma, if you can.

A: …Yeah, there is a tremendous stigma. There's a stigma as far as people, ordinary people, lay people, there is a stigma as far as the government is concerned as far as what they can do and what they can't do. Driving versus not driving. There's a stigma as far as what they can—what kind of insurance they can buy and how much it'll cost them. There's a stigma as far as employers are concerned. You know, it's something that is unfortunately very prevalent in our population, in the population of those who have epilepsy, yeah.

Q: Would you agree that people with seizure disorders, or people with epilepsy can be regarded as having a substantial disability when, in fact, they are not currently disabled if assuming that their medications are at the right levels and their seizures are controlled?

A: If the question – if you mean can they be regarded by the population in general or what we talked

about as far as the so-called stigma of having had a seizure while actually they're under good control and not having any seizures. The answer is, yeah, they can still be regarded. It's a label that sticks with you. It sticks with you forever. (Dr. Fred Seifer depo. at pp.48-50).

Sheriff Sparrow regarded Mr. Morris as unable to perform the broad class of jobs of law enforcement. In his deposition testimony Sheriff Sparrow stated he would have possibly reinstated the Plaintiff had Mr. Morris been able to say, "My doctor guaranteed me 100 percent that I won't have another one, we've gotten my medication balanced and I'm fine." (Steven Sparrow depo. at p. 66). Defendant Sparrow was, in effect, enforcing a "100% healed" policy. Similarly, in *Henderson, supra,* at issue was the Defendant's "100% healed" policy. Under the policy, employees were not allowed to work unless they were "100% healed." The Court held the Plaintiff stated a valid "regarded as" claim because the 100%-healed rule may be interpreted as treating the plaintiff as incapable of working in a manufacturing operation, for the purposes of summary judgment. *Id.* at 652. Likewise, Defendant Sparrow's 100% healed policy indicates that he believed Mr. Morris to be unable to do any law enforcement job - - i.e., that he perceived him to be disabled. This conclusion is further supported by Defendant Sparrow's own statement that had he been aware of the likelihood of Mr. Morris having another seizure after being controlled by medication for a period of one year or more, he might have made a different determination as to whether Mr. Morris would be capable of performing his duties as a deputy. (Steven Sparrow depo. at p. 65). Defendant Sparrow also admitted that he never spoke to the Plaintiff about the possibility of reinstating the Plaintiff if his seizures were controlled by medicine. (Id. at p. 64). In other words, he regarded Mr. Morris as unable to perform any law enforcement job because of his stereotypical beliefs rather than based on any assessment of Mr. Morris' actual abilities. Plaintiff has met his burden of showing a *prima facie* case of discrimination based on disability pursuant to the Kentucky Civil Rights Act, and Defendants'

Motion for Summary Judgment as to this claim must be denied.

The Defendants' perception was that Morris was a danger to himself and others, including being at risk for discharging a firearm inappropriately (See Termination Letter of March 6, 2003, Defendant's Exhibit D). Defendants inaccurately classified Plaintiff as having a condition so severe that he could not be permitted to work in any capacity within the Sheriff's Department. Id. The Defendants' perception came into being as a result of their refusal to accept reliable medical information about the condition of epilepsy, and by their substitution of their own judgment not only as to the severity of his condition, but as to the ability of Mr. Morris to control his condition with medication.

Unfortunately, for Mr. Morris, the Defendants' perception subjected him to employment discrimination and the loss of his livelihood even though it was in error. The Defendants acted as if Mr. Morris could become unconscious at random and without warning, viewing him as a person who at any moment could be rendered unable to perform the most basic life activities while unconscious from a seizure. Defendants perceived Mr. Morris' impairment as so substantial and so random, that if it were true, his major life activities would be extremely curtailed in order to protect himself and others from the potentially lethal consequences that could befall him in the ordinary course of every day life. Therefore, Mr. Morris has a "disability" pursuant to the Kentucky Civil Rights Act as well as the ADA by virtue of the Defendants' perception.

B. Plaintiff Was Regarded As Substantially Limited In The Major Life Activity of Working Because Defendants Perceived Plaintiff as Substantially Limited in a Broad Range of Jobs.

In general, an employer's perception that an employee cannot perform a broad range of jobs suffices to make out a "regarded as" claim. More generally, if an impairment at a certain

level of severity would constitute a disability, then it follows that an employer who perceives an employee as having such an impairment perceives the employee as disabled. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188 (3rd Cir. 1999) (copy attached).

Here, there can be no dispute the Defendants' perception, if true, would have constituted a significant restriction in Mr. Morris' ability to perform either a class of jobs or a broad range of jobs.[1] If Mr. Morris were actually unable to make a forceful arrest, drive a car or use a firearm, as the Department believed, he would have been precluded from **all** jobs in the region involving law enforcement duties - - as well as virtually all private security jobs. Furthermore, if true, note that the department found him unqualified for all other jobs in the department.

In a recent decision by a Pennsylvania District Court, the court refused to overturn a jury verdict for a plaintiff with epilepsy regarded as being a person with a disability. *Taylor v. USF-Red Star Express, Inc.*, 2005 U.S. Dist. LEXIS 3600 (E.D. Penn. March 8, 2005) (copy attached). The court found the employer's statements that plaintiff could have a seizure which rendered him "unable to walk, talk, make decisions, or indeed do anything," constituted unambiguous evidence that defendant viewed the plaintiff as disabled in a major life activity. *Id.* at 8-9.

Where an employer's perception that a plaintiff is substantially limited in the major life activity of working, the question is whether the employer's perception of the disability, if true, would constitute a significant barrier to his vocational opportunities. *Cook v. Rhode Island State Hospital*, 10 F.3d 17 (1st Cir. 1993) (copy attached). In order to have a disability in the major life activity of working, an individual must be precluded from more than one job or type of job. *Id.* Additionally, factors such as the geographical area to which the individual has reasonable access and the number and types of jobs utilizing similar training, knowledge, skills, and abilities

[1] In his deposition testimony, Defendant Sparrow stated that in his opinion Plaintiff's seizure disorder ***limits him in terms of a broad range of jobs*** within the Sheriff's Department. (Steven Sparrow depo. at p. 72-73).

within the geographical area must be assessed. *Id.* at 26. The focus here is not upon the number of jobs the Plaintiff can still perform, but on the number of opportunities from which he is excluded (or would be excluded) as a result of the employer's perception. *Id.*

In *William v. Philadelphia Housing Authority Police Dep't*, 380 F.3d 751 (3d Cir. 2004) (copy attached), a police officer who had served defendant for 24 years was terminated after his employer perceived him as having a mental impairment. The Third Circuit held the district court erred when it failed to consider whether the employee's limitations (or perceived limitations) would have prevented the employee from performing work in a class of jobs and that a reasonable jury could have concluded that the employee was actually (or perceived to be) precluded from working in a class of jobs. *Id.* There was also a material dispute of fact as to whether the employee was disabled and whether he was regarded by the employer as being disabled, and whether the employer refused to provide an assignment based solely upon its erroneous perception that the employee's mental impairment prevented him from having access to guns. *Id. See also Edge v. City of St. Paul*, 2002 U.S. Dist. LEXIS 19505 (D. Minn. 2002) (copy attached) (finding a triable issue of fact as to whether the employer city viewed the plaintiff's depression as substantially limiting him with regard to the class of public safety jobs. Indeed, the court determined that a reasonable jury could find public safety to be job category encompassing, at the very least, firefighters, law enforcement, and emergency medical personnel). *See also Marschand v. Norfolk and W. Ry. Co.*, 876 F. Supp. 1528, (N.D. Ind. 1995) (copy attached), wherein the court described public safety as a "field" encompassing "police officer, fireman or ambulance driver." At its broadest, a jury might construe "public safety" to include correctional officers, life guards, police, fire, and ambulance dispatchers, transit police, security guards, etc. *Id.* at 1540.

Although the Defendants' own statements independently establish that they viewed Mr. Morris as a person with a disability in the major life activity or working, this conclusion is further bolstered by the Vocational Analysis performed by Mr. John Tierney[2] (Vocational Analysis attached as Exhibit 2). By extrapolating the Defendants' articulated perceptions to the labor market in Mr. Morris' geographical region, in light of his age, education and work experience, Mr. Tierney was able to identify the vocational extent of the Defendants' perception regarding Mr. Morris' ability to work in a broad range of jobs. Indeed, had Mr. Morris been impaired to the extent perceived by Defendants, he would have been precluded from consideration for employment, both within his chosen field of work, and within a wide range of jobs across numerous classes within his geographic area.

Mr. Tierney stated that, based upon information from the US Census Bureau, protective service occupations and transportation and material moving occupations constitute 1,458 (12.1%) of the occupations held by males in Oldham County, Kentucky and 24,072 (14.0%) of the occupations held by males in Jefferson County, Kentucky. Mr. Tierney stated that if Mr. Morris had been disabled to the extent perceived by Defendants, he would be excluded from:

> [J]obs with such demands as climbing, balancing, exposure to work in high, exposed places, with proximity to moving mechanical parts, or with explosives. To calculate this, a computerized analysis of over 12,000 separate occupational titles was conducted. Each occupational title is cross-referenced by the skill level, physical demands, and environmental conditions required to perform each occupation satisfactorily. Each occupational category is cross-referenced by the number of workers within Mr. Morris' local labor market, defined as the Louisville metropolitan area.

Mr. Tierney went on to state that absent these perceived work-related limitations, Mr. Morris would be able to perform 60.9% of the jobs in his labor market, based on an ability to perform unskilled and semiskilled work. Excluding Mr. Morris from the broad range of jobs

[2] See Curriculum Vitae of John P. Tierney and his associate Linda Jones, of Vocational Economics, Inc. attached hereto as Exhibits 3 and 4.

requiring the physical demands listed above, based on the Defendants' perception of his disability, would reduce Mr. Morris' labor market access to 50.9%, for a loss of to Mr. Morris of 32,287 jobs, or 16.4% of his labor market access. Mr. Tierney's analysis produced a chart which confirmed that Mr. Morris would be significantly restricted in the ability to perform a broad range of jobs if Defendants' perceptions were accurate.

There can be no dispute the Defendants' perception of Mr. Morris in this case satisfies the statutory threshold. The Defendants' perception, had it been true, would have constituted a significant restriction in Mr. Morris' 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). The Plaintiff has met his burden of showing his epileptic condition, as perceived by the Defendants, substantially limits one or more major life activity for the purposes of the Act and the ADA. Furthermore, whether or not the Plaintiff's epileptic condition substantially limits one of the aforementioned major life activities is a question for the jury, making summary disposition of this issue inappropriate.

Furthermore, Defendants state in their motion that Mr. Morris is "quite capable of working as he is currently employed at the Kentucky State Reformatory as a correctional officer." (Defendants' Motion for Summary Judgment, p. 11). This fact is irrelevant to the "regarded as" prong discussion. It is only an employer's perception about the impact on the activity of working at the time of the employment decision that is material. *See Taylor v. Pathmark Stores, Inc.*, *supra*, 177 F.3d at 191.

C. The Plaintiff is an Otherwise Qualified Individual With or Without Reasonable Accommodation Who is Able to Perform the Essential Functions of Deputy Sheriff for the Oldham County Sheriff's Department.

An otherwise qualified person under the Kentucky Civil Rights Act is one who is able to

perform all of the position's requirements in spite of his handicap. *Hash v. University of Kentucky*, 138 S.W.3d 123 (Ky. App., 2004). The issue in a direct evidence disability case is whether the employee is otherwise qualified, with or without reasonable accommodation, to perform the job. *Noel v. Elk Brand Mfg. Co.*, 53 S.W.3d 95, 101 (Ky. App., 2000). The plaintiff bears the burden of establishing that he or she is disabled and of establishing he or she is otherwise qualified for the position despite his or her disability, without accommodation from the employer, with an alleged essential job requirement eliminated, or with a proposed reasonable accommodation. *Id.* The employer will bear the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer. *Id.* Contrary to the Defendants' assertions, Mr. Morris has shown that he is qualified to perform the essential functions of his job as a Deputy Sheriff, and thus, summary judgment should be denied.

Under the ADA, an employer is required to provide a reasonable accommodation to a qualified individual with a disability. 42 U.S.C.§ 12112(b)(5)(A) (2000); 29 C.F.R.§ 1630.2(o) (2000). Mr. Morris' 30-year plus track record as a deputy attests to his qualifications to perform the job. Under the ADA, the employer, once it knows of an employee's disability, also has an obligation to engage, in good faith, in an interactive discussion with the employee to identify such accommodations. 29 C.F.R. § 1630.2(o)(2000). In situations where an individual's medical condition makes it impossible for the person to perform his job for a specific period of time, possible reasonable accommodations include reassigning nonessential job functions to other coworkers or temporarily reassigning the individual to a vacant position. 29 C.F.R.§ 1630.2(o)(2)(ii)(2000) (listing job restructuring, part-time or modified work schedules, etc. as possible reasonable accommodations).

Defendant Sparrow claims he based his termination of Mr. Morris on concerns relating to his ability to operate a vehicle in emergency circumstances, affecting a forceful arrest and operating a service weapon. However, there is no direct evidence which points to Mr. Morris' inability to perform any of these functions. Mr. Morris has no record of failing to safely perform any of the functions over which Defendant Sparrow expressed concern. Further, the independent medical examiner, Dr. Fred Seifer, in response to Defendants' concern over the abovementioned tasks, reported, "There is nothing specifically that we can say that would preclude his ability to do this, although again someone who has a history of seizures certainly may have a slight increased risk of having a recurrent seizure during stressful, emotional and/or physical situations." (See Dr. Fred Seifer's Independent Medical Examination Report, Defendants' Exhibit C). As to the operation of a service weapon, Dr. Seifer reported that a circumstance in which discharge of weapon in an inappropriate situation would be "very rare" and noted no specific literature existed on the matter. (Id.).

Determining whether an individual can, with or without reasonable accommodation, perform the essential functions of the position held or sought is a two step process and relatively straightforward. *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 146 (3d Cir. 1998) (copy attached). First, a court must consider whether the individual can perform the essential functions of the job without accommodation. *Id.* If so, the individual is qualified and is not entitled to accommodation. *Id.* If not, then a court must look to whether the individual can perform the essential functions of the job with a reasonable accommodation. *Id.* If so, the individual is qualified. *Id.*

Moreover, and in contrast to Defendant's assertions, Plaintiff did make a request for a reasonable accommodation. Under the Kentucky Civil Rights Act, as under the ADA, an employee

may use "plain English" and need not even mention the ADA when making a request for a reasonable accommodation. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3rd Cir. 1999) (copy attached). Instead, all that is necessary is that the employer be put on notice that such accommodation is needed. *Id.* *See, e.g., Schmidt v. Safeway, Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994) (copy attached) ("statute does not require the plaintiff to speak any magic words…The employee need not mention the ADA or even the term "accommodation."); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998) (copy attached) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation").

Mr. Morris put Sheriff Sparrow and the Department on notice that a reasonable accommodation was necessary at the January 9, 2003 meeting when the Plaintiff requested he be assigned light duty and receive three months off work without pay. (Plaintiff's Complaint, ¶ 8). Plaintiff also offered several alternative positions at the Sheriff's department which he would be willing to take, including patrol division and domestic violence officer. (John Morris depo. at p. 78-79). Plaintiff was denied these requests and advised that because these positions required the carrying of a service weapon, he would not be an eligible candidate. (Id.). Plaintiff expressed his belief that he could continue to carry out his duties as deputy sheriff and that he did not wish to take a position outside of the Sheriff's department. (Id. at p. 80, 83).

Moreover, contrary to the Defendant's assertions, Mr. Morris did not request the requirement of carrying a service weapon be waived, but instead merely asserted his belief in his ability to safely perform the essential functions of his job. Furthermore, instructing the Plaintiff to consider taking a position at a substantially lower rate of pay or taking a position in which the plaintiff had no experience is hardly a reasonable accommodation for the purposes of the Act.

The initial accommodation requested by Mr. Morris after his episode in Wal-Mart, in

November 2002, was that he be granted ninety days leave, during the time in which he would not be allowed to drive. Subsequent requests for accommodation by Mr. Morris involved transfer within the Sheriff's Department. All were denied by Defendants. Mr. Morris did not allege in his Complaint that he had an actual impairment under the first prong of the ADA. Rather, the Plaintiff predicated his claim upon the "record of" and the "regarded as" prongs of the statutory definition of disability. Accordingly, if the Court finds Mr. Morris did not request a reasonable accommodation, it is not necessarily an issue under the ADA if his disability is solely a function of the Defendants' perception. *Deane v. Pocono Med. Ctr., supra,* at 148-149.

That is not to say that accommodation is not a relevant issue in the analysis of his discrimination claim, however, as the definition of disability under the ADA requires an assessment as to whether the Plaintiff, in spite of his disability, either actual or perceived, qualified for the job he held or desired with or without accommodation. Additionally, an employer who discriminates against a "regarded as" plaintiff by refusing to accommodate its erroneous perception is liable for employment discrimination under the Act. *Taylor v. Pathmark Stores, Inc., supra.*

D. The Plaintiff is Not a Direct Threat Nor Does His Employment With the Sheriff's Department Present an Elevated Risk of Injury.

Under the Act, a reasonable accommodation need not be given where it would not eliminate any direct threat to the health and safety of others or the individual created by having the individual perform the job. *Manolete v. Bolger*, 791 F.2d 784, 786 (9th Cir. 1986) (copy attached). In determining whether a direct threat exists, employers are required to rely on objective and sound medical opinion and cannot make this determination based on conjecture. *Id.* The risk that Mr. Morris' condition would present a danger to himself or others must be real and substantial, not slight and remote nor hypothetical. *Id.* In the case at bar, the Defendants based its decision on conjecture

and in fact, ignored the objective, sound medical advice of its own examiner. In his report to the Defendants, Dr. Fred Seifer expressed that the risk of Mr. Morris discharging a weapon in an inappropriate manner would be "very rare." (See Dr. Fred Seifer's Independent Medical Examination Report, Defendants' Exhibit C).

Also important to remember is that Plaintiff has been in law enforcement for over thirty years and has never had a seizure while on duty. Of the five documented seizures the Plaintiff has had, four were precipitated by lack of sleep and/or a change in his blood pressure medication. (See Plaintiff's Affidavit attached as Exhibit 1). Defendants cite to a report by Dr. Arar, which references two episodes when the Plaintiff felt slightly confused for a few seconds and had to sit down. However, dates for these incidents are not given. Furthermore, Defendants' motion states, "Dr. Seifer testified that since the Plaintiff continues to have seizures, those seizures are not under control with medication." (Defendants' Motion for Summary Judgment, p. 6). Defendants have taken Dr. Seifer's testimony out of context. Dr. Seifer, in responding to a hypothetical question from counsel, stated that a patient experiencing seizures, not under the control of medication, may be at risk for having a seizure in high-stress situations, but that under good control with medication, it would not necessarily be a problem. (Dr. Seifer depo., p. 21). Furthermore, *not one* of the Plaintiff's documented seizures were stress-related, which seems to be the Defendants' major concern when it comes to their perceived risk of the Plaintiff having a seizure while on duty and possibly injuring himself or others. (See Termination Letter of March 6, 2003, Defendant's Exhibit D; Correspondence from Oldham County Sheriff's Office to Dr. Seifer, Defendants' Exhibit B).

When Defendants terminated the Plaintiff in early March 2003, it had been less than four months since Plaintiff had his episode in the Wal-Mart store. There is a high likelihood that a

patient having seizures can be very well controlled with medication, although perfecting medication may take some time. (Id. at p. 19-20). In fact, Mr. Morris has been seizure free for over two years. (See Plaintiff's Affidavit, Exhibit 1).

Simply put, Plaintiff and his treating neurosurgeon, as well as the Defendants' independent medical examiner, believe Plaintiff can still perform the essential functions of his job as deputy sheriff, especially now that he is on medication and his seizures are being controlled. The Defendants made an uninformed and biased decision to terminate the Plaintiff based on their own stereotypical perception of Mr. Morris' condition.

Defendant Sparrow claims he terminated Mr. Morris because he believed he would not be able to engage in a high-speed chase, affect a forceful arrest, or operate a service weapon. However, there is no direct evidence which points to Mr. Morris' inability to perform any of these functions. Mr. Morris has no record of failing to safely perform any of the functions over which Defendant Sparrow expressed concern. Indeed, Defendant Sparrow acknowledges that prior to learning of Mr. Morris' diagnosis, there was nothing to indicate the Plaintiff was not physically fit to perform his duties as a deputy. (Steven Sparrow depo. at p. 41).

Further, the independent medical examiner, Dr. Fred Seifer, in response to Defendants' concern over the abovementioned tasks, reported, "There is nothing specifically that we can that would preclude his ability to do this." (See Dr. Fred Seifer's Independent Medical Examination Report, Defendants' Exhibit C). As to the operation of a service weapon in an inappropriate situation, Dr. Seifer stated it would be "very rare" and noted no specific literature existed on the matter. (Id.) While it is true Mr. Morris was unable to legally operate a vehicle for 90 days, he was still qualified to perform the essential functions of the job. The law makes clear that an individual is qualified whether or not he needs a reasonable accommodation to perform the task(s). Here a

reasonable accommodation - - either in the form of a leave of absence while the driving restriction was effective or a temporary reassignment to a non-driving position – that would have enabled Mr. Morris to perform the job was available. Thus, he was qualified to do the job. Since the Defendants have failed to show the Plaintiff was unable to perform the essential functions of the job and offered no reasonable accommodation, their motion for summary judgment on Plaintiff's Civil Rights Act claim must be denied.

V. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S RETALIATION CLAIM MUST BE DENIED.

In order to make out a prima facie case of retaliation, a plaintiff must show that 1) he engaged in a protected activity, 2) he was disadvantaged by an act of his employer, and 3) there was a causal connection between the activity engaged in and the employer's act. *Kentucky Ctr. for Arts v. Handley*, 827 S.W.2d 697, 701 (Ky. App., 1991). The burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for the adverse employment action. *Id.* An employee must also show that "but for" his filing of an earlier discrimination action, the adverse employment action would not have occurred. *Id.* The 'but for' test does not require the jury to find discrimination was the exclusive motive for the employee's discharge, but only that it was an essential ingredient. *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185, 187 (Ky., 1993), citing *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky., 1992).

Plaintiff reported his seizures to Sergeant Pete Dunlop, Chief Deputy Ron Jones and Defendant Sparrow. On or about January 23, 2003, Defendants informed Plaintiff they needed his decision as to what he wanted to do by the next week. Plaintiff responded that he intended to return to work on April 1, 2003, when his driving restriction was lifted. When, in late January 2003, Defendants directed Plaintiff to undergo the independent medical assessment by Dr.

Seifer, they threatened that any "failure to comply with this directive will be deemed insubordination which could result in discipline up to and including dismissal." (See Plaintiff's Complaint ¶ 10). On March 6, 2003, Defendant Sparrow notified Plaintiff that he was terminated from his position as deputy of the Oldham County Sheriff's Office stating that Plaintiff had a "medical inability to safely perform essential functions of the job" despite Dr. Seifer's inconclusive report as to whether Mr. Morris' seizure disorder would affect his ability to do what the Defendants claim are the essential functions of the job. (See Independent Medical Examination Report, Dr. Fred Seifer, Defendants' Exhibit C). The only restriction placed on Mr. Morris by his treating physicians was that he could not drive for three months. Plaintiff reasonably requested ninety days of unpaid leave and that he return to work when his driving restriction was lifted. This was a reasonable request by the Plaintiff, which was unreasonably denied by Defendants.

Defendants retaliated against Plaintiff by subjecting him to unjust discipline and subsequent termination of Plaintiff solely because Defendants regarded and/or perceived him as having a disability which would render him unable to perform the essential functions of the job of deputy sheriff. Defendants had no legitimate business reasons for any such acts, only their own stereotypical conclusion that Mr. Morris was a safety threat. Each of said acts of retaliation were in violation of the Kentucky Civil Rights Act.

CONCLUSION

Plaintiff has proved his *prima facie* case of disability discrimination and retaliation under the Kentucky Civil Rights Act. The Plaintiff is disabled under the Act as well as the ADA. The Plaintiff is a disabled individual who is otherwise qualified with or without reasonable accommodation, and can perform the essential functions of the job of deputy sheriff.

Accordingly, Plaintiff respectfully requests that Defendants' motion for Summary Judgment be denied and that Plaintiff be allowed to proceed with his claims against Defendants to a jury of his peers.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class mail this ___ day of August 2005, to the person(s) listed below:

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