IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM BLAKE,	*	
Plaintiff	*	
v.	*	Civil Action L07-CV-50
BALTIMORE COUNTY, MARYLAND, et al.,	*	
Defendants	*	

* * * * * * *

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT ON HIS SECOND AMENDED COMPLAINT

Plaintiff William Blake, by his counsel, Kathleen Cahill, hereby moves for summary judgment on his Second Amended Complaint.

The Court previously has held that there are no disputes of material fact. Plaintiff Blake asserts that based on those established facts, as a matter of law, defendants Baltimore County and Baltimore County Police Department violated his rights protected by the Americans with Disabilities Act, and defendants Baltimore County, the Police Department and former Chief of Police Terrence Sheridan violated his right to privacy protected by 42 U.S.C. §1983.

MATERIAL FACTS NOT IN DISPUTE

In considering the motions for summary judgment at the preliminary injunction stage of the proceedings, the Court

found that "the parties agree that the material facts are not disputed." Memorandum, July 1, 2008, p.3 n.2.

As set out in Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, 12/20/07, the established facts are these:

1. Plaintiff has been a member of the Baltimore County Police Department since 1987. He has served as a detective on the Criminal Intelligence Team since June 1999. Affidavit of Officer William Blake, ¶2.[1]

2. On April 24, 1996, plaintiff suffered a potential seizure on the job in the precinct. Affidavit of Officer William Blake, ¶3; Deposition of Officer William Blake (6/5/07), p.3-4; Deposition of Howard Moses M.D. (8/8/07), pp. 18, 23, 27, 37; Deposition of Alan Krumholz M.D. (8/9/07), p.4-6.

3. Plaintiff was taken by ambulance to GBMC, and accompanied by two superiors to the hospital. Affidavit of Officer William Blake, ¶4; Deposition of Officer William Blake, p.5-8.

[1] For efficiency and to avoid duplication, except when expressly noted otherwise in italics, the exhibits referred to herein are the Exhibits to Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, 12/20/07.

4. Plaintiff was treated in GBMC's emergency room and released. Affidavit of Officer William Blake, ¶5; Deposition of Officer William Blake, p.8.

5. Plaintiff was treated in follow-up by neurologist Howard Moses, M.D. Plaintiff was released to return to work by Dr. Moses effective May 10, 1996. Affidavit of Officer William Blake, ¶6; Deposition of Officer William Blake, p. 12-17; Deposition of Howard Moses M.D., p. 40-42.

6. Plaintiff submitted the required paperwork and was approved by the Police Department to return to duty effective May 10, 1996. Affidavit of Officer William Blake, ¶7 & Exh. A; Deposition of Officer William Blake, p.13-17.

7. Since then, plaintiff has not suffered any other potential seizures, nor has he required additional treatment or any medication as a result of the April 24, 1996 medical event. Affidavit of Officer William Blake, ¶8; Deposition of Officer William Blake, pp.11, 64, 107.

8. From April 1996 to the present, plaintiff has performed his duties exceptionally and with distinction. He has been nominated as Officer of the Year and received countless commendations. Affidavit of Officer William Blake, ¶9 and Exh. B; Deposition of Officer William Blake, p.48.

* * * *

9. In the summer of 2006, plaintiff learned that a fellow police officer, Philip Crumbacker, had experienced a seizure, and that as a result he was being forced off the job by the Police Department. Affidavit of Officer William Blake, ¶10; Deposition of Officer William Blake, p.49-51.

10. Plaintiff sought out Officer Crumbacker to offer his support and assistance, and to share that he too had suffered a seizure on the job and that he had fully performed his duties since then without limitation or challenge from the Police Department. Affidavit of Officer William Blake, ¶10; Deposition of Officer William Blake, p.49-51.

11. On August 31, 2006, a hearing convened on Officer Crumbacker's challenge to his forced retirement from the Police Department. Plaintiff was called as a witness by Officer Crumbacker and testified under oath, pursuant to a subpoena, that he had suffered a potential seizure on the job in 1996 and that he had fully performed his duties since then without limitation, problems or challenge from the Police Department. Affidavit of Officer William Blake, ¶11 & Exh. C; Deposition of Officer William Blake, p.48.

12. Immediately following the hearing, the Chief of Police, Terrence Sheridan, was advised of plaintiff's testimony. Chief Sheridan convened an urgent meeting and

decided that plaintiff, along with one other police officer who had testified at the hearing for Officer Crumbacker and a third officer whose name was raised in evidence by Officer Crumbacker's lawyer, must submit to compelled fitness-for-duty examinations. Deposition of Chief Terrence Sheridan (7/11/07 & 9/25/07), pp.61, 70, 75.

13. One day later, on September 1, 2006, the official order was issued that plaintiff submit to a fitness-for-duty examination on September 5, 2006. Affidavit of Officer William Blake, ¶12 and Exh. D.

14. From May 10, 1996, the date of his return to work, until September 1, 2006, the date of the notification of the compelled fitness-for-duty examination, plaintiff had never heard another word from the Police Department about the 1996 medical event. Affidavit of Officer William Blake, ¶13; Deposition of Officer William Blake, pp.66-68, 109.

15. By September 1 of 2006, plaintiff had taken only one sick day that entire year. Affidavit of Officer William Blake, ¶14 and Exh. E.

16. On September 5, 2006 plaintiff submitted to the fitness-for-duty examination. He did so only because he feared for his job if he were to disobey an order of the Chief of Police. He complied under protest and upon written notice that he viewed the examination as a violation of his

rights. Affidavit of Officer William Blake, ¶15, and Exh. F.

17. Plaintiff was examined by Peter Oroszlan, M.D., a doctor defendants use frequently to conduct compelled medical exams. In 2006, Dr. Oroszlan was paid in excess of $60,000.00 by defendants for such services and opinions. Deposition of Peter Oroszlan, M.D., (7/26/07), p. 14-15.

18. In October 2006, Dr. Oroszlan issued his Report concluding that plaintiff *was* fit-for-duty. Nevertheless, Dr. Oroszlan added: "I believe it is reasonable to request that Mr. Blake at least undergo a random electroencephalogram even if the yield is expected to be low." Deposition of Peter Oroszlan, M.D., p. 4, Exh. 2; Affidavit of Officer William Blake, ¶16, Exh. G.

19. On December 14, 2006, the Chief of Police ordered plaintiff to submit to a compelled EEG. Affidavit of Officer William Blake, ¶17 and Exh. H.

20. In response, plaintiff initiated legal action to enjoin defendants from compelling him to submit to the EEG and from taking any adverse employment action against him for refusing to submit to the test.

* * * *

21. Dr. Moses, plaintiff's treating neurologist and a highly renowned Johns Hopkins neurologist, Deposition of

Peter Oroszlan, M.D.,(7/26/07), p. 78-79, see also Amended Complaint, Exh. 8, testified in his deposition that he is of the opinion that an EEG performed in 2007 would only add confusion about plaintiff's current medical status. Deposition of Howard Moses M.D., pp. 10-11, 45, 47.

22. Dr. Moses is of the opinion that having an EEG performed in 2007 could actually cause plaintiff to suffer a seizure even if he does not have an underlying seizure disorder, as that is an inherent risk of undergoing an EEG procedure. Deposition of Howard Moses M.D., p. 45-46.

23. Dr. Moses is of the opinion that it is "highly unlikely" plaintiff will have a seizure in the future, "less than 5%, less than 1 or 2%," and that that risk will decline the longer plaintiff goes without having a seizure. Deposition of Howard Moses M.D., pp. 22, 23, 34.

24. Dr. Moses is of the opinion that it is never appropriate or consistent with the standard of care to order a patient to undergo an EEG without current clinical findings indicating the need for that test. Deposition of Howard Moses M.D., pp. 44-45, 47.

25. Dr. Alan Krumholz, the leading epileptologist in this area, Deposition of Peter Oroszlan, M.D., p. 78-79, has been retained by plaintiff to serve as an expert witness in this case. Dr. Krumholz testified in his deposition that he

is of the opinion that an EEG performed in 2007 will yield no meaningful information regarding plaintiff's 1996 medical event. Deposition of Alan Krumholz M.D., pp. 8, 28.

26. Dr. Krumholz is of the opinion that an EEG performed in 2007 could provide confusion about plaintiff's current medical status, which Dr. Krumholz believes would be detrimental to plaintiff's employment standing under these circumstances. Deposition of Alan Krumholz M.D., p.8.

27. Dr. Krumholz is of the opinion that an EEG performed in 2007 could actually cause plaintiff to suffer a seizure even if he does not have an underlying seizure disorder, as that is an inherent risk of undergoing an EEG procedure. Deposition of Alan Krumholz M.D., p.9-11.

28. Dr. Krumholz testified that an EEG could disclose other medical findings that have nothing to do with the Police Department's inquiry into plaintiff's 1996 medical event, such as the presence of a tumor, infection or even degenerative disease. Deposition of Alan Krumholz M.D., p. 9.

29. Dr. Krumholz is of the opinion that an EEG in this timeframe "is not predictive of [plaintiff] having a recurrence of his seizures in the future," and that "there's really no evidence that [an EEG] will provide any information that will predict that [plaintiff] is going to

be a safer police officer, or that the public safety is going to be somehow protected by obtaining this EEG." Deposition of Alan Krumholz M.D., pp. 8, 26-28, 32-33.

30. Dr. Krumholz is of the opinion that to perform an EEG with no clinical reason is inappropriate and a deviation from the standard of care. Deposition of Alan Krumholz M.D., p. 35.

31. Dr. Krumholz is of the opinion that the risk of plaintiff having a seizure "in the next few years is about 1%," and that that risk will decline the longer plaintiff goes without having a seizure. Deposition of Alan Krumholz M.D., p. 19-20.

32. Defendants' doctor, Dr. Oroszlan, is an internist, not a neurologist or epileptologist. Deposition of Peter Oroszlan M.D., p. 16. He has never published or held a teaching position, and although he testifies often at workers compensation hearings, he has never been qualified to render opinions as an expert witness in medical malpractice litigation. Deposition of Peter Oroszlan M.D., pp. 19, 24, 76-77.

33. Dr. Oroszlan was wholly unfamiliar with the fact that an EEG can could a seizure in a patient with no underlying seizure disorder. Deposition of Peter Oroszlan M.D., p. 92-93.

34. During his deposition, Dr. Oroszlan agreed that plaintiff *was* fit-for-duty in September 2006 when he examined him. Deposition of Peter Oroszlan M.D., p. 89-91.

35. During his deposition, Dr. Oroszlan agreed that an EEG performed in 2007 will yield no meaningful medical information regarding plaintiff's 1996 medical event. Deposition of Peter Oroszlan M.D., p. 91.

36. During his deposition, Dr. Oroszlan testified that he found no clinical evidence of a seizure disorder at the time that he evaluated plaintiff in September 2006. Deposition of Peter Oroszlan M.D., p. 103-104.

37. During his deposition, Dr. Oroszlan described plaintiff's "underlying problem" at the time he examine him in September 2006 as "a history of seizure." Deposition of Peter Oroszlan M.D., p. 112.

* * * *

38. During his deposition, Chief Sheridan testified that he does not recall reading the report of Dr. Oroszlan prior to ordering plaintiff to submit to the EEG. Deposition of Chief Terrence Sheridan, pp. 75, 78-79.

39. Chief Sheridan testified that at the time he ordered plaintiff to submit to the EEG, he knew nothing about the credentials or qualifications of Dr. Oroszlan. Deposition of Chief Terrence Sheridan, p. 73.

40. Chief Sheridan testified that he knew nothing about what Dr. Oroszlan had or had not reviewed in connection with his evaluation of plaintiff, at the time he ordered plaintiff to submit to the EEG. Deposition of Chief Terrence Sheridan, p. 74.

41. Chief Sheridan testified that he did not undertake any medical inquiry or research, nor did he review plaintiff's medical records, before ordering plaintiff to submit to the EEG. Deposition of Chief Terrence Sheridan, pp. 55, 68-69.

42. Chief Sheridan testified that he did not review the transcript of plaintiff's testimony in the Crumbacker hearing prior to ordering plaintiff to submit to the fitness-for-duty examination and the EEG. Deposition of Chief Terrence Sheridan, p. 12.

43. Chief Sheridan testified that he did not conduct any further investigation after learning of plaintiff's testimony, rather, that he ordered plaintiff to submit to the fitness-for-duty examination "on the face of [his] testimony . . . that [he] had a seizure." Deposition of Chief Terrence Sheridan, p. 66.

44. Chief Sheridan testified that he did not review plaintiff's personnel file or his performance evaluations prior to ordering him to submit to the fitness-for-duty

examination and the EEG. Deposition of Chief Terrence Sheridan, pp. 13, 67, 107-108.

45. Chief Sheridan testified that he did not speak with plaintiff prior to ordering him to submit to the fitness-for-duty examination and the EEG. Deposition of Chief Terrence Sheridan, p. 108.

46. Chief Sheridan testified that he was aware that plaintiff was "an exceptional employee" at the time he ordered him to submit to the fitness-for-duty examination and the EEG. Deposition of Chief Terrence Sheridan, pp. 13, 67.

47. Chief Sheridan testified that he knew, at the time he ordered plaintiff to submit to the fitness-for-duty examination and the EEG, that plaintiff had had the 1996 potential seizure on the job. Deposition of Chief Terrence Sheridan, p. 137.

48. Chief Sheridan testified that he knew, at the time he ordered plaintiff to submit to the fitness-for-duty examination and the EEG, that plaintiff had done everything he was required to do under departmental policies when he was released to return to work in May 1996. Deposition of Chief Terrence Sheridan, p. 135-136.

49. Chief Sheridan testified that he ordered plaintiff to submit to the fitness-for-duty examination and the EEG due

to his concern that a seizure "might occur." He expressly testified that he had no evidence that a seizure was "likely to occur." Deposition of Chief Terrence Sheridan, p. 90.

* * * *

50. During the timeframe at issue, the Police Department did not have a written policy regarding fitness-for-duty evaluations. Deposition of Robert Wickless, (7/11/07 & 9/25/07), p. 101-102; Deposition of Colonel Kim Ward, (7/11/07 & 9/25/07), p. 114-115.

51. During the timeframe at issue, the Director of the Personnel Section for the Police Department, Robert Wickless, issued a total of three Memoranda communicating his concerns that the Police Department's treatment of the four police officers with a history of potential seizures (plaintiff, Officer Crumbacker, and the two other officers ordered for fitness-for-duty on September 1, 2007) violated the ADA. (The three Memoranda are hereinafter referred to as "the Wickless ADA Memoranda.") Deposition of Robert Wickless, p. 101-102; Deposition of Colonel Kim Ward, (7/11/07 & 9/25/07), p. 114-115, Exh. 7 (4/28/05 memo), 11 (8/22/06 memo), and Exh. 4 (10/20/06 memo).

52. Director Wickless wrote, in part: "Recently, because the department has been made aware -- or in some instances,

reminded -- that certain members have a history of a medical condition or disability, it has determined it should take action in those circumstances. However, there has been no empirical evidence brought forward that these individuals are incapable of performing the essential functions of the jobs they have been doing other than a knowledge of a disability, a record of disability, or the presumption of a disability noted by management in the department. Based on this information, the department has required a variety of actions to be taken by these individuals that it does not require of other members. This, to my mind, is clearly a violation of both the intent and the actual statutes in the ADA." Deposition of Colonel Kim Ward, Exh. 4.

53. The Commander of the Human Resources Bureau, Colonel Kim Ward, shared Director Wickless's concerns that the Police Department's treatment of the police officers with a history of potential seizures violated the ADA. Deposition of Colonel Kim Ward, pp. 22, 24.

54. Colonel Ward testified that she viewed Director Wickless as having "good knowledge of the law" and "exceptional" analytic abilities. She noted that he was a very good employee with extensive training in

discrimination issues. Deposition of Colonel Kim Ward, p. 15-16.

55. Colonel Ward has extensive "very specialized training" in discrimination as well, and is viewed as one of the Police Department's experts in the field. Deposition of Colonel Kim Ward, p. 16.

56. Colonel Ward testified that she met with Chief Sheridan multiple times to convey their concerns that the Police Department's treatment of the officers with a history of potential seizures violated the ADA. Deposition of Colonel Kim Ward, pp. 24, 68-69, 125-128.

57. Colonel Ward testified that she delivered the Wickless ADA Memoranda to Chief Sheridan. The documentary evidence confirms that fact. Deposition of Colonel Kim Ward, p. 137, Exh. 10(conveying 8/22/06 Wickless memo) and Exhs. 9&13 (re. 10/22 Wickless memo and conveying 10/22 Wickless memo).

58. Chief Sheridan testified, however, that he has no recall of reading the Wickless ADA Memoranda. Deposition of Chief Terrence Sheridan, p. 156-157.

59. Yet, both Colonel Ward and Director Wickless testified that Chief Sheridan called a meeting with them to address the Wickless ADA Memoranda. In that meeting, according to the testimony of both Colonel Ward and Director Wickless,

Chief Sheridan rebuked them and warned that if they persisted in documenting their concerns about the legality of the Police Department's treatment of the officers with a history of potential seizures, they would do so "at their peril." Deposition of Robert Wickless, pp. 72, 76-77; Deposition of Colonel Kim Ward, p. 73-77, Exh. 6.

60. Colonel Ward testified that at the time Chief Sheridan ordered plaintiff to submit to the fitness-for-duty examination, there was no medical input and no consideration of the quality of plaintiff's performance. Deposition of Colonel Kim Ward, p. 46.

61. Colonel Ward testified that at the time Chief Sheridan ordered plaintiff to submit to the fitness-for-duty examination, plaintiff was known to be an exceptional performer with no attendance or health problems. Deposition of Colonel Kim Ward, p. 48-49.

62. Colonel Ward testified that at the time Chief Sheridan ordered plaintiff to submit to the fitness-for-duty examination, the departmental forms demonstrating that plaintiff had followed procedures and had been released to return to duty back in May 1996 were in his personnel file. Deposition of Colonel Kim Ward, p. 51; Affidavit of Officer William Blake, ¶7 & Exh. A.

63. Colonel Ward summarized her concern regarding the treatment of the four officers, as communicated to Chief Sheridan, as follows: that police officers who "are technically fully functioning, and meet the essential functions of the job, should in fact be in a situation where they are not treated differently." Deposition of Colonel Kim Ward, p. 31.

64. Colonel Ward testified that she raised the question "many times" as to why, after plaintiff had been found fit-for-duty, he was being ordered to submit to an EEG. She testified she never got an answer. Deposition of Colonel Kim Ward, p. 63.

65. Colonel Ward testified that the Police Department did not evaluate plaintiff's present ability to safely perform the job before ordering him to submit to the fitness-for-duty examination and the EEG. Deposition of Colonel Kim Ward, p. 91.

66. Colonel Ward testified she did not believe there was an imminent threat of serious harm that was likely to occur if plaintiff did not submit to the EEG. Deposition of Colonel Kim Ward, p. 93.

* * * *

67. On August 23, 2007, the Equal Employment Opportunity Commission found that the above action by the Police

Department violated the ADA. Affidavit of Officer William Blake, ¶21 and Exh. I. The EEOC reached the same Determination on the Charges of the other 3 officers as well. Based on the EEOC investigation and Determination, the U.S. Department of Justice is now considering the cases for litigation.

* * *

There are certain material facts of heightened importance to the present Motion.

68. On or about August 22, 2006, defendant Sheridan ordered Robert Wickless to search the personnel files and medical records of Lt. Lauenstein and Officer Ward. In his responsive Memorandum, Mr. Wickless wrote: "I feel obligated to note that even the gathering of the above information for use now puts us on dangerous ground." Deposition of Colonel Kim Ward, Exh. 11.

69. On August 31, 2006, defendant Sheridan added plaintiff Blake to the prior order requiring review of his personnel and medical records. Deposition of Colonel Kim Ward, Exh. 11.

70. On September 1, 2006, Mr. Wickless reported, as ordered, on his review of plaintiff's medical records. *Wickless Deposition, Exh. 7.*

71. Thereafter, defendant Sheridan issued the September 1, 2006, order compelling plaintiff to submit to a "workability examination," to produce voluminous medical records, and to sign a blanket Authorization for Release of Medical Information. Exh. D. Plaintiff edited the Authorization for Release of Medical Information to reserve his rights to challenge what he viewed as illegal, and in an effort to limit the scope of the intrusion into his medical privacy. Exh. F.

72. Unbeknownst to plaintiff, some of his medical records had already been accessed, reviewed and shared with defendant Sheridan and others, pursuant to defendant Sheridan's orders to Mr. Wickless.

73. During the September 5, 2006 "Independent Medical Evaluation," defendants' doctor interviewed plaintiff starting with his birth. He inquired about personal history; marital history; caffeine, tobacco, alcohol, and drug use; prescription and over-the-counter medications; and childhood and teenage surgical procedures, among other areas. He inquired about plaintiff's mother's medical history. He performed a full physical examination, including palpating plaintiff's liver. He subjected plaintiff to an electrocardiogram. He checked his blood pressure and told him to cut his salt intake. He reported

that plaintiff had not been to see his primary care physician in more than five years. Exh. G.

74. The six-page Report of the "Independent Medical Evaluation" was sent to defendant Baltimore County's Office of Human Resources, and made its way to the Human Resources Bureau at the Police Department. *Wickless Deposition, Exh. 4.* The findings of the physical examination and content of the Report continued to be the subject of deliberation and discussion by defendants' personnel, even to the present.

75. There is no evidence of defendants implementing any measures to limit access or guard as confidential any of plaintiff's private medical information, throughout this three-year process.

* * *

Since the filing of the first motions for summary judgment, there have been two relevant developments. On January 13, 2009, Robert Wickless filed a Charge of Discrimination with the EEOC on the basis that he was forced out of his job after he was deposed, and otherwise retaliated against, due to his protected conduct described herein. *See Exhibit 1.* Additionally, plaintiff Blake has formally requested that the Department of Justice intervene

in this action, which request is under active consideration.

THE AMERICANS WITH DISABILITIES ACT

As the Supreme Court pointed out in School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987), "society's accumulated myths and fears are as handicapping as are the physical limitations that flow from actual impairment." See also VanZande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1975)(" . . . many impairments are not disabling but are believed to be so, and the people having them may be denied employment or shunned as a consequence.") As the EEOC cautions, with regard to workers with epilepsy: "When it comes to safety, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about epilepsy. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and how epilepsy affects him." Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act, EEOC, http://eeoc.gov/facts/epilepsy.html.

Disability Related Inquiries and Medical Examinations

The ADA provides that once an employee is on the job, the employer can conduct disability-related inquiries and medical examinations only under very limited circumstances.

Disability-related inquiries and testing can be undertaken only if they are "job-related and consistent with business necessity." Specifically, the ADA provides that an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. 12112(d)(4)(A)(1994); 29 C.F.R. 1630.14(c)(1998). See also EEOC Technical Assistance, Employment Tests and Selection Procedures, December 2007.

As the language of the statute makes clear, that prohibition applies to all employees, not just those with disabilities. EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, General Principles, (7/26/00), Section B, nn. 13-15, http://eeoc.gov/policy/docs/guidance-inquiries.html.; EEOC Compliance Manual, §2-II(B)(8)(5/20/98); see also, Conroy v. New York State Dept. of Correctional Services, 333 F.3d 88, 94-95 (2nd Cir. 2003); Cossette v. Minnesota Power & Light, 188 F.3d 964,969-970 (8th Cir. 1999)(and cases cited therein); Karraker v. Rent-a-Center, Inc., 239 F.Supp.2d

828, 834-836 (C.D.Ill. 2003), Jackson v. Lake County, 2003 WL 22127743, *7-9 (N.D.Ill. 9/15/03). The EEOC interpretive guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986) (citations and internal quotation marks omitted).

The purpose of the prohibition is to prevent employers from conducting medical evaluations that serve no legitimate purpose. As Congress noted, that is necessary because "an inquiry or medical examination that is not job-related serves no legitimate purpose, but simply serves to stigmatize a person with a disability." See S.Rep.No. 101-116 at 39-40 (1989); H.R.Rep.No. 101-485, pt.2, at 75 (1990).

Disability-related inquiries and testing are "job-related and consistent with business necessity" if the employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." EEOC Enforcement Guidance, Job-

Related and Consistent with Business Necessity, supra, Section A. The EEOC makes clear, however, that "an employer's reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition must be based on *objective evidence* obtained, or reasonably available to the employer." Id. (emphasis original); see also Conroy v. New York State Dept. of Correctional Services, supra, 333 F.3d at 98. Significantly, the EEOC states: "such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions." Id. As Congress set out in the legislative history of the ADA: "actual performance on the job is, of course, the best measure of ability to do the job." See S.Rep.No. 101-116 at 39 (1989); H.R.Rep.No. 101-485, pt.2, at 75 (1990).

To meet the "direct threat" standard, an employer must show "a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodations." 29 C.F.R. §1630(r)(1998). It is the employer's burden to prove that a reasonable person could believe that the employee poses a direct threat. Conroy v. New York State Dept. of Correctional Services, supra, 333 F.3d at 98-99; Tice v.

Centre Area Transportation Authority, 247 F.3d 506, 516-519 (3rd Cir. 2001).

As it applies to epilepsy, the direct threat assessment must be based on "objective, factual evidence, including the best recent medical evidence and advances to treat and control epilepsy." EEOC Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act, http://eeoc.gov/facts/epilepsy.html. "In making a 'direct threat' assessment, the employer must evaluate the employee's present ability to safely perform the job. The employer also should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The harm must be serious and likely to occur, not remote and speculative." 29 C.F.R. §1630.(r)(1998).

ADA Retaliation

The ADA prohibits retaliation against those who engage in protected activity, including those who (a) participate in any manner in proceedings related to the ADA, (b) advocate on behalf of another they believe has been subjected to a violation of his or her rights under the ADA, and (c) oppose any practice they believe is illegal under the ADA. 42 U.S.C. §12203(a); see also EEOC

Compliance Manual, §8-II(A)(5/20/98) http://eeoc.gov/policy/docs/retal.html. As with the protections against illegitimate medical inquiries or testing, those protections extend to all employees, not just those determined to be disabled. See EEOC Compliance Manual, supra, §§2-II(A)(5) and 8-I(B), at n.7. To prove a claim of illegal retaliation based on participation or opposition, plaintiff need prove that he engaged in protected activity, that he suffered a materially adverse employment action, and that there is a causal connection between the protected activity and the adverse employment action. McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991).

ARGUMENT

The Court's Findings

In the July 1, 2008 Memorandum, the Court made the following findings, which plaintiff submits now entitle him to judgment as a matter of law.

1. "Defendants have presented no evidence that Blake's ability to perform his job functions had been impaired . . ." Memorandum, p.10.
2. "Defendants must maintain that Blake's 1996 seizure creates the risk that he poses a direct threat. . .

As Sheridan confirmed, Defendants did not take any of these required [direct threat] factors into account before ordering Blake to submit to a fitness for duty examination." Memorandum, pp. 10-11.

3. "Defendants' subsequent order that Blake submit to an EEG test was issued despite the assessment of the department's own physician that Blake was fit for duty." Memorandum, p.11.
4. "No evidence was considered by Defendants with respect to Blake, and no investigation of any kind took place before Blake was required to submit to a fitness for duty examination." Memorandum, pp.11-12 n.13.

Ultimately, the Court concluded: "these facts suggest a marked absence of any meaningful investigation into the effects, if any, Blake's 1996 seizure had on his ability to safely perform his job before Defendants ordered him to submit to medical evaluation and testing." Memorandum, p.11.

ADA Violations

Based on its detailed analysis and with these findings, the Court has held, in effect, that plaintiff has proven the illegality of the medical inquiries and testing, and that defendants wholly failed to meet the controlling

test of "job-related and business necessity." [2] Accordingly, plaintiff is entitled to judgment that the forced disclosure of his medical records, the forced medical examination and testing by defendants' doctor, and the order compelling him to submit to the EEG all violated the ADA, entitling him to damages and a permanent injunction barring such future conduct.[3]

Turning to the retaliation claim, there is no dispute that plaintiff Blake participated in protected activity when he testified during the Crumbacker hearing. There also is no dispute that within mere hours of that protected activity, defendants engaged in adverse employment action in the form of scouring his "in-house" medical records, ordering him to authorize access to voluminous medical records in the possession of his healthcare providers, and ordering him to submit to compelled medical inquiries, examination, and ultimately, testing, under threat of

[2] As in his prior Motion for Summary Judgment, plaintiff asserts that because defendants failed to plead the affirmative defense of business necessity, they have waived the right to assert it. In fact, defendants never filed a responsive pleading after the filing of the Second Amended Complaint. On this basis alone, the Court can enter judgment for plaintiff.

[3] In the event the Court does not agree that its prior findings are dispositive, plaintiff incorporates by reference herein the arguments set forth in Plaintiff's Memorandum in Support of Motion for Summary Judgment, 12/20/07.

discipline, including potential discharge. Given the timeline, there can be no legitimate question of the causal nexus. Again, defendants do not deny or dispute any of these facts.

In addition, as the Court has found, it is established that the adverse action was taken for no legitimate work-related reason, as it was based on no investigation or analysis, nor on any current medical or performance-related evidence. Moreover, defendant Sheridan readily conceded that he persisted in ordering medical testing even after plaintiff was declared fit-for-duty by defendants' doctor. As the Court summed up: "these facts suggest a marked absence of any meaningful investigation into the effects, if any, Blake's 1996 seizure had on his ability to safely perform his job before Defendants ordered him to submit to medical evaluation and testing." Memorandum, p.11.

Accordingly, the record evidence establishes as a matter of law that plaintiff was subjected to illegal retaliation, and judgment should be entered for plaintiff on that claim as well.

Violation of Right to Privacy

It is well-established that a constitutional privacy right exists in medical information, which can only be overcome by a compelling state interest.[4]

"It is indeed clear beyond peradventure that 'the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.' Thornburgh v. American College of Obstetricians, 476 U.S. 747, 106 S.Ct. 2169, 2184, 90 L.Ed.2d 779 (1986). This constitutional right to privacy extends to 'the individual interest in avoiding disclosure of personal matters.' Whalen v. Roe, 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977); Trade Waste Management Ass'n, Inc. v. Hughey, 780 F.2d 221, 223 (3d Cir.1985); see also Kurland, The Private I, The University of Chicago Magazine 7, 8 (Autumn 1976) ('The concept of a constitutional right of privacy [includes] the right of an individual not to have his private affairs made public by the government.'). *And as courts have held, medical records are clearly within this constitutionally protected sphere.* See, e.g., Whalen, 429 U.S. at 598, 97 S.Ct. at 875; United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir.1980) ('There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.'); Shoemaker v. Handel, 608 F.Supp. 1151, 1159 (D.N.J.1985) ('There is a privacy interest in avoiding disclosure to government agents of personal medical information.').

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The individual privacy interest in the patients' medical records must be balanced against the legitimate interests of the state in securing the information contained therein. Cf. Whalen, supra; Westinghouse, supra.

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[4] Defendants now concede that plaintiff has a right to privacy in his medical information. See Memorandum of Law in Support of Defendant Baltimore County's Motion for Summary Judgment as to the Remainder of Count I (2/13/09), p. 2 fn. 1.

In re Search Warrant (Sealed), 810 F.2d 67, 71-72 (3rd Cir. 1987)(emphasis added); see also Levin v. Board of Educ. of City of Chicago, 470 F.Supp.2d 835, 841 (N.D.Ill. 2007)("in the Seventh Circuit it is clearly established that individuals have a 'substantial' right in the confidentiality of medical information that can only be overcome by a sufficiently strong state interest.")

Here, plaintiff has a privacy right in the medical information that he was compelled to disclose under threat of discharge, in the form of (1) his medical records obtained with the September 1, 2006 Authorization for Release of Medical Information (Exh. D & F), (2) the lifetime medical information elicited by defendants' doctor during the September 5, 2006 "Independent Medical Evaluation" (Exh. G), and (3) the medical findings derived by defendants' doctor's September 5, 2006 physical examination and testing of his body (Exh. G). As well, plaintiff has a privacy right in his medical records on file with the Police Department and Baltimore County government, pre-dating September 1, 2006. Finally, plaintiff has a privacy interest in the medical findings that would be derived from the compelled EEG.

In light of the Court's July 1, 2008 findings, there is no evidence upon which it could be found that defendants

had any "legitimate interests [] in securing the information contained therein," or for forcing submission to the physical examination and testing. In re Search Warrant (Sealed), 810 F.2d at 71. As such, defendants cannot possibly have an interest of such strength that it would prevail on balance. Id. There is absolutely no evidence of a current medical condition or any performance issue that would justify delving into plaintiff's medical records, or compelling extensive disclosure, examination or testing. Indeed, the most cursory of inquiries would have revealed that all evidence was to the contrary, that plaintiff had consistently performed exceptionally and rarely missed a day. Nonetheless, and even after their selected doctor declared the obvious, that plaintiff was fit for duty, defendants stubbornly persisted in their campaign of intrusion. That "marked absence of any meaningful investigation" prior to ordering such significant and extraordinary intrusions into the zone of medical privacy tilts the balance decidedly in plaintiff's favor.

Accordingly, plaintiff is entitled to judgment as a matter of law on the Section 1983 right to privacy claim.

Immunity of Defendant Sheridan

In the July 1, 2008 Memorandum, in denying defendants' motion for summary judgment on the Section 1983 count, the Court wrote: "As discussed, the ultimate resolution of Blake's right to privacy claim is for another day." Nonetheless the Court continued: "Even assuming that Defendants violated Blake's right to privacy, however, the facts of this case do not demonstrate that Sheridan's conduct violated a clearly established constitutional right. . . . Accordingly, qualified immunity for Sheridan applies here, and Blake's §1983 claims against Sheridan will be dismissed."

We respectfully submit that because the issue was not ripe, that portion of the Court's opinion was advisory or dicta. Alternatively, we seek reconsideration of this issue in light of the full briefing of the right to privacy and the immunity issue.

First and foremost, at the time of the issuance of the Court's July 1, 2007 ruling, defendant Sheridan had not filed an answer to the First Amended Complaint. Since then, he also failed to answer the Second Amended Complaint. As such, defendant Sheridan never properly pled the defense of qualified immunity. Accordingly, he was and is not entitled to summary judgment on the issue of qualified immunity.

Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982), citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official.")

But even if he had properly pled the defense, we submit defendant Sheridan would have failed to earn that protection on these facts. As set forth in Harlow v. Fitzgerald, 457 U.S. at 818, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Defendant Sheridan's subjective intent also is central to the analysis. "The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether '[the] official himself [is] acting sincerely and with a belief that he is doing right.'" Gomez v. Toledo, 446 U.S. at 641, quoting Wood v. Strickland, 420 U.S. 308, 321 (1975).

The initial inquiry is whether defendant Sheridan violated a clearly established constitutional right to medical privacy. "In order for the right to be clearly established it must be: 'sufficiently clear that a reasonable official would understand that what he is doing

violated that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.' Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (internal citation omitted)." Valladares v. Cordero, 552 F.3d 384, ___ (4th Cir. 2009).

As set forth above, the right to privacy in general, and the right to privacy in medical information in particular, have been clearly established for decades. Again, defendants do not appear to contest that. See Memorandum of Law in Support of Defendant Baltimore County's Motion for Summary Judgment as to the Remainder of Count I (2/13/09), p. 2 fn. 1.

Turning to the second prong, we submit that a reasonable police chief in "similar circumstances" would have appreciated that it was a violation of plaintiff Blake's privacy to order personnel to delve into his old medical records in the department's files, to force him to authorize access to all his medical records, to compel him to turn over extensive records to the department doctor, and then to submit to a physical examination and testing of

his body by their doctor and an interview about his lifelong medical history, *with no basis whatsoever in fact*.

Added to that, defendant Sheridan's own "resident experts," charged with reviewing and advising him on such personnel actions, expressly notified him repeatedly of potential illegality. On August 22, 2006, just one week before defendant Sheridan issued the orders under scrutiny, Personnel Section Director Robert Wickless wrote in his memorandum "Review of Medical Folders": *"I feel obligated to note that even the gathering of the above information for use now puts us on dangerous ground."* Deposition of Colonel Kim Ward, Exh. 11 (8/22/06 memo)(emphasis added). Colonel Ward testified that that memorandum, along with two other Wickless memoranda advocating for caution due to the potential illegality of the intended course, was delivered to defendant Sheridan and discussed with him. While defendant Sheridan professed lack of recall, both Colonel Ward and Mr. Wickless testified consistently to those facts. Further, both testified that thereafter, defendant Sheridan threatened them that if they persisted in expressing concerns about the legality of the plan, they did so "at their peril," a threat which Col. Ward

documented. Deposition of Colonel Kim Ward, p. 73-77, Exh. 6.[5]

So after silencing the messengers with threats of adverse employment action, defendant Sheridan charged ahead with the campaign. A public official of his experience and position should not be able to silence the messengers, then turn around and claim he simply did not appreciate the illegality of his conduct.

But defendant Sheridan's willful ignorance did not end with his silencing of Colonel Ward and Robert Wickless. Again, he testified he issued the series of orders without looking at any of the evidence on hand: not Dr. Oroszlan's report, plaintiff's Board of Appeals testimony, the medical records concerning plaintiff's 1996 event, which demonstrated he was clearly released to return to duty, any medical information about seizures, or plaintiff's personnel file. Meanwhile, he never spoke to plaintiff or his supervisors. Then, ultimately, when Dr. Oroszlan

[5] In total, defendant Sheridan replied in his deposition *more than 100 times* that he did not recall or he did not know. Notably, in his sworn Charge of Discrimination, Robert Wickless claims, "prior to a second deposition on the same suit I was advised by a County Attorney handling the case that it was 'okay to not remember things' to which I replied that I thought that it was only 'okay' if not remembering was the truth. When I reported this incident to my superiors, including the Chief of Police, I was told I was 'making a mountain out of a molehill.'" See Exhibit 1.

recommended an EEG, a significant medical test *after* finding plaintiff fit-for-duty, he did not pause to apply an ounce of analysis or scrutiny. He admitted he never considered Dr. Oroszlan's credentials or qualifications nor did he look into what Dr. Oroszlan reviewed in making that unprecedented recommendation.

As the Supreme Court has explained: "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular [government] conduct." Saucier v. Katz, 533 U.S. 194, 205 (2001). Surely, in this case, we are not dealing with such a "reasonable mistake." On this record of persistent stubborn, thoughtless action, defendant Sheridan cannot plausibly assert he "was acting sincerely with a belief that he is doing right." Gomez v. Toledo, 446 U.S. at 641. Rather, this record, we submit, demonstrates multiple instances of willful disregard for plaintiff's privacy rights transpiring over the course of weeks. On these established facts, a police chief generally, and defendant Sheridan in particular, should not be rewarded with immunity.

As such, we urge, judgment should be entered for plaintiff on his claim for violations of his right to privacy.

CONCLUSION

For the reasons set forth herein, and based on the controlling law, plaintiff Blake is entitled to judgment as a matter of law, and for such additional relief as the Court deems just.

/S/

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