**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

**Civil Action No. 10-cv-02569-WJM-KLM**

**CHANDRA J. BRANDT,**

**Plaintiff,**

**vs.**

**THE UNIVERSITY OF COLORADO HOSPITAL AUTHORITY,**

**Defendant.**

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

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Plaintiff Chandra J. Brandt ("Plaintiff" or "Brandt"), by and through undersigned counsel, hereby responds to Defendant's Combined Motion and Brief in Support of Summary Judgment ("Motion for Summary Judgment"). As Brandt shows below, genuine disputes as to several material facts exist, and thus the Motion for Summary Judgment filed by Defendant, the University of Colorado Hospital Authority ("Defendant" or "the Hospital"), should be denied.

## I. RESPONSE TO MOVANT'S MATERIAL FACTS ("RMMF")

Brandt hereby submits, pursuant to Rule 56(c)(1), Fed.R.Civ.P., D.C.COLO.LCivR 56.1.A and WJM Revised Practice Standard III.E.5, the following response to the Hospital's previously filed "STATEMENT OF UNDISPUTED MATERIAL FACTS ('SUMF')" (Doc. #62, pp. 5-10).

1. Ostensibly, Brandt admits the asserted material facts set forth by the Hospital in ¶1 of its SUMF. That being said, and while it may be of no consequence,[1] Brandt quibbles with the

[1] *See* Black's Law Dictionary 362 (9th ed. 2009).

Hospital's characterization of "a ***conditional*** job offer". (Emphasis added). The actual "contingent" job offer is attached hereto as Exhibit 1. *See* Doc. #29, p. 3, ¶8 (*referencing* Doc. #29-1) & Doc. #35, p. 3, ¶9.

2. Ostensibly, Brandt admits the asserted material facts set forth by the Hospital in ¶2 of its SUMF. That being said, in support of ¶2 of its SUMF the Hospital specifically cites to page 54, lines 1-13 of Brandt's deposition (Doc. #62-1, p. 6). In so doing, the Hospital conveniently omits Brandt's additional comment therein that "I also understood that a phase 2 would be offered after the preliminary health history form is filled out." Thus, while ¶2 of the Hospital's SUMF may be literally true, it is certainly lacking context.

3. Brandt admits the asserted material facts set forth by the Hospital in ¶3 of its SUMF.

4. Ostensibly, Brandt admits the asserted material facts set forth by the Hospital in ¶4 of its SUMF. That being said, in support of ¶4 of its SUMF the Hospital specifically cites to several lines combed from Brandt's 145 page deposition transcript but it does not, for obvious reasons, specifically include the Health History Form referenced therein. In lieu of lodging an objection pursuant to Rule 1002, Fed.R.Evid., the actual Health History Form, dated October 2 (by Brandt) and 8 (by Diann Eason), 2008, is attached hereto as Exhibit 2.

5. Brandt admits the asserted material facts set forth by the Hospital in ¶5 of its SUMF.

6. Brandt admits that Dr. Roth conducted a Phase I review of some of Brandt's medical records; however, Brandt denies that to the extent that asserted material fact implies that Dr. Roth reviewed all of Brandt's then-extant medical records or that the review was robust and extensive. That being said, in support of ¶6 of its SUMF the Hospital specifically cites to a single paragraph from an Affidavit from Henry Roth, M.D. In so doing, the Hospital conveniently omits any reference to the fact that this Phase I review:

A. lasted an estimated thirty (30) minutes [*see* attached Exhibit 3 (32:18 - 33:11)];

B. consisted of nothing more than a review of some of Brandt's written medical records (*id.* at 29:3-6);

C. did not include the "most important piece" of the screening process, *to wit*, talking with Brandt (*id.* at 39:2-11); and

D. did not contain any analysis whatsoever about potential reasonable accommodations for Brandt's disability (*id.* at 33:12 - 37:3) including, *inter alia*, job restructuring (*id.* at 61:4 - 62:4). This is particularly problematic inasmuch as that even if Brandt's seizure disorder was "poorly controlled" as alleged by the Defendants, "there still would have been employment opportunity of some sort at that point." *Id.* at 58:26 - 59:3.

Thus, while ¶6 of the Hospital's SUMF may be literally true, it is certainly lacking context.

7. Subject to the same observations set forth in ¶¶6.A-C, *supra*, Brandt ostensibly admits the asserted material facts set forth by the Hospital in ¶7 of its SUMF. That being said, and from a medical standpoint, a seizure disorder is "not controlled or stabilized" if the patient, here Brandt, is experiencing any seizures whatsoever. *See* attached Exhibit 4 (46:20 - 47:4). Thus, the nomenclature is a bit more dramatic that the reality.

8. Brandt admits the asserted material facts set forth by the Hospital in ¶8 of its SUMF.

9. Brandt objects to the asserted material facts set forth by the Hospital in ¶9 of its SUMF on the grounds and for the reason that they are irrelevant to the issues presented herein. *See Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 374 (6th Cir. 1999) (explaining how irrelevant evidence must be disregarded in considering the response in opposition to a motion for summary judgment).

10. Brandt:

A. objects to the asserted material facts set forth by the Hospital in ¶10 of its SUMF on the grounds and for the reason that the affiant, Dr. Henry Roth, has no firsthand, personal knowledge as to why Brandt did not participate in a Phase II examination. *Id.* (explaining how hearsay evidence must be disregarded in considering the response in opposition to a motion for summary judgment). *See* attached Exhibit 3 (63:18-24); and

B. disputes the asserted material facts set forth by the Hospital in ¶10 of its SUMF on the grounds and for the ***undisputed*** reason that Brandt was not evaluated for a restriction, accommodation, or alternate position by Dr. Roth because her "offer of employment with the University of Colorado Hospital" (*see* attached Exhibit 2, p. UCHA.Brandt 0247) was revoked by Paul G. Davis, an employee with the Hospital, prior to, and in lieu of, the scheduling of the Phase II examination. *See* attached Exhibits 5 (25:10 - 38:19), 6 (p. 6) & 7 (13:22 - 15:12).[2]

11. Brandt admits the asserted material facts set forth by the Hospital in ¶11 of its SUMF.

12. Brandt:

A. admits the asserted material facts set forth by the Hospital in ¶12 of its SUMF and it certainly agrees with the Hospital's observation in footnote 2 that "[t]he content of this conversation is disputed."; and

[2] In advance of a potential hearsay objection to this testimony from Brandt's then boyfriend (now fiancé) Jacob M. Hunker, Brandt asserts that this portion of his testimony is admissible pursuant to the excited utterance exception set forth in Rule 803(2), Fed.R.Evid.

B. disputes the suggestion in footnote 2 "that the Hospital did attempt to schedule a Phase II examination." What actually occurred, as alleged in ¶17 of the First Amended Complaint (Doc. #29, pp. 4-5) and attached Exhibits 6 (p. 7) and 8 (p. BRANDT_000556), is that:

> "Later that day, Brandt received a call from another male nurse from the Hospital, attempting to set up an appointment for a pre-employment physical. The second caller had not been informed that a Hospital official had called earlier to rescind her job offer. When Brandt so informed him, he accepted her statement as true and did not make any further attempt to schedule the physical."

As the Hospital does not even know who made this second call (*see* attached Exhibit 9, p. 2), it is certainly not in a position to dispute Brandt's version of the conversation.

13. Brandt admits the asserted material facts set forth by the Hospital in ¶13 of its SUMF.

14. Brandt admits the asserted material facts set forth by the Hospital in ¶14 of its SUMF. However, for the sake of clarity, ¶14 should probably say "later that day." *See* attached Exhibits 6 (p. 7) & 8 (p. BRANDT_000556).

15. Brandt admits the asserted material facts set forth by the Hospital in ¶15 of its SUMF.

16. Brandt disputes the asserted material facts set forth by the Hospital in ¶16 of its SUMF. Not only does Brandt specifically refute this fact in, *inter alia*, attached Exhibit 6 (p. 7) but, what is more important, the portion of her deposition that the Hospital cites to in support of this "fact" does not even remotely support the Hospital's proposition. *See* Doc. #62-1, p. 16-17 at pp. 79:17 - 81:4.

17. Brandt objects to the asserted material facts set forth by the Hospital in ¶17 of its SUMF on the grounds and for the reason that it calls for speculation. *See Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) ("Rule 56(e) states that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Thus, statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement.") (Internal punctuation omitted).

18. Brandt objects to the asserted material facts set forth by the Hospital in ¶18 of its SUMF on the grounds and for the reason that it calls for speculation. *Id.*

19. Brandt:

A. Admits that she "did not later attempt to contact the Hospital to schedule a Phase II examination" because, as pointed out in ¶10(B), *supra*, her offer of employment had already been revoked; and

B. Objects to the assertion that she "did not... take any action to attempt to resolve the miscommunication" at the Hospital. It is totally speculative as to whether and to what extent there was "miscommunication" within the Hospital about Brandt's offer of employment with the Hospital. *See, e.g., Stagman*, 176 F.3d at 995.

20. Brandt admits the asserted material facts set forth by the Hospital in ¶20 of its SUMF.

21. Brandt admits the asserted material facts set forth by the Hospital in ¶21 of its SUMF. *But see* ¶¶53-54, *infra*, which specifically relates to Brandt's convalescence.

22. Brandt admits the asserted material facts set forth by the Hospital in ¶22 of its SUMF.

23. Brandt admits the asserted material facts set forth by the Hospital in ¶23 of its SUMF.

24. Brandt disputes the asserted material facts set forth by the Hospital in ¶24 of its SUMF. *See* attached Exhibit 10 (24:7 - 30:21 & 40:12 - 41:9).

25. Brandt admits the asserted material facts set forth by the Hospital in ¶25 of its SUMF.

26. Brandt admits the asserted material facts set forth by the Hospital in ¶26 of its SUMF.

27. Brandt admits the asserted material facts set forth by the Hospital in ¶27 of its SUMF.

28. Brandt admits the asserted material facts set forth by the Hospital in ¶28 of its SUMF.

29. Brandt admits the asserted material facts set forth by the Hospital in ¶29 of its SUMF.

30. Brandt admits the asserted material facts set forth by the Hospital in ¶30 of its SUMF.

31. Brandt admits the asserted material facts set forth by the Hospital in ¶31 of its SUMF.

32. Subject to the same observations set forth in ¶1, *supra*, Brandt ostensibly admits the asserted material facts set forth by the Hospital in ¶32 of its SUMF.

33. Brandt objects to the asserted material facts set forth by the Hospital in ¶33 of its SUMF on the grounds and for the reason that they are irrelevant to the issues presented herein. *See Godfredson*, 173 F.3d at 374.

34. Brandt objects to the asserted material facts set forth by the Hospital in ¶34 of its SUMF on the grounds and for the reason that they are irrelevant to the issues presented herein. *Id.* In particular, of what relevance is it that Brandt may have had seizures after her job offer had been revoked?

35. Brandt disputes the asserted material facts set forth by the Hospital in ¶35 of its SUMF. In particular, the portion of her deposition that the Hospital cites to in support of this "fact" does not even remotely support the Hospital's proposition.

36. Brandt admits the asserted material facts set forth by the Hospital in ¶36 of its SUMF.

37. Brandt admits the asserted material facts set forth by the Hospital in ¶37 of its SUMF.

38. Brandt admits the asserted material facts set forth by the Hospital in ¶38 of its SUMF, *to wit*, "this could be very problematic". In other words, Dr. Sheri Friedman responded to a speculative question with a more speculative response.

39. Brandt admits the asserted material facts set forth by the Hospital in ¶39 of its SUMF.

40. Brandt admits the asserted material facts set forth by the Hospital in ¶40 of its SUMF.

41. Brandt admits the asserted material facts set forth by the Hospital in ¶41 of its SUMF. To be clear, this process could function much like the Hospital's current process of

relieving technologists on a given case so that the technologist could take lunch or otherwise attend to other matters. *See* attached Exhibit 10 (24:24 - 25:6). A surgical technologist who does not have epilepsy may also at times have to be relieved due to sudden incapacitation or illness. *See, e.g., id*. (23:17 – 24:6). Brandt does not admit, however, that this was the only possible accommodation for her disability. *See generally* ¶¶61-62, *infra*.

42. Brandt:

A. objects to the asserted material facts set forth by the Hospital in ¶42 of its SUMF on the grounds and for the reason that it calls for speculation. *See Stagman*, 176 F.3d at 995; and

B. would like point out that the portion of her deposition that the Hospital cites to in support of this "fact" specifically states that "if there was a risk to that patient, it would be a small one."

43. Brandt admits the asserted material facts set forth by the Hospital in ¶43 of its SUMF.

## II. STATEMENT OF ADDITIONAL DISPUTED FACTS ("SADF")

Brandt hereby submits, pursuant to Rule 56(c)(1), Fed.R.Civ.P., D.C.COLO.LCivR 56.1.A and WJM Revised Practice Standard III.E.6, the following statement of additional disputed facts.

44. Brandt had worked without incident for some years prior to October 2008, including in positions involving potentially dangerous instruments and conditions. *See* attached Exhibit 8, p. BRANDT_000552.

45. Brandt worked as a clinical intern at the University of Colorado Hospital in 2008 and at the Medical Center of the Rockies from 2007 to 2008. *Id.*

46. As a Surgical Technologist at these facilities, Brandt was responsible for the management of all surgical instrumentation used during the procedures. She had to handle very sharp instruments such as scalpels, syringes/needles, suture needles, surgical scissors, forceps, trocars, surgical staplers; powdered devices such as drills and drill bits; and heat conducting devices such as electrocautery pens, and other potentially dangerous instruments. *Id.*

47. Among other things, Brandt was responsible for the transfer of these items to and from the "back table" to the surgical table. *Id.* at BRANDT_000552 - BRANDT_000553.

48. There was never any incident or mishandling of the instruments that could raise any concern about Brandt's ability to perform her job safely. *Id.* at BRANDT_000553.

49. Brandt worked with potentially dangerous items and in potentially dangerous conditions as a waitress at Bonefish Grill from 2007 to 2008 and at Buffalo Wild Wings from 2006 to 2007. *Id.*

50. In those positions, she was constantly around, using, or carrying sharp, kitchen-type utensils and was around hot grills and burners while in the kitchen area. *Id.*

51. Brandt has never had a seizure in a work-related position, whether as a clinical intern, a waitress, or otherwise. *Id. See also* attached Exhibits 8 (p. 2, ¶4) and 11 (p. 4, ##11-12).

52. As of October 2008 and since that time, Brandt has received medication and treatments to limit seizures and control her condition with the result that she only experiences seizures relatively infrequently. She has taken seizure-controlling medications, such as Trileptal and Keppra, for several years. *See* attached Exhibit 8, p. BRANDT_000553.

53. Brandt's Vagus Nerve Stimulator ("VNS") surgery was an outpatient surgery that took place on a Friday, October 24, 2008. *See* attached Exhibit 12 (74:2-12).

54. Brandt recovered from the surgery over the weekend and was back in classes the next week. *Id.* at 74:15-18.

55. The VNS implant delivers electronic stimulation in regular pulses all the time and serves to prevent or limit seizures. *See* attached Exhibit 8, p. BRANDT_000553.

56. For patients such as Brandt who experience an "aura," or warning, prior to the onset of a seizure, it is possible to place a magnet over the VNS implant to stop the seizure entirely, shorten it, make it less severe, or reduce the post-seizure recovery time (if any). *Id.*

57. Brandt made the Hospital aware of this then-upcoming implantation at the time she spoke with the female nurse as a part of Brandt's health history review, but the Hospital appears not to have considered it or its likely positive and ameliorative effects of this relatively new treatment option on her ability to perform whatsoever. *Id.*

58. Because Brandt nearly always has an "aura," or warning, that she experiences some significant period of time before the onset of a seizure, she is able to (1) use a magnet to stop or curtail a seizure, as described above, or, in the event this fails to avoid a seizure entirely, (2) make necessary arrangements ahead of, and otherwise prepare for, any seizure. *Id.*

59. When asked if somebody with epilepsy could work in direct patient care, Dr. Roth testified "[i]t would depend." *See* attached Exhibit 3 (38:9-24).

60. Dr. Roth is not a specialist in neurology by education or formal training. *Id.* at 23:18 - 25:14. *See also* Doc. #62-2, ¶1.

61. In addition to the accommodation discussed in ¶41, *supra,* the Hospital could have restructured the Surgical Technologist position into tasks that Brandt could clearly do without any direct patient care whatsoever. In particular, Brandt could have been responsible for

preparing the surgical instruments prior to surgery and she could have been responsible for cleaning them up after surgery. *See* attached Exhibit 10 (24:7 - 41:9 & 51:17 - 56:4).

62. In addition to the accommodation discussed in ¶41, *supra*, Brandt would have also considered accepting another position at the Hospital. *See* Doc. #62-1, p. 15 and p. 108:7-10.

63. The Hospital neither performed a medical examination on Brandt before withdrawing its offer to her, nor requested the input of Brandt or her treating physician as to how having epilepsy affects Brandt or whether she could safely perform the job notwithstanding her condition. *See* attached Exhibit 8, p. BRANDT_000554.

64. The Hospital further failed to engage in an interactive process with Brandt to determine whether there might be a reasonable accommodation that may have enabled her to do so (to the extent it was believed she could not perform the essential functions without such an accommodation). *Id.*

65. If asked, Brandt's neurologist, Dr. Friedman was prepared to inform the Hospital that Brandt's seizures had been "under excellent control" at that point, that Dr. Friedman expected her to "respond well to the vagus nerve stimulator," and that Dr. Friedman was willing to write a letter to Brandt's supervisor or to speak personally with the supervisor in support of Brandt's bid to work at the Hospital, as Dr. Friedman observed in her contemporaneous notes after seeing Brandt on November 19, 2008. *See* attached Exhibit 13 (authenticated by Dr. Friedman in her deposition at 13:21-24 & 22:3-20).

66. The Hospital's claim that the reason Brandt was not interviewed and did not receive an examination is because she "self-terminated" the "Phase II" (the in-person interview and examination) process is preposterous and not worthy of credence. As Brandt has previously

indicated, she received two incoming calls from the Hospital on October 22, 2008, the date in question. *See* attached Exhibit 8, p. BRANDT_000556.

67. The first call, which Brandt recalls coming around 11:15 am that day, was from a male Hospital employee, who informed Brandt that the Hospital had decided to rescind her job offer after reviewing her medical records, but that she could re-apply for a position that had no "direct patient contact" because the Hospital believed she would present a danger to their staff and patients. Brandt asked what precisely it was about the records that led them to rescind the offer, and the employee said he was simply transmitting what the doctor said. *Id.*

68. The second call, which Brandt recalls occurring around 1:15 pm that day, was from another male Hospital employee who called to set up an appointment for a pre-employment physical or examination. Brandt told the caller she was confused because she had already been told the offer was rescinded. The employee replied he did not know that, but seemed to accept that such was the state of affairs and did not make any further attempt to schedule the examination. *Id.*

69. The Hospital employs a number of other persons with epilepsy even though they too have direct patient contact. *See* attached Exhibit 14 (30:10 - 36:6 & 43:18 - 44:25).

## III. STANDARD OF REVIEW

Summary judgment is properly granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The existence of a genuine dispute as to any material fact depends upon "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one31/-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986). Substantive law indicates which facts are "material," and a

dispute as to a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248. Finally, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id*. at 255.

## IV. ARGUMENT

Federal law[1] prohibits discrimination "against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *See* 42 U.S.C. § 12112(a). Such proscribed discrimination specifically includes, but is not limited to, the following:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant; [and]
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . ."

42 U.S.C. § 12112(b). *See also* 29 C.F.R. § 1630.9(a)-(b).

To establish a prima facie case of disability discrimination, Brandt "must show that (1) she is disabled within the meaning of the ADA, (2) she is able to perform her essential job functions with or without a reasonable accommodation, and (3) [the Hospital] discriminated

[1] Brandt agrees that the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq*., and the Rehabilitation Act, 29 U.S.C. § 701, *et seq*., generally utilize the same standards and will consequently also combine her treatment of her ADA and Rehabilitation Act claims.

against her in [its] employment decisions because of her alleged disability." *McWilliams v. Jefferson Cnty*, 463 F.3d 1113, 1116 (10th Cir. 2006).

The Hospital does not dispute that Brandt had a disability, namely, epilepsy. Instead, the Hospital argues that Brandt: (1) was not discriminated against because of her disability since she allegedly declined to participate in a Phase II examination; (2) was not a "qualified individual" for the position at issue; and (3) posed a "direct threat" to herself or others. Because genuine disputes as to these material facts exist, summary judgment is not appropriate here. Accordingly the Hospital's Motion for Summary Judgment should be denied.

### A. A Genuine Issue of Material Fact Remains as to Whether the Hospital Discriminated Against Brandt Based on Her Disability.

The Hospital contends that Brandt cannot establish that "the Hospital's reason for withdrawing her contingent offer was based on her disability," suggesting instead that "Brandt declined to participate in the Phase II examination."[2] (Motion for Summary Judgment, pp. 13, 15). According to the Hospital, during the Phase II examination, Brandt would have been examined and would have had an opportunity to disclose additional information about her condition. (*Id*., p. 3). In addition, the Phase II meeting would have "provide[d] an opportunity to determine additional restrictions and/or to identify other potential suitable positions for the employee." (*Id*.; *see also* SUMF, ¶8; RMMF, ¶8). Substantial evidence demonstrates that it was

[2] The Hospital also suggests that Brandt may not have provided all records in existence at that point in time pertaining to her condition, but rather only records from her treating neurologist. Brandt notes first in this regard that the paragraphs in the SUMF cited in this regard do not stand for the propositions for which they are cited. Second, the record here is not clear with respect to which records or the extent of the records Brandt was asked to provide. Brandt may have very reasonably believed that by seeking records from her treating neurologist, she would be providing the Hospital with all that they needed for their review. Third, it is not at all clear that any gaps or omissions in the records were attributable to Brandt (as opposed to the doctor's office from which she requested the records). Finally, and importantly, Brandt was neither asked to supplement these records nor given an opportunity to do so because the Hospital withdrew the job offer before the Phase II process began, as the following demonstrates.

not Brandt who "declined to participate in the Phase II examination," but rather the Hospital that simply withdrew her contingent job offer in light of the results of the Phase I review by Dr. Roth.

Brandt received two incoming calls from the Hospital on October 22, 2008, the date in question. (SADF, ¶66). The first call, which Brandt recalls coming around 11:15 am that day, was from a male Hospital employee, who informed Brandt that the Hospital had decided to rescind her job offer after reviewing her medical records, but that she could re-apply for a position that had no "direct patient contact" because the Hospital believed she would present a danger to their staff and patients. (SADF, ¶67; RMMF, ¶¶10, 19). Brandt asked what precisely it was about the records that led them to rescind the offer, and the employee said he was simply transmitting what the doctor said. (SADF, ¶67).

The second call, which Brandt recalls occurring around 1:15 pm that day, was from another male Hospital employee who called to set up an appointment for a pre-employment physical or examination. (SADF, ¶68). Brandt told the caller she was confused because she had already been told the offer was rescinded. (*Id*.). The employee replied he did not know that, but seemed to accept that such was the state of affairs and did not make any further attempt to schedule the examination. (*Id.*). Brandt did not thereafter contact the Hospital to further attempt to schedule a Phase II examination for the obvious reason that she understood the Hospital had already rescinded the job offer. (RMMF, ¶¶10, 12, 19).

It strains credulity to suggest that Brandt, who had been offered a job in her chosen field, would simply walk away from the job and not bother to work with the Hospital to set up a required examination. The examination and interview could have only served to enhance her prospects for securing her employment at the Hospital by enabling her to provide additional information and discuss other potentially suitable positions, to the extent it was found she could

not perform the functions for her chosen job. It is indeed difficult to believe, yet this is precisely what the Hospital is suggesting happened here.

### B. A Genuine Dispute of Material Fact Exists With Respect to Whether Brandt Is a "Qualified Individual."

#### 1. Brandt can perform the essential functions of the surgical technologist job.

The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individuals holds or desires." *See* 42 U.S.C. § 12111(8). More specifically, such an individual "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without accommodation, can perform the essential functions of such position." 29 C.F.R. § 1630.2(m).

In this case, a genuine dispute exists with respect to whether Brandt can perform the essential functions of the surgical technologist job, even without a reasonable accommodation.[3] That the Hospital found that Brandt had the requisite education, skills, and experience for the position is apparent; after all, the Hospital initially extended her an offer of employment for the position when she applied in 2008. Instead, the Hospital's argument in this regard hinges on which functions it contends Brandt would not be able to perform *if she had a seizure*.[4] However,

[3] It bears mentioning that Dr. Roth, who reviewed Brandt's medical records and assessed her condition, did not express a general concern about her ability to perform the functions of the job; rather, he was concerned about whether Brandt could perform the functions safely and without endangering herself or others in the operating room – that is, whether, she posed a direct threat. *See* Doc. #62-2, ¶ 4. The Hospital's more general concern is of a much more recent vintage.

[4] It is worth pointing out that under the Hospital's line of reasoning, no one with epilepsy who suffers even occasional seizures would ever be "qualified" to do any job because such an individual could not fulfill the essential functions all of the time, or more precisely, while they are having a seizure, no matter how briefly they last or how infrequently they occur. Such a pernicious construction of laws designed to promote the employment of individuals with disabilities is certainly to be avoided.

the record here indicates that Brandt has never had a seizure at work – prior to October 2008 or since. (SADF, ¶¶44, 51).

The undisputed evidence demonstrates that Brandt worked as a waitress at Bonefish Grill from 2007 to 2008 and at Buffalo Wild Wings from 2006 to 2007 without ever experiencing a seizure at work. (SADF, ¶49). Likewise, Brandt worked without incident as a clinical intern at the University of Colorado Hospital in 2008 and at the Medical Center of the Rockies from 2007 to 2008. (SADF, ¶45). Her duties as a surgical technologist at these facilities involved duties very similar to those she would have performed had the job offer not been withdrawn by the Hospital. (SUMF, ¶¶22-23; RMMF ¶¶22-23; SADF, ¶¶46-47). Finally, she has never experienced a seizure while working at any subsequent job. (SADF, ¶51).

As a result of taking medication, having surgery, and other ameliorative efforts, Brandt suffers seizures only relatively infrequently. (SADF, ¶52). As of October 2008 and since that time, Brandt has received medication and treatments to limit seizures and control her condition. (*Id*.) She has taken seizure-controlling medications, such as Trileptal and Keppra, for several years. (*Id*.) Although Brandt's seizures were not always "well controlled," this simply means that she was not entirely seizure-free at times. (RMMF, ¶ 7).

On Friday, October 24, 2008, Brandt had a Vagus Nerve Stimulator ("VNS") implanted through outpatient surgery. (SADF, ¶53). Brandt recovered from the surgery over the weekend and was back in classes the next week. (SADF, ¶54). The VNS implant delivers electronic stimulation in regular pulses all the time and serves to prevent or limit seizures. (SADF, ¶55). For patients such as Brandt who experience an "aura," or warning, prior to the onset of a seizure, it is possible to place a magnet over the VNS implant to stop the seizure entirely, shorten it, make it less severe, or reduce the post-seizure recovery time (if any). (SADF, ¶56). Because

Brandt nearly always has an "aura," or warning, that she experiences some significant period of time before the onset of a seizure, she is able to (1) use a magnet to stop or curtail a seizure, as described above, or, in the event this fails to avoid a seizure entirely, (2) make necessary arrangements ahead of, and otherwise prepare for, any seizure. (SADF, ¶58). If asked, Brandt's neurologist, Dr. Friedman, was prepared to inform the Hospital that Brandt's seizures had been "under excellent control" at that point, that Dr. Friedman expected her to "respond well to the vagus nerve stimulator," and that Dr. Friedman was willing to write a letter to Brandt's supervisor or to speak personally with the supervisor in support of Brandt's bid to work at the Hospital, as Dr. Friedman observed in her contemporaneous notes after seeing Brandt on November 19, 2008. (SADF, ¶65). Accordingly, there exists a genuine dispute as to whether Brandt could perform the essential functions of the job.

*Olsen v. Capital Region Med. Cnt.*, 2012 U.S. Dist. LEXIS 51605 (W.D.Mo. April 12, 2012), an unpublished district court decision from another circuit cited by the Hospital, is wholly inapposite to this case. In that case, the plaintiff was a mammography technologist whose job required her to perform mammography examinations and radiographic procedures of the breast and to operate radiographic equipment, among other things. *Id*. at *1-2. Over a six-year period, the plaintiff had at least 16 seizures while at work, fourteen of which occurred over a twenty-six month period between 2008 and 2010. *Id*. at *2. As a result of these seizures, the plaintiff suffered numerous injuries, including hitting her head several times (once requiring staples), biting her tongue and cheek, cutting her head and tongue, injuring her face, and apparently ceasing to breath. *Id*. at *2-3, 5. In addition, the plaintiff suffered at least two seizures while working directly with patients, including once during the compression portion of a mammogram, thereby creating actual patient safety issues. *Id*. at *3.

The defendant employer implemented a "number" of accommodations "in an effort to alleviate conditions which might be potential triggers for [the] plaintiff's seizures." *Olsen*, 2012 U.S. Dist. LEXIS 51605, at *4-5. After the plaintiff was seriously injured, the employer also attempted to work with the plaintiff to find alternative positions. *Id*. at *5-7. Ultimately, the employer offered to reinstate the plaintiff with her prior pay and full seniority and benefits, but the plaintiff rejected the offer and was terminated. *Id*. Based on these facts, and after rejecting the plaintiff's suggestion that intermittent leave would have been a reasonable accommodation, the court found that the plaintiff was not a "qualified individual" who could perform the essential functions of the job with or without a reasonable accommodation. *Id*. at *11-16.

Unlike the plaintiff in *Olsen*, who frequently suffered seizures at work that resulted in actual and significant injuries, compromised patient safety, and rendered her unable to perform the essential functions of her job, Brandt has never suffered a seizure at work, much less developed a pattern of having such seizures repeatedly. In a striking contrast to Brandt, the plaintiff in *Olsen* had an actual, well-established history of not being able to perform her job at times due to her frequent and unpredictable seizures. With respect to reasonable accommodations and participating in the interactive process, the employer in *Olsen* was the very model of accommodating, diligently seeking to find ways to enable the plaintiff to continue in her employment. As Brandt shows below, the difference in approach between the Hospital in this case and the employer in *Olsen* could scarcely be more pronounced and clear.

**2. The Hospital utterly failed to participate in the interactive process or to otherwise explore any reasonable accommodations that might have enabled Brandt to perform the essential functions of the job, even though a number of such potential accommodations existed.**

An employer is required to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5). *See also* 42 U.S.C. §§ 12111(8), 12113(a); 29 C.F.R. § 1630.2(r). A "reasonable accommodation" may include, among others, "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . training materials or policies, . . . and other similar accommodations for individuals with disabilities." *See* 42 U.S.C. § 12111(9).

"To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). It is incumbent on both parties to participate in good faith and to "proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company and, if so, to identify an appropriate reassignment opportunity if any is reasonably available." *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999). The failure to consider an individual with a disability for other vacant positions is a sign of bad faith. *Id*. at 1172, 1174.

In this case, a genuine dispute exists as to whether the Hospital engaged in the required interactive process or otherwise attempted in good faith to make a reasonable accommodation, to the extent such an accommodation was needed, once Brandt's disability became known and identified to the Hospital. As noted above, the Hospital never even evaluated Brandt for a restriction, accommodation, or alternative position because the Hospital withdrew its offer of employment after Dr. Roth's initial review of Brandt's medical records and before a Phase II

examination, at which such matters would have been addressed, could take place. (RMMF, ¶¶10, 12). The Hospital neither performed a medical examination on Brandt before withdrawing its offer to her, nor requested the input of Brandt or her treating physician as to how having epilepsy affects Brandt or whether she could safely perform the job notwithstanding her condition. (SADF, ¶63). The Hospital utterly failed to engage in an interactive process with Brandt to determine whether there might be a reasonable accommodation that may have enabled her to do so (to the extent it was believed she could not perform the essential functions without such an accommodation). (SADF, ¶64).

Had the Hospital participated in the interactive process or otherwise attempted to make a reasonable accommodation in good faith, the Hospital would have found that a number of potential accommodations existed. Among other things, the Hospital could have had another surgical technologist fill in for her whenever she had a seizure. (SUMF, ¶41; RMMF, ¶41). This process could function much like the Hospital's current process of relieving technologists on a given case so that the technologist could take lunch or otherwise attend to other matters. (RMMF, ¶41). Because a surgical technologist may also at times have to be relieved due to sudden incapacitation or illness unrelated to a disability, (*see, e.g.*, RMMF, ¶41), an employer that is a health care provider must, as a practical matter, be able to make such arrangements to relieve a surgical technologist from time to time to avoid compromising patient safety and care. *See Lane v. Harborside Healthcare-Westwood Rehab. & Nursing Ctr.*, 2002 U.S. Dist. LEXIS 13568, at *27-30 (D.N.H. July 16, 2002) (in a case involving a nurse with epilepsy who had been injured at work, summary judgment denied in part because employer must occasionally relieve nurses for other reasons and her "occasional seizures are [no] more detrimental to effective staff coverage than the sudden illness of a non-disabled LPN").

In addition, the Hospital could have restructured the Surgical Technologist position into tasks that Brandt could clearly do without any direct patient care whatsoever. (SADF, ¶ 61). In particular, Brandt could have been responsible for preparing the surgical instruments prior to surgery and she could have been responsible for cleaning them up after surgery. (*Id*.).

Furthermore, Brandt would have considered accepting another position at the Hospital. (SADF, ¶ 62). However, she was not given the opportunity to explore other positions because of the Hospital's withdrawal of her job offer. Likewise, because the Hospital did not even explore accommodations, it never considered whether – and has never demonstrated that – a particular accommodation would constitute an undue hardship or would be unreasonable. Thus, genuine issues of material fact exist with respect to whether the Hospital failed to accommodate Brandt.

**3. The "direct threat" defense is not available to the Hospital here, and at any rate the Hospital has not shown that Brandt posed a threat.**

a. The "direct threat" defense is, by its nature, an affirmative defense, and thus the Hospital bears the burden of proof on this issue.

The "direct threat" defense to an ADA claim is an affirmative defense, and as such, the burden of proof properly lies on the defendant to establish that the plaintiff was a direct threat to health or safety. *See Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 78-84 (2002) (discussing the "direct threat" defense and referring to it multiple times as an "affirmative defense"); *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003) ("In the employment context, it is the defendant's burden to establish that a plaintiff poses a 'direct threat' of harm to others") (italics and citations omitted); *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004), *rehearing denied*, 2005 U.S. App. LEXIS 9919 (7th Cir. May 20, 2005) ("[I]t is the employer's burden to show that an employee posed a direct threat to workplace safety that could not be eliminated by a reasonable accommodation."); *Hutton v. Elf Atochem. N. Am.*, 273 F.3d 884, 893 (9th Cir. 2001) ("Because

it is an affirmative defense, the employer bears the burden of providing that an employee constitutes a direct threat."); EEOC, *Questions and Answers about Epilepsy in the Workplace and the Americans with Disabilities Act* (last modified Feb. 2, 2011), *at* http://www.eeoc.gov/facts/epilepsy.html ("An employer may prohibit a person who has epilepsy from performing a job when it can show that the individual may pose a direct threat."). *See also Fellows-Gilder v. Chertoff*, 2005 EEOPUB LEXIS 5729, at *17 (EEOC 2005) ("The agency has the burden of proof regarding whether there is a significant risk of substantial harm.").

The Tenth Circuit has likewise held that, generally, "the existence of a direct threat is a defense to be proved by the employer." *See Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007). *See also Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1091 (10th Cir. 2008) (noting that "the burden of showing that an employee is a direct threat typically falls on the employer").

The Tenth Circuit's decision in *McKenzie v. Benton*, 388 F.3d 1342 (2004), does nothing to alter this state of affairs. In *McKenzie*, the Court addressed whether "the district court erred in instructing the jury that in cases involving an inherently dangerous job, an individual with a disability bears the burden of proving that she did not pose a direct threat." *Id*. at 1353. The ADA plaintiff in that case was a peace officer who had "suffered from a variety of psychological afflictions, including post-traumatic stress disorder (PTSD) related to childhood sexual abuse by her father," "fired six rounds from her off-duty revolver into the ground at her father's grave," and "suffered serious self-inflicted wounds and drug overdoses requiring several hospital visits." *Id*. at 1345-46.

In reaching its determination on the issue presented, the Court took into consideration several key facts present in the case:

> [T]he plaintiff had demonstrated clearly reckless use of her department issued off duty firearm when she fired six shots into her father's grave. McKenzie's

> irresponsible conduct could have tragic consequences if it reoccurred while she was on duty. In addition, evidence was presented at trial of McKenzie's engaging in violent conduct which had the potential to be a direct threat to others and which, in fact, led to physical harm to herself[, including cutting her own wrists and other forms of self-mutilation.] As a result, not only was the occupation in question "inherently dangerous," as stipulated by the parties, but McKenzie demonstrated particularly reckless and dangerous conduct.

*Id*. at 1355-56. Immediately following its recitation of these key facts, the Court held that "*under these circumstances*, the district court did not err by instructing the jury that the burden rested on the plaintiff to prove that she did not pose a 'direct threat' to others in the workplace." *Id*. at 1356 (emphasis added).

Importantly, the Court did not thereby create any blanket rule whereby the burden of proving the (non)existence of a direct threat is shifted to an ADA plaintiff in every case; rather, the Tenth Circuit has repeatedly emphasized since *McKenzie* that the burden properly rests on the defendant unless such circumstances are present. *See, e.g., Jarvis*, 500 F.3d at 1122; *Justice*, 527 F.3d at 1091. *See also Collins v. Raytheon Aircraft Co.*, 2003 U.S. Dist. LEXIS 1148, at *15 (D.Kan. Jan. 16, 2003) (referring to the ADA's "direct threat" defense as an "affirmative defense," citing the U.S. Supreme Court's decision in *Chevron U.S.A. v. Echazabal*, *supra*).[5]

The circumstances in this case are not remotely comparable to those in *McKenzie* in their nature, degree or extent of any risk or potential for harm, or key features. Far from stipulating that the surgical technologist job is "inherently dangerous," as the parties in *McKenzie* did with respect to being a peace officer, Brandt disputes such a characterization, and the Hospital has failed to show how the job at issue here is "inherently dangerous" or how *McKenzie* is otherwise

[5] Notably, in *McKenzie*, the Tenth Circuit failed to discuss or even mention *Echazabal*, decided only two years earlier, in analyzing whether the district court erred in instructing the jury that the plaintiff bore the burden of proving the nonexistence of a direct threat in that case. Instead, the *McKenzie* Court discussed decisions generally ante-dating *Echazabal*. To the extent *McKenzie* suggests that the burden of proof on the direct-threat issue may ever be on an ADA plaintiff, Brandt respectfully submits that such a position is inconsistent with the language of the ADA, which refers to the direct-threat matter as a "defense," and *Echazabal*.

applicable here. Among other things, Brandt wishes to point out in this regard that as a surgical technologist, she would be only one member of a surgical team, including a surgeon, assisting in any surgery, and she would not be actually performing any surgery or be otherwise directly responsible for patient care. (SUMF, ¶¶22, 43; RMMF ¶¶22, 43). Thus, the burden of proving a direct threat (to the extent the issue is before the Court – *see infra*) remains on the Hospital.

b. Because the Hospital failed to plead or to otherwise raise this affirmative defense in this case, it has waived the omitted defense.

Rule 8(c)(1), Fed.R.Civ.P., provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . ." Failure to plead an affirmative defense in a timely manner generally results in the waiver of the omitted affirmative defense. *See Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1076 (10th Cir. 2009).

In this case, Defendant did not raise the "direct threat" affirmative defense in its answer. (*See* Doc. No. 35, "Defenses"). Likewise, Defendant did not include such an affirmative defense in its "Statement of Claims and Defenses" in the proposed Scheduling Order, which was approved as amended on November 8, 2011. (*See* Doc. No. 45, § 3(b)). Instead, Defendant indicated it would defend on the other grounds set forth therein. Since Defendant has failed to comply in this regard with Rule 8(c), Fed.R.Civ.P., thereby failing to provide the required notice that it intended to maintain such a defense, the "direct threat" affirmative defense is waived and may not now be asserted in connection with its Motion for Summary Judgment. *See Andresen v. Fuddruckers, Inc.*, 2004 U.S. Dist. LEXIS 25373, at *25 (D.Minn. Dec. 14, 2004) (noting, in ruling on an employer's motion for summary judgment in an ADA case, that "[b]ecause Fuddruckers failed to plead its 'direct threat' affirmative defense, it has been waived").

This is not a case in which the "direct threat" issue was included in a court filing, such as a pretrial order, or was "consistently asserted" in the litigation process, thereby formally placing

the plaintiff on notice of the affirmative defense and overcoming a waiver argument. *See McKenzie*, 388 F.3d at n.2.[6] Therefore, the Hospital has waived this affirmative defense and may not now maintain that Brandt posed a direct threat to herself or others.

c. The Hospital has failed to establish that Brandt posed a direct threat or that it properly explored whether a reasonable accommodation might reduce or eliminate any such threat.

Under federal law, an employer may defend a charge of discrimination by showing "that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job . . . to an individual with a disability . . . [is] job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation . . ." *See* 42 U.S.C. § 12113(a). Such "'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id*., § 12113(b). *See also* 29 C.F.R. § 1630.15(b) (same).

A "direct threat," in turn, is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *See* 29 C.F.R. § 1630.2(r). *See also* 42 U.S.C. § 12111(3). Accordingly, the relevant inquiry under the ADA is not "whether a risk exists, but whether it is significant," since "few, if any, activities in life are risk free." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). *See also Fellows-Gilder v. Chertoff*, 2005 EEOPUB LEXIS 5729, at *17 (EEOC 2005) (noting an employer "must show more than that an individual with a disability poses a slightly increased risk of harm").

The determination as to whether "an individual poses a 'direct threat' shall be based on an *individualized assessment* of the individual's *present ability* to safely perform the essential functions of the job." 29 C.F.R. § 1630.2(r) (emphasis added). Under the governing regulation,

[6] It is noteworthy that the *McKenzie* Court did not dispose of the waiver argument in that case by suggesting that Rule 8(c)(1), Fed.R.Civ.P., did not apply in that case, but rather reached its determination in this regard solely on the bases outlined above.

the factors to be considered in making this determination include: (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. *Id*.

"The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.'" *Echazabal*, 536 U.S. at 86 (quoting 29 C.F.R. § 1630.2(r)). *See also Bragdon*, 524 U.S. at 649; *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1248 (9th Cir. 1999). "Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical records." *Mantolete v. Bolger*, 767 F.2d 1416, 1422 (9th Cir. 1985). Moreover, a good-faith belief that a significant risk exists is insufficient to relieve a defendant from liability. *See Jarvis*, 500 F.3d at 1122. If it is determined that a "significant risk" is posed, then the question becomes "whether the employer can make a reasonable accommodation, without undue hardship to the employer, so that the employee can perform her job without such risk." *Nunes*, 164 F.3d at 1248. "Such an analysis necessarily requires the employer to gather 'substantial information' about the employee's work history and medical status, and disallows reliance on subjective evaluations by the employer." *Id*.

Here, there is a genuine dispute as to whether Brandt posed a direct threat. As shown above, the Hospital based its determination of Brandt's then-present ability to perform the job safely solely on its limited and cursory review of medical records and further failed to consider whether she might be accommodated. *See* Doc. #62-2, ¶¶4, 6. Dr. Roth, who conducted the review, does not specialize in neurology, (SADF, ¶60), nor is there any evidence that he consulted with a specialist or gathered sufficient medical background. The Phase I review lasted an estimated thirty (30) minutes, consisted of nothing more than a review of some of Brandt's

written medical records, did not include the "most important piece" of the screening process, *to wit*, talking with Brandt, and did not contain any analysis whatsoever about potential reasonable accommodations for Brandt's disability. (RMMF, ¶ 6). This is particularly problematic inasmuch as "there still would have been employment opportunity of some sort at that point," even if Brandt's seizure disorder was "poorly controlled," as alleged by the Defendants. (*Id*.).

Dr. Roth noted that whether a person with epilepsy could work in direct patient care "would depend" on some factors. (SADF, ¶59). The Hospital employs a number of other persons with epilepsy even though they, too, have direct patient contact. (SADF, ¶69). Dr. Roth conceded that because a Phase II examination was not held, he "could not evaluate further what conditions or restrictions, if any, might be appropriate for Ms. Brandt either in a surgical technologist position or an alternate [*sic*] position" and that he would require "additional medical records or information pertaining to Ms. Brandt" before he could "render any other medical opinion pertaining to Ms. Brandt." *See* Doc. #62-2, ¶6. Likewise, it is not at all clear that the Hospital considered Brandt's then-upcoming VNS implantation or the likely positive and ameliorative effects of this relatively new treatment option on her ability to perform, even though Brandt made the Hospital aware of this the approaching implantation at the time she spoke with the female nurse as a part of Brandt's health history review. (SADF, ¶57). *See also* Doc. #62-2.

Had the Hospital performed the required analysis at the time,[7] it would have determined that Brandt did not pose a "significant risk of substantial harm" in the first instance. Crucially, as pointed out above, ***Brandt has never had a seizure in a work-related position***, whether as a clinical intern, a waitress, or otherwise – prior to October 2008 or thereafter. *Cf.* EEOC,

[7] Given that the relevant inquiry focuses on Brandt's then "present ability to safely perform the essential functions of the job," it is inappropriate for the Hospital to justify its position by citing transcripts from depositions taken years later or relying upon medical records or other documents that were neither in its possession nor pursued by it at the time. *See Nunes*, 164 F.3d at 1248.

*Questions and Answers about Epilepsy in the Workplace and the Americans with Disabilities Act*, *supra* (finding, in an example of an employee with epilepsy applying to be a welder, that "the employer may deny the employee the job" in large part because the employee "has experienced sudden and unpredictable seizures at work" in the past, thus making it appear significantly more likely that the employee may experience such seizures in the future). Furthermore, between 2006 and October 2008, when the Hospital withdrew its offer, she never had any incident which could have raised concerns about her ability to perform her jobs safely, even though she regularly worked with sharp, dangerous instruments (*e.g.*, scalpels, scissors, syringes/needles, electrocautery pens) and in dangerous conditions (*e.g.*, around hot grills and burners in a kitchen). (SADF, ¶¶44-50). *See* EEOC, *Questions and Answers about Epilepsy in the Workplace and the Americans with Disabilities Act*, *supra*.[8] There is no evidence of Brandt either causing or sustaining an injury as a result of a seizure, at work or otherwise.

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[8] The EEOC guidance provides in this connection as follows:

> The fact that an applicant has epilepsy may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, without posing a direct threat to safety. . . . The employer, therefore, should evaluate the applicant's present ability to perform the job effectively and safely. *After an offer has been made, an employer also may ask the applicant additional questions about his epilepsy, such as whether he takes any medication; whether he still has seizures and, if so, what type; how long it takes him to recover after a seizure; and/or, whether he will need assistance if he has a seizure at work.*
>
> *The employer also could send the applicant for a follow-up examination or ask him to submit documentation from his doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions and to do so safely*.
>
> > **Example**: An experienced chef gets an offer from a hotel resort. During the post-offer medical examination, he discloses that he has had epilepsy for ten years. When the doctor expresses concern about the applicant's ability to work around stoves and use sharp utensils, the applicant explains that his seizures are controlled by medication and offers to bring

In addition, because Brandt nearly always has an "aura," or warning, that she experiences some significant period of time before the onset of a seizure, she is able to (1) place a magnet over the VNS implant to stop or curtail a seizure or, in the event this fails to avoid a seizure entirely, (2) make necessary arrangements ahead of, and otherwise prepare for, any seizure. (SADF, ¶¶56, 58). *See Fellows-Gilder*, 2005 EEOPUB LEXIS at *19-20 (finding the existence of an aura prior to seizures militates against finding that an employee poses a "direct threat").

## V. CONCLUSION

It has been observed that motions for summary judgment are often "overuse[d]" and frequently "unreasonably delay[] the progress of civil litigation." WJM Revised Practice Standards III(E)(1). As is the case with many summary judgment motions, including motions concerning ADA claims brought by individuals with epilepsy, this matter is not appropriate for summary judgment. *See, e.g., Dark v. Curry County*, 451 F.3d 1078 (9th Cir. 2006); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208 (2d Cir. 2001); *Lane v. Harborside Healthcare-WestwoodRehab. & Nursing Ctr.*, 2002 U.S. Dist. LEXIS 13568 (D.N.H. July 16, 2002).

**WHEREFORE**, Plaintiff respectfully requests that the Court deny Defendant's Motion for Summary Judgment in its entirety.

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> information from his neurologist to answer the doctor's concerns. He also points out that he has worked as a chef for seven years without incident. Because there is no evidence that the applicant will pose a significant risk of substantial harm while performing the duties of a chef, the employer may not withdraw the job offer.

(emphasis added). In this case, the Hospital asked Brandt few, if any, of the foregoing "additional questions" about her epilepsy and failed to send her for a follow-up examination or to request documentation from her doctor concerning her ability to perform the job's functions effectively and safely. Such additional information would have indicated that Brandt was able to do so and that she had been able to do such (and other potentially dangerous) work in the past without incident. (*See* SADF, ¶¶44-51, 65).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10th of August, 2012, I electronically filed a true and exact copy of the foregoing Response with the Clerk of Court using the court's CM/ECF system.

/s/ Jarrett J. Haskovec