UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DISTRICT

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Plaintiff, and CHRISTOPHER FULTZ Intervenor-Plaintiff, v. RITE AID CORPORATION Defendant.	Civil Action No. 1:08-civ-2576 (CCB)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff Christopher Fultz hereby submits his brief in opposition to Defendant's Motion for Summary Judgment. With regard to the parties' joint claims, the U.S. Equal Employment Opportunity Commission joins in sections II and III of the brief. The parties incorporate their Joint Statement of Disputed Facts in its entirety.

Summary Judgment Standard

The Court may not grant summary judgment where there is a genuine issue as to any material fact. Fed. R. Civ. P. 56(c). Rite Aid bears the burden of demonstrating the absence of any disputed facts in this case. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985), *abrogated on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 238 (1989). The court must view the facts in the light most favorable to Fultz and the EEOC and draw all inferences in their favor. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150 (2000); *Ross*, 759 F.2d at 364. As in most discrimination or retaliation cases, the state of mind of Defendant's decisionmakers plays a central role in determining liability. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). The jury is the sole arbiter of credibility determinations and where any questions of intent turn on the credibility of a witness, summary judgment is inappropriate. *Ross,* at 365. Moreover, an employer cannot claim an adverse action was taken for a nondiscriminatory reason based on after-acquired information, since an employer cannot be motivated by knowledge it did not have at the time the adverse action was taken. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 359-60 (1995).

I. Fultz Is Disabled under Maryland Law.

Fultz is covered by the Maryland anti-discrimination statute because he is considered to have a disability under Maryland law by virtue of having epilepsy. *See* MD State Gov. Code § 20-

601(b)(1)(i)(1)(defining disability to include epilepsy). *See also id*. § 20-606 (protecting individuals with a disability from unlawful employment practices).

II. Fultz Is a Qualified Individual with a Disability under the ADA.

Title I of the ADA prohibits a covered employer from discriminating against a "qualified individual with a disability" with regard to his employment. 42 U.S.C. § 12112(a). A person is disabled within the meaning of the ADA if he (1) has "a physical or mental impairment that substantially limits one or more major life activities;" (2) has a record of such impairment; or (3) has been "regarded as having such an impairment." *Id.* § 12102(2). As explained below, Fultz is covered under each of these sections.

A. Fultz' Epilepsy Is an Actual Disability Under 42 U.S.C. § 12102(2)(A).

"The phrase 'substantially limits' sets a threshold that excludes minor impairments from coverage under the ADA." *EEOC v. Sara Lee Corp.*, 237 F.3d 349, 352 (4th Cir. 2001). However, the determination of whether an individual has a disability should not demand extensive analysis and the substantial limitation requirement should not be interpreted in overly restrictive manner.[0] *See*

[0] In arguing that Fultz' epilepsy is not an "actual" disability under the ADA, Defendant relies on the EEOC's regulations interpreting substantial limitation under the statute. Def. Mem. at 18 (*citing* 29 C.F.R. § 1630.2(j)). However, in enacting the ADAAA, Congress made explicit findings that "the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress; and … that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard." 42 U.S.C.A. § 12101 note (2008)(setting forth "Findings" and "Purposes" of ADAAA).

Consequently, Congress also expressed its "expectation that the Equal Employment Opportunity Commission … revise that portion of the current regulations that defines the term 'substantially limits' as 'significantly restricted …' *Id*. The EEOC has therefore revised its definition of "Substantially Limits" as follows:

> An impairment is a disability within the meaning of this section if it "substantially limits" the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability...

74 Fed. Reg. 48431, 48446 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)). The EEOC's revised regulations also state the following:

> the term "substantially limits," … shall be construed in favor of broad coverage of individuals to the maximum

Rohr v. Salt River Project Agric. Improvement & Power Dist., 555 F.3d 850, 862 (9th Cir. 2009)(*citing* ADA Amendments Act of 2008, Pub. L. No. 100-325, 122 Stat. 3553, 3554 (2008)). Consistent with its goal of protecting from discrimination a person with significant – and often misunderstood – medical conditions, Congress explicitly contemplated that persons with epilepsy would be covered by the ADA. *Sara Lee Corp.*, 237 F.3d at 352 (*citing* H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 52). Further, when it amended the ADA in 2008 in order to restore the intent and protections of the statute, Congress made it clear that "major life activities" encompass "[t]he operation of major bodily functions," including "neurological" and "brain" functions. *See* 42 U.S.C.A.. § 12102(2)(B)(2008).[1]

Thus, Fultz' epilepsy – a condition caused by irregular electronic activity in his brain -- constitutes a substantial limitation of a critical bodily function and is therefore an actual disability covered by the statute. *See Rohr,* 555 F.3d at 862 ("While we decide this case under the ADA, and not the ADAAA, the original congressional intent as expressed in the amendment bolsters our conclusions."); *Geoghan v. Long Island R.R.*, 2009 WL 982451, at *11 (E.D.N.Y. Apr. 9, 2009) (using ADAAA to interpret ADA analysis of a major life activity); *Green v. Am. Univ.*, 2009 WL 2569776, at *5 (D.D.C. Aug. 21, 2009) (same); *Menchaca v. Maricopa Comm. College Dist.*, 2009

> extent permitted by the terms of the ADA and should not require extensive analysis. … The comparison of an individual's limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence. … (A) Example 1: An individual with epilepsy will meet the definition of disability because he is substantially limited in major life activities such as functions of the brain or, during a seizure, functions such as seeing, hearing, speaking, walking, or thinking …. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples of impairments that may be episodic include, but are not limited to, epilepsy …. *Id*. at 48446-48447.

[1]Plaintiffs recognize that various courts have ruled that the ADAAA does not apply retroactively. However, Plaintiffs are not seeking retroactive application of the statute. Rather, "the ADAAA sheds light on Congress' original intent when it enacted the ADA" and therefore the amendments should inform the analysis of whether an individual is disabled under the original version of the statute. *Rohr*, 555 F.3d at 862.

WL 166923, at *4-6 (D. Ariz. Jan. 26, 2009) (relying on the Amendments Act as guidance in interpreting the ADA, and (1) citing its instruction that disability should not demand extensive analysis, (2) adopting its expanded list of major life activities, and (3) agreeing to assess disability in the active state for conditions that are episodic or in remission); *see also Bley v. Bristol Township Sch. Dist.*, 2006 WL 220669 at *6 (E.D. Pa. Jan. 25, 2006) ("All types of epilepsy have an uncontrolled electrical discharge from brain nerve cells.")(*quoting* Signet/Mosby Medical Encyclopedia, 211 (1985)).

Moreover, the severity of Fultz' seizures cause him to experience substantial limitations in major life activities such as walking, standing, speaking, and thinking. *See* 29 C.F.R. § 1630.2(i)(App.). During 2006 and 2007, Fultz had seven grand mal seizures during waking hours. Fultz Interrog. Resp. at 32-33; Fultz Decl. at ¶3.[2] When in the tonic-clonic phase of these seizures, he cannot stand, loses control over body movement, cannot speak, may lose control over his bladder, and is unable to remember the event. *See* Plaintiffs' Joint Statement of Disputed Facts ("SMF") at 4-6. He is wholly incapacitated, and therefore substantially limited in various major life activities. *Otting v. J.C. Penney Co.*, 223 F.3d 704, 710-11 (8th Cir. 2000)(Plaintiff's treatment-resistant epilepsy substantially limited major life activities because "when she suffers a seizure, she is rendered entirely incapable of speaking, walking, and seeing."); *Rowles v. Automated Prod. Systems, Inc.*, 92 F. Supp.2d 424, 430 (M.D. Pa. 2000) ("[Plaintiff] occasionally experiences seizures – which undisputedly limit[] his ability to walk, talk, speak, see, hear, and work …."); *Lane v. Harborside Healthcare-Westwood Rehab and Nursing Ctr. et al.*, 2002 WL 1674184, *7 (D.N.H. June 16,

[2]Fultz' best recollection is that he experienced five grand mal seizures during waking hours in 2006, two in 2007, and one in 2008. Fultz Interrog. Resp. at 32-33; Fultz Decl. at ¶3. Most of his seizure activity occurs while he is sleeping. Fultz Decl. at ¶2. He sometimes knows that he had a grand mal seizure at night because he wakes up in the post ictal phase with a severe headache. *Id*. During his last two years at Rite Aid, this occurred approximately 2-3 times per month. *Id*.

2002)("[W]hen Plaintiff has a seizure she cannot walk, stand, speak, see, think, control her movements, perform manual tasks, or care for herself ….[P]laintiff's seizures also eliminate her ability to control her bladder and bowel. These affected functions constitute major life activities."); *Bley*, 2006 WL 220669 at *6 (Plaintiff's epilepsy "clearly severely restricts her from several major life activities (walking, talking, thinking) while she is experiencing and shortly after a seizure.").

Further, substantial limitation of Fultz' major life activities continue after the tonic-clonic phase of his grand mal seizures and also occurs during his more frequent complex partial seizures. Because his consciousness is altered while in this state, he cannot communicate with other people and is prone to benign compulsive behavior. SMF at 4-5. Thus, there is substantial limitation in the major life activities of speaking and thinking. *See* 29 C.F.R. § 1630.2(i)(App.).

Fultz' major life activities are also significantly affected by the efforts he must take to try to prevent seizures. In addition to his lifelong protocol of anti-seizure medication, he must try to avoid stress, and when this is impossible, engage in on-the-spot stress management techniques. SMF at 6-7. Although many people are advised by their doctors to do the same, the difference with Fultz is that the consequence he is trying to avoid is a grand mal seizure and resultant incapacitation. The same is true of the necessity for him to try to be well-rested and to avoid becoming ill with common conditions like colds and the flu. Fultz Decl. at ¶8. Being fatigued or ill can cause him to experience a significant seizure – a consequence that most people in the general population do not face. Thus the combination of what Fultz experiences during his seizures, as well as his lifelong need to decrease the likelihood of seizures, substantially limits him, *see Rowles*, 92 F. Supp.2d at 429, and the entirety of his condition compels a conclusion that it is a disability covered by the ADA. *See Id*. ("The Court is mindful that taken individually, the limitations Plaintiff claims that he experiences

in connection with his [epilepsy] may not be particularly significant, viewed in their entirety, one could reasonably conclude that such limitations are substantial.").

The case law establishes that Fultz' condition – lifelong, treatment-resistant epilepsy that causes him to experience grand mal seizures – is an actual disability under the first prong of the ADA, *Otting v. J.C. Penney Co.*, 223 F.3d 704, 710-711 (8th Cir. 2000), and when a plaintiff's epilepsy manifests itself in a manner similar to Fultz', summary judgment must be denied on the issue of whether his condition is substantially limiting. *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 938 (3rd. Cir. 1997)("We simply hold that whether [plaintiff] is disabled or not constitutes a genuine issue of material fact better left for resolution by a jury ….."); *Rowles,* 92 F. Supp.2d at 430 (denying summary judgment because record established that Plaintiff's epilepsy was not totally controlled by medication and, that even with one breakthrough seizure per year, "… the court cannot say, as a matter of law … .." "… that this is not substantially limiting."); *Lane*, 2002 WL 1674184 at *8 (The permanence of Plaintiff's seizure disorder and the incapacitating nature of her seizures, establish "a trialworthy issue" "…as to whether [Plaintiff's] impairment substantially limits a major life activity."); *Bley*, 2006 WL 220669 at *6 (Because Plaintiff suffered from lifelong, treatment-resistant epilepsy summary judgment as to whether "… this impairment substantially limits the plaintiff in one or more major life activities … would be ill advised."); *Genthe v. Quebec or World Lincoln, Inc.,* 2002 WL 31833278 at *3 (D. Neb. Dec. 17, 2002)(Where co-workers had witnessed recent seizures and Plaintiff argued that seizures substantially limited cognitive thinking "… there remains a genuine issue of material fact as to whether the plaintiff is substantially limited in a the major life activity."); *see also Otting*, 223 F.3d at 711 (affirming district courts denial of defendant's motion for judgment as a matter of law because Plaintiff established that his epilepsy

was permanent, treatment-resistant, and caused incapacitating seizures).

Finally, Fultz' seizures are of a different type and severity than those suffered by Vanessa Turpin, the claimant in *EEOC v. Sara Lee*, 237 F.3d 349 (4th Cir. 2001). Whereas Fultz suffers from both grand mal and complex partial seizures, Turpin's epilepsy "… does not normally affect motor activity, and does not cause major motor or grand mal seizures." *Id*. at 351. Turpin's seizures were limited to nocturnal events in bed and complex partial seizures during her waking hours. *Id*. at 350-351. In upholding the District Court's determination that Turpin's epilepsy did not substantially limit major life activities, the Fourth Circuit relied upon the record evidence that she suffered from "a milder form of epilepsy" that had not required brain surgery. *Id*. at 352-53. Unlike Fultz, "Turpin's symptoms were markedly less severe than those of the plaintiff in *Otting*," and "[did] not rise to the level of substantially limiting … any major life activities." *Id*. at 353.

Because Fultz experiences more significant seizures and the ADA requires an individualized assessment of the condition at issue, Defendant's reliance on *Sara Lee* is misplaced and the Fourth Circuit's decision in that case does not support a summary judgment finding with regard to Fultz. For all of the reasons stated above, the Court should reject Defendant's arguments that, as a matter of law, Fultz is not actually disabled under the ADA.

B. Rite Aid Regarded Fultz as Having a Disability and Being Substantially Limited in the Major Life Activity of Working When It Removed Him from the Workplace.

Adverse actions taken against an individual who is regarded as disabled violate the ADA. *Wilson v. Phoenix Specialty Mfg. Co.*, 513 F.3d 378, 385 (4th Cir. 2008) at 385. 42 U.S.C. § 12102(2)(A); §12102(2)(C). The "regarded as" coverage provides protection when the employer believes that the "impairment substantially limits one or more major life activities," even when the

employee is not actually as limited as the employer believes. *Wilson*, 513 F.3d at 384-85 (citing *Sutton v. United Air Lines, Inc*., 527 U.S. 471, 489 (1999).

Working is a major life activity. 29 C.F.R. § 1630.2(i). To support a claim that an employee is regarded as substantially limited in the major life activity of working, an employer must have viewed the impaired employee as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Sutton,* 527 U.S. at 491 (citing 29 C.F.R. § 1630.2(j)(3)(i)).

1. When Rite Aid Removed Fultz from the Workplace, It Regarded Him as Substantially Limited in the Major Life Activity of Working.

From 2004-2008, Fultz worked on the first level in the Cooler, with satisfactory performance and causing no injury to himself or others. SMF Ex. 9; McDaniel Dep. at 339. Nonetheless, on January 4, 2008, Rowekamp concluded that Fultz was unable to continue in this position because he was unable to work alone, work in isolated areas, work around equipment, or work. SMF Ex. 53. Fultz' neurologist, on the other hand, opined that he was only unable to climb ladders and drive a forklift. SMF Ex. 14 (Feb. 25, 2008). It is undisputed that Rite Aid adopted Rowekamp's opinions about Fultz' ability to work when it removed him from his position. McDaniel Dep. at 233, 250. In so doing, it demonstrated agreement with the Rowekamp's exaggerated conclusions. *Russo v. Sysco Food Services of Albany, LLC*, 488 F. Supp. 2d 228, 235 (N.D.N.Y. 2007) (reliance upon company doctor's determinations establishes regarded as coverage for employee with epilepsy. While Rite Aid claims its doctor's opinion insulates it from liability, "[e]mployers do not escape their legal obligations under the ADA by contracting out certain hiring and personnel functions to third parties." *Rodriguez v. Conagra Grocery Products Co.*, 436 F.3d 468, 476-77 (5th Cir. 2006)(rejecting argument that employee could not rely upon employer's doctor's perceptions for

regarded as evidence).

Vocational evidence is relevant to determine whether an impairment affecting an individual's ability to work constitutes a disability under the ADA. *Taylor v. Fed. Express Corp*., 429 F.3d 461, 464 (4th Cir. 2005). *See also Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 145 (3d Cir. 1998) (reversing summary judgment on regarded as ADA claim based on expert report of Daniel Rappucci opining that employer's perceptions foreclosed plaintiff from 83% of jobs in geographic region). The unrebutted analysis performed by Plaintiffs' vocational rehabilitation expert, Daniel Rappucci, demonstrates that Rite Aid viewed Fultz as so limited in his ability to work that were Rite Aid's views true, Fultz would be substantially limited in all warehouse jobs like those at the Perryman facility as well as a broad range of jobs.[2] As shown in Rappucci's analysis, summarized below, under the limitations that Rite Aid projected onto Fultz, he would be shut out of 90% of warehouse jobs and 97% of jobs for which he would otherwise be qualified. Vocational Analysis of Daniel Rappucci (Sept. 10, 2009) at 5-6, Ex. 1.

a. Class of Jobs - 90% Loss of Opportunity

Rappucci concluded that "considering all jobs in the Baltimore-Towson, Maryland Metropolitan Statistical Area in which Fultz would have the requisite same/similar training, skills, abilities when compared to an average person – he has sustained a **90%** loss of employment opportunity." *Id.* at 5 (emphasis added). Specifically, Rappucci concluded the following:

- Based on Rite Aid's perceptions, Fultz would have been able to perfom only 38 job titles and 10,684 jobs in the entire region. Labor Market Employability Assessment, (Sept. 4, 2009) at CF004089-4091, Ex. 2.

[2]Consulting the U.S. Department of Labor's Dictionary on Occupational Titles, ("DOT"), Rappucci applied the functions delineated in Rowekamp's January 4, 2008, letter as they are defined in the DOT dictionary in order to determine the loss of job opportunity experienced by Fultz. Vocational Analysis at 3; n.1, Ex. 1. The DOT is recognized by the Social Security regulations as a source of "reliable job information." 20 C.F.R. § 404.1566(d)(1) (2006).

- Without any workplace restrictions, Fultz would have had access to 534 job titles and 106,763 jobs in the region. *Id*.

- Based on Fultz' neurologist's restrictions (forklift driving and ladders) Fultz would still have had access to 465 job titles and 89,394 jobs in the region. *Id.* at CF004076-4078.

b. Broad Range of Jobs - 97% Loss of Opportunity

Rappucci concluded that Fultz "sustains a **97%** loss of employment opportunity within the Baltimore-Towson Maryland Metropolitan Statistical Area" when considering the number and types of other jobs from which Fultz would have been disqualified in view of his perceived limitations, with such jobs not involving similar training, knowledge, skill, or abilities, *i.e*. a broad range of jobs in various classes. Vocational Analysis at 6 (emphasis added), Ex. 1. Specifically, Rappucci concluded the following:

- Based on Rite Aid's perceptions, Fultz would have only been able to perform 138 job titles and 17,373 jobs in the region. Labor Market Employability Assessment, (Sept. 4, 2009) at CF004079-4088, Ex. 2.

- Without any restrictions, Fultz would have been able to perform 8,940 job titles and 523,782 jobs in the region. *Id*.

As identified above, Rappucci also explored the number of jobs from which Fultz would actually be excluded based on the recommendations his treating neurologist imposed, i.e. no ladder climbing and no driving industrial trucks. Rappucci concluded that Fultz was disqualified from a far smaller percentage of jobs and range of jobs – only **20%** of a class/type of jobs and **22%** of a broad range of jobs in various classes. Vocational Analysis at 6, Ex. 1. Rappucci's analysis thus shows that Rite Aid's unfounded perceptions resulted in Fultz being disqualified from employment to a far greater than with the actual restrictions imposed by his treating neurologist.

2. After Removing Fultz from his Employment, Defendant Continued to Adhere to its Perception that Fultz Couldn't Work, Despite His Neurologist

Repeatedly Stating that He Could.

When Fultz attempted to return to work in February 2008, he submitted contemporaneous medical releases following examinations with his own neurologist. See SMF 14 (Feb. 11, 2008) (Feb. 25, 2008). Rite Aid continued its reliance upon Rowekamp's opinion, reached following his meeting with Fultz two months earlier. Rite Aid's steadfast disregard of Dr. Lesser's releases, based on the most current objective medical evaluations, illustrate clearly that Rite Aid remained steadfast in regarding as substantially limited in the major life activity of working.

The Fourth Circuit reached this conclusion on strikingly similar facts, finding that an employer's regarded as perception "was evident" when it ignored the employee's neurologist's recommendation that plaintiff be released to work without restrictions and instead required a release from the company doctor, who had not even reexamined the employee. *Wilson,* 513 F.3d at 385 (affirming a bench verdict in favor of an employee who was terminated because the employer regarded him as disabled). The Court found, "the company's firm perception that [plaintiff] was disabled led it to discount the specialist's medical opinion that [plaintiff] was capable of returning to work." *Id*. at 385. *See also Finan v. Good Earth Tools, Inc.*, 565 F.3d 1076 (8th Cir. 2009)(employer's discounting of treating physician's opinion supported jury's regarded as determination); *Taylor v. Red Star Express*, 2006 WL 3749598, 212 Fed. Appx. 101 (3rd Cir. Dec. 21, 2006)(same)). Similarly, Rite Aid demonstrated its "evident" perception when it was provided three more current releases from Dr. Lesser, which it disregarded, after Fultz was examined by Dr. Rowekamp. *See generally* SMF 14 Lesser Clinic Notes (Jan.16, 2008), (Feb. 11, 2008), (Feb. 25, 2008). Rather than consider Dr. Lesser's releases, Rite Aid adhered to the perception that Fultz could not work because of his epilepsy and continued to rely upon Dr. Rowekamp's findings, who had not

(and in fact refused to) re-examine Plaintiff. A reasonable jury could conclude that Rite Aid's adherence to Rowekcamp's findings, despite the more recent and informed opinions of Fultz' neurologist, demonstrates that Rite Aid regarded Mr. Fultz as disabled.

3. Rite Aid Further Adhered to Its Perception That Fultz Could Not Work by Refusing to Consider Him for Re-employment in Any Job at its Perryman Facility.

Over the six month period in which Fultz attempted to return to work, Rite Aid filled hundreds of positions for which he was never considered. A jury could find that Rite Aid viewed Fultz as unable to perform a class of jobs because management determined that Fultz was unfit to work *anywhere* in the entire facility. An overly broad disqualification from *any* employment within a large facility will support a determination that an employer regarded an employee as disabled under the ADA. *Rodriguez,* 436 F.3d at 477 (decision maker's belief that uncontrolled diabetic was unable to perform even the most basic entry-level position in plant due to potential black outs established that there were essentially no manual labor jobs for which employee could perform); *Taylor,* 212 Fed. Appx. at 107 (disqualification of employee believed to have epilepsy from workplace because "no matter what he was doing [he] could be a threat to himself and others."); *Pinckney v. Potter*, 186 Fed. Appx. 919, 925 (11th Cir. 2006) (disqualification from all entry level jobs with Postal Service); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 188 (3d Cir. 1999) (disqualification from all supermarket jobs); *Dipol v. New York City Transit Authority*, 999 F. Supp. 309, 314 (E.D.N.Y. 1998) (placing plaintiff on no-work status, excluding him from all jobs with Transit Authority); *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1113 (N.D. Ind. 1998) (disqualification from production plant created a material issue of fact on a "regarded as" claim).

Here, Rite Aid manifested the belief that Fultz could not work anywhere, even as an Picker,

a position considered the most basic-entry level job in the entire facility. Brown Dep. at 32-34. *See Rodriguez*, 436 F.3d at 477-78. Rite Aid contends that its disqualification of Fultz for employment was position-specific (Def. Mem. 22), yet the list of essential functions upon which Fultz was adjudged to be unable to perform because of his epilepsy applied not only to Fultz' position, but *every* single Order Fulfillment Partner who worked in the facility. Lazor Dep. at 70-71; Def. Ex. 5. What is more, Corporate HR Director Armstrong assumed without having first-hand knowledge there no place in the entire Distribution Center where Fultz could work because he would always "be around equipment, because every building has equipment in it." Armstrong Dep. at 199.[3] HR Director McDaniel similarly determined that, not only could Fultz not work in the Pharmacy Department, he could not work anywhere in the facility. McDaniel Dep. at 224-225.[4] The assumptions and lack of knowledge by Rite Aid's key decision-makers distinguish the facts at hand from the cases relied upon by Defendant. *See* Def. Mem. at 24 (citing cases for proposition that work restrictions based on medical opinions do not establish perception of disability).

Rite Aid's belief that Fultz' epilepsy prevented him from performing any job, in its entire 1,400 employee warehouse, Pfiefly Dep. at 27-28, is demonstrated by the fact that Rite Aid advertised 819 positions at the Distribution Center while Fultz was barred, yet he was not considered for any of them. Lazor Dep. at 288. A conservative estimate, which excludes all driving, lead, trainer, and clerk positions, (which Rite Aid contends Fultz was not qualified for various reasons), reveals there were 331 positions which Fultz was qualified to perform. SMF Ex. 74. Fultz was not considered for any

[3] Armstrong had never been in the Pharmacy Department, including neither the second or third floors from which he restricted Fultz in 2006. Rite Aid's Responses to Fultz' Requests for Admission, Nos. 22-23, at 5.

[4] McDaniel also assumed that Fultz' epilepsy would automatically qualify him for short term disability. McDaniel Dep. at 253-254. Rite Aid's short term disability policy would have required a certification that Fultz "has been totally disabled" "because of" epilepsy. In essence, McDaniel's express views show that he did not believe Fultz to be capable of working at all, given his epilepsy.

of these positions. Lazor Dep. at 288.

The 331 jobs filled constitute a class of jobs, namely warehousing jobs. A "class of jobs" is the job from which a claimant was disqualified, as well as all other jobs utilizing similar training, knowledge, and skills within "the geographical area to which the [claimant] has reasonable access." 29 C.F.R. § 1630.2(j)(3) (ii)(A)-(B). A single place of employment can include either a broad range of jobs in various classes or a class of jobs. *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1088 (10th Cir. 2008). The 331 positions advertised were scattered throughout the building and comprised positions in nearly every Department.[5] SMF Ex. 74. The 331 positions advertised constitute a class of jobs performed in a warehouse, plant, or distribution center.[6] The broad disqualification of Fultz from consideration for any of these warehouse-type jobs demonstrates that Rite Aid regarded as Fultz as substantially limited in the major life activity of working.[7]

C. Fultz Has a Record of a Disability Within the Meaning of the ADA.

Rite Aid has not asserted any basis for summary judgment on Fultz' "record of" disability claim under the ADA. With regard to the "record of" prong, Fultz' medical file at Rite Aid was replete with medical documentation establishing his continuous treatment for a seizure disorder. Early in Fultz' time with Defendant, he took medical leave in order to undergo and recover from brain surgery. He therefore provided detailed documentation with regard to the severity of his condition and the complexity of the procedure. *See* SMF Ex. 77 (FMLA pre-certification letter authorizing

[5]The Departments included Regional 2, Pharmacy ("RX"), Outbound, Replenishment, Regional 1, Inbound, CP, Inventory, Systems, Inventory Control, and Returns. *See* SMF Ex. 74.

[6]The positions included Picker, Stocker, Clerk, Omit Stopper, Case Picker, Palletizer, Receiver, and Inbound Receiver. *Id.*

[7]Rite Aid was served with Requests for Admission asking it to admit that in its view, Fultz was not able to perform the essential functions of any position in the Distribution Center as of February 8, 2008. Rite Aid refused to make such an admission. SMF Ex. 23, No. 29. Thus, a genuine issue of material fact exists as to why Rite Aid refused to offer Fultz any of the 331 advertised positions within the distribution center, if not because Rite Aid regarded Fultz as having a disability.

absence to undergo placement of electrodes in his brain for monitoring; FMLA pre-certification letter authorizing 1/25/02 - 3/8/02 absence to undergo brain surgery). In addition, consistent with the requirements imposed upon him by Defendant's HR Department, he provided Defendant with releases and reports from his neurologist when he suffered grand mal seizures. *See* SMF Ex. 14. Also consistent with the requirements of Defendant's HR Department, in the final year of Fultz' employment, these reports were increasingly detailed and included Dr. Lesser's best assessment of factors that had contributed to bringing on the seizure. *Id.* This extensive documentation pertaining to Fultz' seizure history establishes a record of disability. *See Norden v. Samper*, 2007 WL 2219312, *16 (D.D.C. August 3, 2007)("[I]t is well beyond dispute that when [plaintiff] attempted to return to work … she had a well-documented history of a major disability that substantially restricted her in the major life activities of learning and working, and that [the employer] had relied on her record of impairment in making several employment decisions. This is sufficient to render her disabled under the Rehabilitation Act"); *Shaver v. Indep. Stave Co.,* 350 F.3d 716, 720 (8th Cir. 2003)(holding that employee had a record of substantial impairment under the ADA because he once had severe epilepsy that was corrected by brain surgery); *Granzow v. Eagle Food Ctrs., Inc.*, 27 F. Supp.2d 1105, 1108-09 (N.D. Ill. 1998)(employee who told her employer that she had epilepsy and at one point took four months off due to her illness had demonstrated a record of substantial impairment under the ADA).

In addition, the "record of" prong can be satisfied with documentation other than medical records that is relied upon by the employer and demonstrates a substantially limiting impairment. 29 C.F.R. § 1630. 2(k) (app.). Here, Defendant created and maintained documentation – *e.g*, witness statements; Attorney Carlson's chronology provided to the EEOC and doctors– of seizures Fultz had in the workplace. *See* SMF Exs. 43, 45, 54, 78; Def. Mem. at Ex. 22. Though Plaintiffs take issue

with the self-serving and exaggerated nature of many of these records, especially those created after the EEOC issued its Determination, the disconnect between Defendant's creation of this documentation and its position that Fultz does not have a covered disability, compels a jury question with regard to whether coverage is established under the "record of" prong.

D. Fultz was Able to Perform the Essential Functions of the Cooler Picker Position.

A "qualified individual" is one who can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. § 12111(8). "Essential functions" are those "fundamental job duties of the employment position" at issue. 29 C.F.R. § 1630.2(n)(1). During the EEOC's investigation of Fultz' charge of discrimination, Defendant repeatedly admitted that Fultz was performing the essential functions of his positions as a Cooler Picker and that, despite his restriction to the first floor, he was able to perform his job just like the other Pickers in his department:

> [The height restriction] does not in any way limit the type of work performed by Mr. Fultz. … The pickers in the RX department all do the same job … but on a given shift are assigned to the first floor or the second floor. There is nothing different about the job being performed by pickers on the second floor than is done on the first where Fultz is assigned.
>
> The doctors [Lesser and Rowekamp] all agree … that Mr. Fultz is able to perform the essential functions of his job. … Mr. Fultz is able to perform his job functions and is permitted by Rite Aid to do so.

Letter from Carlson to Cassell (Nov. 6, 2006), SMF Ex. 78; Letter from Carlson to Cassell (May 9, 2007), SMF Ex. 79.

Further, in her deposition, Defendant's HR Manager confirmed that the essential functions of the Pharmacy Order Picker position are contained in the "Rite Aid Job Description" for the Position – Def. Ex. 6 – not in the form now relied on by Defendant – Def. Ex. 5. Lazor Dep. at 60,

62, 65. As stated in the Job Description, the essential functions track the purpose of the job: "to [f]ill requisitions and work orders …." and to "prepare parcels for shipping." 29 C.F.R. § 1630.2(n)(1) (A job function may be considered "essential" for any of several reasons, including, but not limited to the fact that "the reason the position exists is to perform that function.").

The form upon which Defendant is now attempting to rely, the "Essential Functions Checklist," is not specific to the Pharmacy Order Picker position. Lazor Dep. at 69-71. Rather, it is a checklist completed by every applicant for every position at the Perryman facility. *Id*. It includes functions, such as forklift driving, that Pharmacy Order Pickers do not perform. Given the overbreadth of the form, it cannot comprise the basis for any ADA-compliant assessment of the essential functions of the Pharmacy Order Picker Position, or of Fultz' of ability to perform those functions, as any such analysis must be a highly individualized factual inquiry. *See, e.g., Hohider v. United Parcel Serv., Inc*., 574 F.3d 169, 195 n.21 (3d Cir. 2009); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 993 (9th Cir. 2007); *Lee v. City of Salem*, 259 F.3d 667, 673 (7th Cir. 2001); *Allen v. Hamm*, 2006 WL 436054 at *7 (D. Md. Feb. 22, 2006) (*quoting Skerski v. Time Warner Cable Co*., 257 F.3d 273, 279 (3d Cir. 2001) (*citing* 29 C.F.R. § 1630.2(n)); *Champ v. Baltimore Cty.*, 884 F. Supp. 991, 998 (D. Md. 1995), *aff'd on other grounds*, 91 F.3d 129 (4th Cir. 1996).

In adopting Rowekamp's January 4, 2008, findings and terminating Fultz, Defendant re-defined the essential functions of his position in a manner that bore very little resemblance to the position itself. It now has the burden of proving that the challenged functions are essential. *See Ward v. Mass. Health Research Inst.,* 209 F.3d 29, 35 (1st Cir. 2000); *Monette v. Elect. Data Sys. Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995). It is unable to do so because Rowekamp's opinion that Fultz was not fit for duty was premised

on an inaccurate articulation of Fultz' job functions – fed to Rowekamp by Defendant – that did not comport with either the position description for Fultz' job or with Fultz' actual experience in performing the job. *See* Section IIE, *infra*. Thus, when it terminated Fultz, Defendant (through Rowekamp) asserted that it was essential for him to work at heights. It did so even though the job description for the Pharmacy Order Picker states that Pickers are only "occasionally" asked to climb stairs and does not define as "essential" any requirement regarding where an employee is assigned to work, and despite the fact that, based on an earlier opinion by Rowekamp, Fultz was restricted to the first floor. *Compare* Letter from Rowekamp to Lazor (Jan. 4, 2008), SMF Ex. 53, *with* Essential Functions: Order Fulfillment Partner, SMF Ex. 3 *and* Rite Aid Job Analysis Questionnaire (Rx Order Picker), SMF Ex. 69.[8] Defendant also asserted that Fultz must be able to work alone and in isolated areas. However, Pickers in the Cooler and Cage are in fact required to work with others. *Compare* Letter from Rowekamp to Lazor (Jan. 4, 2008), SMF Ex. 53 *with* Brown Dep. at 31; Reiter Dep. at 12; Fultz Dep. at 134, 158. Given the patent inaccuracies with regard to how Defendant defined Fultz' job description when it terminated him, a reasonable juror could find that Fultz was fulfilling

[8]This highly specific 19-page analysis of the RX Order Picker position was never provided to Rowekamp. It described "Essential Duties and Responsibilities" of the position are described as follows:

1. Sorts and places materials or items on racks, shelves, or in bins according to predetermined sequence such as size, type, style, color, or product code.
2. Sorts and stores perishable goods in refrigerated rooms.
3. Fills requisitions, work orders, or requests for materials, tools, or other stock items and distributes items to production workers or assembly line.
4. Assembles customer orders from stock and places orders on pallets or shelves, or conveys orders to packing station or shipping department.
5. Marks materials with identifying information.
6. Weighs or counts items or distribution within plant to ensure comformance to company standards.
7. Uses computer to enter records.
8. Prepares parcels for mailing.
9. Maintains inventory records
10. Maintain acceptable quality rating
11. Maintain acceptable productivity rating.

It also indicates that Fultz was *never* required to work near moving mechanical parts, in high, precarious places, or in confined spaces. SMF at Ex. 69, pp. at 16,18.

the essential functions of his job when Defendant removed him from the workplace, and indeed throughout his tenure in RX. *See Calef v. Fedex Ground Packaging Systems, Inc.*, No. 08-2031, 2009 WL 2632147 at *10-*11 (4th Cir. 2009)(Because management official was impeached with job description that did not include functions he was claiming were essential, a reasonable juror could conclude that these functions were not essential); *Skerski*, 257 F.3d at 281 (In determining whether a function is essential, relevant facts and circumstances include the employee's actual experience in the job.).

Finally, the ADA defines a qualified person with a disability as one who can perform the essential functions of his position with or without reasonable accommodation. 42 U.S.C. § 12111(8). Therefore, to the extent that employer views disability-based safety concerns as an impediment to the performance of essential job functions, it is required to engage in an interactive process with the employee to identify accommodations to eliminate these concerns. *See Haneke v. Mid-Atlantic Capital Mgmt.*, 2005 WL 1101069 at *1 (4th Cir. 2005). However, Defendant never did that with Fultz when it adopted Rowekamp's flawed assessment that he could not work alone or at heights and removed him from his employment. As Plaintiff's Vocational Rehabilitation expert has opined, various accommodations – such as safety netting for the second floor, mats for the floors, and first-alert devices – could have minimized the concerns presented in Rowekamp's findings. Vocational Analysis at 12-13, Ex. 1. That Defendant never explored any such options – and also repeatedly rejected qualified medical opinions from epilepsy specialists with regard to Fultz ability to work safely at its facility -- precludes it from obtaining summary judgment on the issue of whether Fultz could perform the essential functions of his position. *Pantazes v. Jackson*, 366 F. Supp.2d 57 (D.D.C 2005) (internal citation omitted); *see also Haneke*, 2005 WL 1101069 at *4; *Bultemeyer v.*

Fort Wayne Cmty. Sch., 100 F.3d 1281, 1285-86 (7th Cir. 1996).

E. Defendant Did Not Undertake any Direct Threat Analysis When It Removed Fultz from the Workplace and Has Failed to Establish that Fultz Posed a Direct Threat or Future Hazard Permitting Removal.

Defendant asserts that its removal of Fultz was justified because he constituted a threat or hazard to the workplace. The "direct threat" and "future hazard" defenses provided by the ADA and Maryland law are affirmative defenses. 42 U.S.C. § 12111(3) (ADA); *see, e.g, Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996); Code of Maryland Regulations 14.03.02.08. However Defendant never pled these defenses in its Answers and therefore is precluded from raising them at this stage.[8] Further, as with all affirmative defenses, Rite Aid bears the burden of proving that the employee is a direct threat or future hazard.[9] *See*, *e.g*, *Rohan v. Networks Presentations*, *LLC*, 2003 WL 23901762 (D. Md. Apr. 17, 2003); *Elliot v. Pratt & Whitney Aircraft,* 2002 WL 1900509 (2d Cir. Aug. 19, 2002). Whether one is a direct threat or future hazard are complicated, fact intensive determinations, and not questions of law. "To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm." *Rizzo*, 84 F.3d at 764. As explained below, because Rite Aid never undertook such an analysis, it cannot meet its burden now by relying on post-hoc arguments based upon after-acquired evidence.

1. No Scientific, Objective Evidence Supported Defendant's Decision.

[8] In fact, Rite Aid never filed an Answer to the EEOC's Amended Complaint filed on September 28, 2009. Docket Entry No. 44.

[9] Maryland state law includes a similar provision which places the burden on the employer to "establish to a 'reasonable probability' that the complainant's physical handicap or perceived physical handicap would create a future hazard to his health or safety." *Office of Occupational Med. & Safety v. Baltimore Cmty. Relations Com.*, 88 Md. App. 420, 432-433 (Md. Ct. Spec. App. 1991)(citing *B & O R.R. v. Bowen*, 60 Md.App. 299, 309, 482 A.2d 921 (Md. Ct. Spec. App. 1984).

The ADA defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). This determination must 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); *EEOC v. Browning-Ferris*, *Inc.*, 262 F. Supp.2d 577, 587 (D. Md. 2002) (*citing* EEOC regulations and *Montalvo v. Radcliffe*, 176 F.3d 873, 876 (4th Cir. 1999)). It is the employer's burden to educate itself about the varying nature of medical impairments and to make individualized determinations about affected employees. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 192 (3d Cir. 1999). Therefore, the employer must base a direct threat assessment on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. *Browning Ferris*, 262 F. Supp.2d at 587.[10]

Rather than basing its judgment on the most current medical knowledge or objective evidence, Rite Aid relied upon Dr. Rowekamp's assessment when it removed Fultz from his employment and repeatedly denied his requests for reinstatement. McDaniel Dep at 226, 229, 263. Rowekamp did not – and could not – provide Defendant an individualized assessment of whether Fultz posed a present, significant risk of substantial harm. Rather, a reasonable inference can be made when Defendant sought Rowekamp's counsel, Rite Aid was not interested in objectively assessing Fultz' medical condition.

Rowekamp's re-emergence as Defendant's consultant coincided with Defendant's attorney's unsuccessful efforts – initiated immediately after the EEOC issued its determination that there was

[10] Likewise, under the "future hazard" defense provided by Maryland law, "[a] mere possibility of hazard, without more will not carry the employer's burden." *Id.* (affirming judgment for complainant where doctor only testified that hazard was a possibility but could not state the probability of the hazard); *Office of Occupational Med. & Safety*, 88 Md. App. at 433 (affirming judgment for complainant under Maryland law where doctor reported that patients problems were only "conceivable.").

reason to believe Rite Aid had violated the ADA – to pressure Dr. Krumholz to reverse his findings that Fultz could work in the Pharmacy Department with minimal restrictions. Instead of following Krumholz' suggestion to consult with Fultz' treating physician, a Johns Hopkins epilepsy specialist, Defendant turned instead to Rowekamp, a doctor who has not completed a medical residency, has no expertise in neurology or epilepsy, has never treated epilepsy, and is not board certified in any recognized specialty, not even in occupational medicine, the area for which he was under contract with Defendant. Rowekamp Dep. at 17-18, 22, 78; *see also* Lazor Dep. at 243 (stating that no one at Rite Aid ever obtained any information about Rowekamp's level of expertise with regard to epilepsy.).[10] Instead of relying upon experts, Rite Aid went with a doctor who would give it the result it desired. Rite Aid knew what it was getting with Rowekamp, whose "personal protocol is that when it comes to workplace safety, you have to be as conservative as possible. Therefore, if there's any risk at all, then I attempt to eliminate that risk by restricting the employee." Rowekamp Dep. at 118. He defines his role as "identify[ing] the worst case scenarios." *Id*. at 234. With regard to Fultz' condition, he equated the possibility of a workplace seizure with the possibility of death "… and now you have OSHA involved in the situation." *Id*. at 230. This attitude could not lead to an objective assessment of risk as required by the ADA and Maryland law.

The circumstances of Rowekamp's evaluation of Fultz demonstrates a profound lack of objectivity. Rowekamp met with Fultz after McDaniel threatened to terminate Fultz's employment for questioning Rowekamp's qualifications and requesting that Rite Aid instead send him to any neurologist of Rite Aid's choosing. SMF Ex. 50, 51; Lazor Dep. at 254-256. Rowekamp spent ten

10 Rowekamp is no longer an occupational health doctor. He is in the process of starting a new practice in anti-aging medicine, with a focus on using a mushroom-derived drug for estrogen replacement and also in using "nano technology" to replace damage in the body as it is happening in real time. Rowekamp Dep. at 24-27.

minutes with Fultz, less than a third the time he typically spends in a fitness for duty examination. SMF Ex. 19, No. 15 at 26; Rowekamp Dep. at 73. Contrary to Rowekamp's standard practice during fitness for duty examinations, he did not discuss Fultz' medical history with him or review his medical records with him. *Id*. at 71-73; Fultz Dep. at 353. He did not perform the neurological tests that typically occur during the most basic physical, such as touching finger to nose or walking in a straight line. Fultz Dep. at 353. Rowekamp never consulted with Fultz' neurologist. Rowekamp Dep. at 59, 231. Given his lack of credentials and lack of investigation, Rowekamp never obtained much of an understanding of Fultz' condition. For instance, Rowekamp did not know whether Fultz' seizure activity had increased over time, and in fact, believed that this was unknowable. Rowekamp Dep. at 196-197.

Rite Aid sought to avoid an objective evaluation of Fultz by feeding Rowekamp incorrect information concerning Fultz' job and seizures, which Rowekamp accepted, without question. Rowekamp Dep. at 48, 51, 176-178("… all he was doing was applying what he had been told …."). As demonstrated by his written findings, Rowekamp assumed that Fultz was required to work on multiple levels and that Fultz regularly worked alone. SMF Ex. 53. Fultz' actual experience in his job – including his permanent assignment to the first-floor locations where he was required to work with others and the restriction banning Fultz from the second floor – were not taken into account. *Id*. at 175 (stating it was not in his "purview" to consider where Fultz actually worked).

Further, based on Rite Aid's misrepresentations to him, Rowekamp did not take into consideration Fultz' position description, which clearly demonstrates that the only physical demand with regard to heights might be "occasional" climbing of stairs. Rowekamp Dep. at 170. Rather, Rowekamp relied upon Defendant's generic "Essential Functions" checklist, a form filled out by

persons hired for every position in the facility, including forklift drivers and persons who will be assigned to the second floor pick mods and replenishment stations. *Id. See also* Rowekamp Dep. at 74-75 (74 ("For example, if there are a list of 10 essential functions for a specific position, if in my medical opinion they can't do one of those, I say they're not fit for duty ….")); Lazor Dep. at 65-66, 68 70-71. Simply because Defendant, in its communications with Rite Aid, deemed a duty to be "essential," Rowekamp assumed it to be so.

Further, in making his determination, Rowekamp admits he did not take into account any reasonable accommodations sought by Fultz or the need for any interactive process to identify other accommodations. Rowekamp Dep. at 187. This is not what Rite Aid hired him to do: "I offer my medical opinion on somebody's capabilities and it is incumbent upon the employer to attempt to accommodate the … medical problem if possible." *Id*. at 50-51 ("[I] leave it up to the company to take it from there.").[11]

Finally, Defendant did not share with Rowekamp that Fultz had *never* suffered a significant injury resulting from a workplace seizure. *Id*. at 192. Regardless of this significant omission, however, when he provided Defendant with his opinion that Fultz was unfit for duty, Rowekamp did not actually believe that Fultz was more at risk for injury than he was in 2004 – when Rowekamp had found him fit for duty with the first-floor workplace restriction. *Id*. at 192-193. Nor, four years later, did Rowekamp think that the nature of the risk on the first floor had changed in any way. *Id*. at 193.

The case law is replete with examples of similar scenarios in which an employer relied upon an unqualified medical opinion in making an employment decision and therefore was foreclosed from establishing a direct threat defense because it failed to make the necessary individualized assessment

[11]Any direct threat analysis must include consideration of whether the employee can be accommodated. 42 U.S.C. § 12111(3).

required by the ADA. *See*, *e.g.*, *Browning Ferris*, 262 F. Supp.2d at 591 ("A jury could conclude that [defendant's] assessment of [the terminated employee], based entirely on the opinion of a physician with minimal experience treating Crohn's Disease who spent fifteen minutes examining [employee], was based on neither the most current medical knowledge or the best available objective evidence."); *Echazabel v. Chevron USA, Inc*., 336 F.3d 1023, 1029 (9th Cir. 2003)(Triable issue created by Defendant's reliance on company physicians who were not liver specialists in making determination that applicant's liver was not functioning properly); *Lowe v. Alabama Power Co.*, 244 F.3d 1305 (11th Cir. 2001)(company doctor's cursory meeting with the employee and the lack of objective, medical evidence to support defendant's position that the employee, a double amputee, constituted a direct threat were he assigned to a mechanic's position, could not support a direct threat defense); *EEOC v. Texas Bus Lines*, 923 F. Supp. 965, 979 (S.D. Tex. 1996)(company doctor's conclusion that obese bus driver could not safely perform the job, "without the benefit of objective medical testing or findings," did not satisfy the employer's burden to prove the direct threat defense); *Kuntz v. City of New Haven*, 1993 WL 276945 (D. Conn. Mar. 3, 1993)(employer's doctor's opinion that the plaintiff's heart attack years earlier disqualified him from promotion to lieutenant failed to establish that his risk of injury was imminent and substantial and ignored medical opinions to the contrary from plaintiff's personal physician and cardiologist).[12] Further, although the record is replete with evidence of Defendant's bad faith in retaining and relying upon Rowekamp, even good faith reliance on a medical opinion does not independently insulate an employer from liability under the ADA if that opinion was unreasonable or not based on the most current or objective medical information.

[12]Defendant's citation to *LaChance v. Duffy's Draft House*, 146 F.3d 832 (11th Cir. 1998) is not helpful as there was no dispute between the employer and the employee's doctor as to whether the employee was a threat to himself.

Bradgon v. Abbott, 524 U.S. 624, 649 (1998). Thus, regardless of Defendant's actual motivations in relying on Rowekamp, the uncontested fact that Rite Aid relied upon an opinion not based on the most current or objective medical information precludes summary judgment in this case.

2. Rite Aid Did Not Consider the Necessary Factors Prior to the Removal of Fultz from the Workplace, in Determining Whether He Posed a Threat to Himself or Others.

Rite Aid was required to consider the following factors before removing Fultz from the workplace:

> (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.

29 C.F.R. § 1630.2(r). Not only has Rite Aid failed to establish any of the above necessary factors, it did not undertake this analysis when it removed Fultz from the workplace. Other than "getting the industrial doctor involved," Rite Aid did not have any procedures for Defendant's HR staff to determine whether an employee's disability poses a direct threat under the ADA. McDaniel Dep. at 81, 85. Thus, prior to removing Fultz from the workplace, Rite Aid did not discuss any of the following with Rowecamp:

- How long any safety threat was likely to last. Rowekamp Dep. at 211;
- Why his opinion in 2008 finding Fultz unfit for duty was entirely different from his opinion in 2004 merely restricting him from the second floor. Rowekamp Dep. at 218.
- His basis for finding that Fultz' seizure activity was "unstable" or why he had concluded that "it may become more progressively unstable," when Fultz' neurologist was not reporting these things and was in fact releasing him to work. McDaniel Dep. at 228.
- The feasibility of accommodating Fultz. *Id*. at 229; Rowekamp Dep. at 187.
- Any analysis of the likelihood of Fultz being hurt by machinery. McDaniel Dep. at 232.
- Whether Fultz had in fact been injured during any workplace seizures (perhaps because this had never occurred). *Id*. at 223.

- Simply allowing Fultz to continue with the height restriction he had for many years. Lazor Dep. at 284-285.

Nor did Rite Aid ever analyze the risk in the context of establishing a proper protocol for employees in responding to Fultz' seizures. As Safety Manager Williams conceded, had Fultz' co-workers been instructed to back off and stay away from Fultz while he was experiencing a seizure, none of the safety concerns identified by Williams would have been an issue. Williams Dep. at 197. In fact, Williams was not involved or consulted in any of the discussions regarding Fultz' removal from the workplace. SMF Ex. 23, Nos. 13-14. Nor was any training of employees ever considered. Williams Dep. at 27-28, 51-53

Rather than analyzing any of these factors, Rite Aid simply terminated Fultz' employment, believing that it would not be held accountable because it had obtained an opinion from Rowekamp.

3. After Acquired Evidence Cannot Support a Direct Threat/Future Hazard Defense.

In a post-hoc attempt to justify that Fultz was a direct threat in the workplace, Rite Aid relies upon various extreme accounts of Fultz' seizures in the workplace and records which were only obtained in litigation. Not only are these accounts disputed, they also constitute after-acquired evidence that was never reported to Rite Aid prior to Fultz' termiantion. As such, they cannot constitute a basis for summary judgment. *See McKinnon* v. Nashville Banner Pub. Co., 513 U.S. 352, 359-60 (1995). For example:

- Richard Krall claims he witnessed Fultz have a seizure in the men's restroom on April 25, 2006. Def. Mem. at 8-9; Def. Ex. 22. Rite Aid did not include such a seizure on this date, in this location, in the chronology of seizures provided to the EEOC; nor does the chronology identify Krall as present. *See* SMF Ex. 79. Krall's claims are undermined by Todd Warren, who was actually present for this seizure, who described Fultz as "zoned out." Warren Dep. 27. Because Krall's account is directly contradicted by Warren, the nature of this incident is at a minimum subject to dispute.

- Rick Snyder claims he witnessed Fultz have two seizures in an unused stairwell near the Cooler in 2006. *See* Def Mem. at 9; Snyder Dep. at 27-28; 35. Snyder is not identified by Rite Aid as having been present for only documented stairwell seizure which occurred on April 25, 2006. *See* SMF Ex. 79. Thus, Snyder's claim that he witnessed a second seizure between April 25-September 6, 2006 is disputed. No one else, including Rite Aid, has ever claimed that Fultz had a second seizure in that stairwell during this time or anytime. *Id.* Snyder also claims that EMT's arrived while he was present. Snyder Dep. at 35-36; 60. Rite Aid has subpoenaed all of Fultz' medical records from the Emergency Rooms where Fultz was treated and these records do not reflect a seizure during this time. Snyder also admits that he never told anyone at Rite Aid about the events he described in his deposition; thus Rite Aid could not have been aware of his claims. Snyder Dep. at 70.[13]

- Rite Aid also contends that Fultz pinched a co-worker's breast during a seizure in 2000. Def. Mem. at 6; Def. Ex. 12. Again, Rite Aid was not aware of this seizure or any of the alleged manifestations of this seizure until this litigation. *See* SMF Ex. 79. Moreover, the witness who testified to this incident admitted she never reported it to anyone at Rite Aid. Hendrix Dep. at 29-31.

- Defendant's Exhibits 13-15, 37, 44, and 64 were only obtained by Subpoena in this litigation and were never independently produced by Rite Aid. *See* Subpoenas to Harford Memorial Hospital and Johns Hopkins Hospital (Dec. 31, 2008), and Perryville Cold Storage (June 11, 2009), Ex. 3.

4. Disputed Facts Relating to the Risk Associated with Fultz' Seizures Precludes Summary Judgment as to Direct Threat Defense.

Rite Aid's characterization of Fultz' seizures is similarly disputed and must be presented to a jury to determine the various witnesses' credibility. *See Ross,* 759 F.2d. at 365. Each of the following characterizations are in dispute.

- Rite Aid's characterization that Fultz grabbed the hair of a co-worker and would not let go despite her screams is disputed. Def. Mem. at 6; Def. Ex. 11. *See* Warren Dep. at 70 (stating that Fultz played with a co-worker's hair); Fultz Dep. at 152-153 (counsel for Rite Aid characterizing the event as Fultz "touching a female employee's hair" and Fultz agreeing with the characterization).

[13] Snyder identified Phil Johnson, Cheryl Jones, and Steve Hunter as also being present during this seizure. Snyder Dep. at 35-36. Hunter testified that had Fultz never exposed himself during a seizure and no one ever reported to him that Fultz had exposed himself. Hunter Dep. at 49. Moreover, Jones who was present for the stairwell seizure, did not identify Snyder as having been present. Jones Dep. at 50.

- Rite Aid's characterization that Fultz urinated on the floor of the distribution center in April 2006 is disputed. Def. Mem. at 8; Ex. 23. *See* SMF Ex. 79 (containing no such account). Additionally, the witness offering such testimony claims to have made a report or log of this incident which he sent to his Manager. Snyder Dep. at 49. Rite Aid has never produced this document. Thus, in addition to being in dispute, this testimony likely constitutes after-acquired evidence.

- Rite Aid's characterization of the risk associated with Fultz' seizure on April 26, 2006, is disputed. Def. Mem. at 8-9. Rite Aid's First Responder, Brandon Roop, panicked and was shaken when he arrived at the scene. N. Williams Dep. at 25. Safety Manager Williams instructed that Fultz be held down on the ground. C. Williams Dep. at 97; Fultz Dep. at 243. Defendant now attempts to justify holding Fultz to the ground by focusing on alleged employee concern over Fultz hitting his head on a "sprinklerpipe." However, this alleged threat was never mentioned in either Defendant's more contemporaneous description of the seizure submitted during the EEOC investigation or in eyewitness Richard Krall's same-day account. *See* SMF Ex. 79 at 5-6; Def. Ex. 22. Further, although Defendant now claims that Fultz hit his head on the concrete floor during the seizure, Defendant's Safety Manager has a different recollection: "I didn't see any fresh blood or any blood on the floor." Williams Dep. at 112, 101 (The cut on his head "wasn't fresh …. [I]t was maybe like a scab ….[H]e wasn't bleeding from the head or anything like that.."). *See also* N. Williams Dep. at 27; Snyder Dep. at 34 (confirming no injury to Fultz or anyone else).

- Rite Aid's characterization that Fultz attempted to defecate during a seizure on September 5, 2006 is disputed. *See* Snyder Dep. at 46 (stating he made an assumption that Fultz was going to use the bathroom and he never observed Fultz defecate). Nor did Snyder report his alleged observations to anyone. Snyder Dep. at 70.

Much of the above-described disputed facts and after-acquired evidence is completely immaterial to whether Fultz was a direct threat to himself or others at Rite Aid. Rite Aid attempts to bootstrap conduct it deems offensive, *i.e.* Fultz allegedly exposing himself, pulling down his pants, etc..., into the direct threat analysis. Rite Aid never took any action against Fultz for any of this alleged offensive conduct. These allegations are not relevant to the issue of whether Fultz was a safety hazard while working at Rite Aid and cannot justify Fultz' removal. Because Rite Aid failed to conduct any direct threat analysis at the time and has not established, Rite Aid is foreclosed from asserting a direct threat defense and summary judgment must be denied.

III. Rite Aid Retaliated Against Fultz When it Terminated His Employment.[14]

The ADA broadly prohibits "discrimination against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. § 12203(a).[15] The elements of proof to support a Title VII retaliation claim similarly apply to the ADA. *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 391 (4th Cir. 2001). Accordingly, "the burden of establishing a prima facie retaliation case 'is not onerous.'" *Ross,* 759 F.2d at (internal citation omitted). Plaintiffs must show that: (1) Fultz engaged in protected activities; (2) Defendant took adverse employment action against him; and (3) there exists a causal connection between the protected activity and the adverse employment action. *Rhoads*, 257 F.3d at 392 (internal citations omitted). Defendant seeks summary judgment with regard to the second and third elements and does not contest that Fultz engaged in protected activity. However, as explained below, because Plaintiffs can establish their *prima facie* case, their retaliation claim must proceed to trial.

Fultz's removal from the workplace for 8 months without pay constitutes an adverse employment action. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 72-73 (2006). Fultz was removed from the facility on February 8, 2008 against the advice of his treating neurologist and Rite Aid's neurologist. Rite Aid did not pay Fultz while on leave. His neurologist

[14]Defendant has also reasserted that Fultz cannot recover for the same claims brought by the EEOC and Plaintiffs cannot recover compensatory and punitive damages. Def. Mem. at 35-37. These are the same arguments made in its Motion to Dismiss which the Court denied without prejudice on February 25, 2009. *See* Docket Entry No. 31. For efficiency purposes, Plaintiffs incorporate their responses to Defendant's arguments from their Joint Opposition to Rite Aid's Motion to Dismiss, Docket Entry No. 25, filed on January 30, 2009.

[15]Maryland's anti-discrimination in employment statute contains a similar provision making retaliation unlawful. *See* MD State Gov. Code 20-606(f). The anti-retaliation provisions of each statute cover all employees, disabled or not disabled.

did not believe he qualified for short-term disability because he could work, and Rite Aid's doctor refused to certify him for short-term disability. Fultz had safely worked in Defendant's facility since 1998 and had not injured himself or others. The only thing that changed is that Fultz filed a charge of discrimination, and as a result, EEOC found cause to believe that Rite Aid had discriminated against Fultz. Rite Aid engaged in a calculated campaign to terminate Fultz. Its actions establish not only a causal connection between Fultz protected activity and termination, but also highlight Rite Aid's clear retaliatory animus against Fultz.

Defendant argues that Plaintiffs cannot establish a causal connection between Fultz' protected activities and the adverse actions taken against him because of the time that elapsed between the filing of his charge and his termination. Def. Mem. at 37-40. In so doing, Defendant conveniently ignores the undisputed record evidence demonstrating that its campaign to remove Fultz from his employment began immediately after the EEOC issued its Determination on Fultz' Charge finding that Defendant's treatment of Fultz violated the ADA. From this point onward, as Fultz' supervisor shared with him, Defendant viewed Fultz as a liability. Moreover, only **two weeks** after Fultz complained to his supervisor that he was being treated differently and that he wanted equal opportunity (a clear renewal of his EEOC complaint), Defendant put Fultz on indefinite, unpaid administrative leave.

The chain of events leading up to Fultz' removal from employment evidence a heightened hostility toward Fultz (retaliatory animus) and a methodical process of removing him from his employment as a result of receiving the EEOC's August 20, 2007, Determination[20]:

- September 14, 2007: within three weeks of the determination, Defendant's attorney

[20] Attorney Carlson, Human Resources Director McDaniel, and Corporate Human Resources Director Armstrong all knew about the Determination during the relevant time period. *See* SMF at 19.

pressured Dr. Krumholz to change his findings. SMF Ex. 43.

- September 2007: McDaniel placed Fultz' epilepsy under greater scrutiny and sought documentation of all possible seizures including those occurring outside the workplace, in addition to more information on his use of FMLA leave.

- Early October 2007, Defendant failed to respond to the approval from the Drug Enforcement Agency allowing Fultz to have the accommodation of access to the cage. SMF Ex. 23.

- October 26, 2007: McDaniel instructed his subordinate to photograph Fultz during a seizure.

- October 2007: in response to his complaints about the photograph, Fultz' supervisor told him, "Chris you're a liability, we have to protect ourselves." SMF at 21.

- November 6, 2007: after Defendant was unable to convince Krumholz to rescind his opinion, McDaniel sent Fultz a letter threatening him with termination if he did not submit to a fitness for duty examination by Dr. Rowekamp. SMF Ex. 51.

- December 6, 2007: Rowekamp conducted a perfunctory 10 minute examination of Fultz. SMF at 23.

- January 4, 2008: Rowekamp recommended to Defendant that Fultz is not fit for duty with regard to any job in any location in the Perryman facility. SMF Ex. 53.

- February 8, 2008: Defendant removed Fultz from his employment. SMF at 28.

Because Defendant embarked on this campaign to fire Fultz immediately after the EEOC issued its reasonable cause determination, a reasonable juror could find causation between his protected activity (at the point at which it proved sufficiently threatening to Defendant) and Defendant's adverse actions against him. *See Sitar v. Indiana Dept. of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003)(Plaintiff was fired shortly after management learned that investigator had found her internal EEO complaint to be meritorious. Therefore "…it was error [for the trial court] to [have] focus[ed] on … a small part of the picture – the time period between the filing of the complaint and the termination."); *Lettieri v. Equant, Inc.*, 478 F.3d 640, 651 (4th Cir. 2007)(causal connection for

retaliation established by evidence that Defendant took steps to eliminate Plaintiff's position during the intervening period between her protected activity and termination); *see also Woodson v. Scott Paper Co.,* 109 F.3d 913, 920-21 (3d Cir. 1997), *overruled in part on other grounds, Burlington Northern,* 548 U.S. at 55 (despite 26-month gap between filing of EEOC charge and termination, causal link was established by employer's intervening actions undertaken to effectuate plaintiff's retaliatory firing).

Further, as Defendant's hostility towards Fultz intensified after the issuance of the EEOC's Determination, he continued engaging in protected activity, signaling to Defendant that his assertion of his rights under the ADA was not going to end with the conclusion of the EEOC's investigation. Shortly after the issuance of the EEOC's determination, Fultz made a new request for an accommodation related to working in the cooler. This request constitutes protected activity. *See Haulbrook v. Michelin North America, Inc.*, 252 F.3d 696, 706 (4th Cir. 2001). Further, his opposition to Defendant's discrimination against him continued. On October 31, 2007, only days before Defendant lined up Rowekamp to conduct Fultz' fitness for duty examination, Fultz submitted a letter to Human Resources Manager Lazor stating that having his picture taken during a seizure was "very degrading and discriminating." *See* SMF Ex. 47. A week later, during a meeting with Lazor and his supervisor, Fultz vehemently protested Defendant's decision to send him to Rowekamp. SMF Ex. 50. In early January 2008, just weeks before he was placed on involuntary medical leave, Fultz told Human Resources Director McDaniel that he had retained a lawyer and might need to take legal action against Defendant. McDaniel Dep. at 148-149.

Fultz then made it abundantly clear to Defendant that he still thought Defendant's refusal to consider him for a promotion was discrimination based on his epilepsy. Merely two weeks before

his termination, on January 21, 2008, Fultz asked his supervisor, Kim Brown, why he had not been interviewed for a Lead position that he had applied for in 2007. SMF Ex. 19, No. 7 at 6. When Brown told him that HR had never given her his application, Fultz expressed dismay that he was being treated differently and told her that all he wanted was the same opportunity as everyone else, a clear reference to discrimination and one issue for which the EEOC had found probable cause. *Id.* Thus, despite Defendant's arguments to the contrary, Fultz' protected activity was continuous in the final months before his termination and the temporal "gap" upon which its argument is wholly premised simply does not exist.

Finally, Fultz suffered an adverse action when he was put on unpaid, indefinite administrative leave. Therefore, there is no merit to Defendant's argument that its actions did not rise to the level of objective materiality required by *Burlington Northern*, 548 U.S. at 55 (2006)(broadly defining prohibited retaliatory conduct as "… that which "might well have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' ")(internal citation omitted). To the contrary, the United States Supreme Court has recognized that a 37-day suspension from work may constitute an adverse action. *Id.* at 72-73. Although Defendant tries to characterize its removal of Fultz from the workplace as a benign action, the " administrative leave" it forced upon him was involuntary, unpaid, medically unwarranted and forced him to spend months without either a paycheck or any indication that he would be able to come back to the workplace. As such, it was an adverse employment action. *Id.* at 73. (finding that even living 37 days without a paycheck or any indication of when a paycheck would be forthcoming would be a "serious hardship" for many reasonable employees and could "act as a deterrent to protected conduct"); *Baker v. Windsor Republic Doors,* 2009 WL 1231035, *11 (D. Tenn. 2009)(upholding that involuntary medical leave was a retaliatory

adverse action under the ADA); *Waldo v. New York City Health and Hospitals Corp.*, 2009 WL 2777003, *3 (E.D.N.Y 2009) (involuntary medical leave adverse employment action); *Remick v. Lake State Industries, Inc.,* 2009 WL 205213, *11 (D. Minn. 2009)(involuntary medical leave an adverse employment action under Title VII)(*citing Deneen v. Northwest Airlines*, 132 F.3d 431, 436 (8th Cir. 2009); *Mitchell v. GE Healthcare, Inc.*, 2007 WL 601759, * 15 (E.D. Wisc. 2007) (same).[20]

While Defendant only challenges two components of the prima facie case, ample record evidence would allow a reasonable juror to conclude that the safety reasons alleged as the justification for Fultz' termination are pretextual. For instance, as explained in the direct threat and unlawful medical exam sections, Rite Aid manipulated the fitness for duty exams, relied on the least qualified and most biased doctor for its actions, refused to consider any accommodations to allow Fultz to remain at work, permitted Fultz to continue working for five weeks after it claims it began to fear that he was a direct threat, and then only removed Fultz after he made a new equal opportunity complaint. Further, a jury could conclude that the manner in which Krumholz and Rowekamp's exams were conducted and implemented (or not implemented) is further evidence of a pretext for retaliation. *See generally McGreal v. Ostrov et. al.,* 368 F.3d 657 (7th Cir. 2004) (fitness for duty exam was one step in employer's "campaign" to terminate plaintiff); *McDonough v. City of Quincy*, 452 F.3d 8 (1st Cir. 2006) (upholding jury verdict for plaintiff where evidence suggested that fitness for duty exam was used as cover for discrimination); *Erbe v. Potter*, 2010 WL 1643568 (M.D. Pa. Mar. 22, 2010)(evidence that employer informed doctor of its "preferred outcome" pretext to retatliation"); *Gordon v. Gerard Treatment Programs*, 390 F. Supp.2d 826, 843 (N.D. Iowa 2005)

[20] Defendant's argument is not advanced by its reliance on *Baum v. Rockland County*, 2005 WL 3527543 (2nd Cir. 2005), a pre-*Burlington Northern* case in which the Court of Appeals applied the overly restrictive adverse employment actions specifically rejected by the Supreme Court.

(pretext sufficiently suggested where employer seemed to be finding excuses not to accept certification of fitness provided by plaintiff's own doctor).

IV. Rite Aid's Manipulation of Fultz' Medical Examinations Subjected Fultz to Unlawful Medical Inquiries in Violation of the ADA.

An employer is not provided *carte blanche* to send an employee for a medical examination at its whim. "The prohibition against discrimination" under the ADA includes certain "medical examinations and inquiries" and requires any such examination to be "job-related" and "consistent with business necessity." 42 U.S.C. § 12112(d)(1); § 12112(d)(4)(A). The prohibition against unlawful medical examinations protects all employees, regardless of whether they are "qualified individuals with a disability." *Roe v Cheyenne Mt. Conf. Resort*, 124 F.3d 1221 (10th Cir. 1997); *Cossette v Minnesota Power & Light*, 188 F.3d 964 (8th Cir. 1999); *Conroy v N.Y. State Dep't of Corr. Servs*., 333 F.3d 88 (2d Cir. 2003); *Green v Joy Cone Co.*, 278 F. Supp. 2d 526 (W.D. Pa. 2003), *aff'd*, 107 Fed. Appx. 278 (3d Cir. 2004).

During the year and a half following Fultz' complaint to the EEOC, Fultz was cleared for duty by Dr. Lesser, an accomplished neurologist and Fultz' own doctor, five times. *See* SMF Ex. 14. Yet, Rite insisted on seeking opinions from four other medical professionals, three of whom cleared Fultz for duty. Rite Aid then ignored all but the employer-favorable conclusions of the company doctor. Not only did Rite Aid violate the ADA by directing the exams to exceed the scope of Fultz' job, but a jury could also find that Rite Aid required the exams for unlawful, outcome-determinative purposes inconsistent with business necessity, as Rite Aid engaged in a year long pattern of doctor shopping repeatedly ignoring (or even seeking to change) favorable results to Fultz. Moreover, the suspicious timing of the examinations, always ordered in close proximity to developments in Fultz' EEOC case could lead a jury to conclude that Rite Aid sent Fultz for repeated

medical examinations for discriminatory and retaliatory purposes, rather than anything job-related or consistent with business necessity.

A. The Exams Were Unlawful Because They Exceeded the Scope of Fultz' Job Duties.

A jury could find that the Krumholz and Rowekamp exams were not job-related or consistent with business necessity because the exams tested for physical abilities that were not required in Fultz' position. *See, e.g., Stevens v. Coach U.S.A. et. al.*, 386 F. Supp.2d 55 (D Conn. 2005) (jury could find defendant was inventing medical documentation requirements merely to prevent plaintiff from returning to work). In preparation for the exams, Rite Aid provided both Krumholz and Rowekamp a document titled Essential Functions: Order Fulfillment Partner that presented Fultz' job duties as broader than they actually were. Def. Ex. 5. As a result, based on this document, Fultz was evaluated for duties that he had never been required to perform as a Cooler Picker. SMF Ex. 38, 49. The following illustrates the way that the exams exceeded the scope of Fultz' job duties based on false information:

Essential Functions: Order Fulfillment Partner	Fultz' Actual Job Experience
"Drive lift trucks, forklifts, and other material handling equipment ..." Def. Ex. 5.	**Fultz was never required to operate any equipment in the warehouse after 1998.** Fultz Dep. at 48**.** **Cooler Pickers did not drive equipment because there were specialized drivers to perform this function.** Reiter Dep. at 14, 16- 17.

"Working at heights up to 400 inches (33.34 feet) and "Climbing three flights of stairs unimpeded." Def. Ex. 5.	**After 2004, Fultz was never required to work at heights or climb stairs, because the entirety of his duties were performed on the first floor.** Fultz Dep. at 194. **Cooler Pickers were only occasionally required to go to the second level.** Reiter Dep. at 11.

Therefore, the exams violated the ADA's provision against unlawful medical exams.[21]

B. Rite Aid Ordered Medical Exams for Unlawful Purposes

The ADA specifically sets forth the narrow circumstances in which employers are permitted to require medical exams of their employees: where business necessity requires a medical determination with respect to the employee's ability to do the job. Here, a jury could find that Rite Aid did not order the exams to discover whether or not Fultz was actually fit for duty, but rather Defendant sought the exams with the express goal of obtaining a determination that Fultz was *unfit* to work at heights or to work at all. Nowhere in the statute does the ADA permit an employer to use a medical exam for such a purpose. *See* 42 U.S.C. § 12112(d)(1) (expressly limiting medical inquiries to those specified in the statute).

First, if Rite Aid had ordered the exams out of a sincere desire to determine Fultz' fitness for duty, it would have provided the most specific and accurate description of Fultz' position – the Rite Aid Job Analysis Questionnaire – a 19 page highly detailed list of the essential functions of the RX Order Picker position. SMF Exs. 38, 49. Had they been provided this document, the doctors would have learned that Fultz was *never* required to work near moving mechanical parts, in high, precarious

[21] It is true that Fultz was amenable to the exam with Dr. Krumholz becauase he believed Krumholz had the qualifications to make an accurate assessment. Nevertheless, the *manner* in which Rite Aid ultimately directed the exam to be conducted violated the provision against subjecting an employee to an unnecessarily broad medical exam.

places, or in confined spaces. SMF Ex. 69 at 16,18. Instead, Rite Aid provided the broader job description including duties that Fultz did not actually need to perform, making it more likely that the doctors would find Fultz unfit.

Second, had Rite Aid truly sought an objective opinion of Fultz' fitness, it would not have had its attorney pressure Krumholz to change his opinion and then seek the company doctor's opinion when Kurmholz refused to modify his recommendations. Moreover, in setting up the Rowekamp exam, Rite Aid again only provided him the misleading description of the job and specifically did not include the more accurate description or the Krumholz Report that confirmed Dr. Lesser's opinion that Fultz did not need to be restricted. Thus, Rite Aid manipulated the fitness for duty examinations at the front end by cherry-picking helpful information, while purposely withholding harmful information, in order to ensure an employer-favorable result. This intentional manipulation of the process suggests that the examinations were not for any valid business necessity. *See Erbe v. Potter*, 2010 WL 1643568 (M.D. Pa. Mar. 22, 2010) (implicitly communicating the employer's preferred outcome to the employee-retained doctor suggested the exam was a pretext).

Third, Rite Aid's true motivation for subjecting Fultz to these repeated exams is reflected by its continuous disregard of the opinions of Dr. Lesser, who knew Fultz' condition and history the best – as the Director of the Johns Hopkins Epilepsy Center and Fultz' treating neurologist since 1998. Dr. Lesser had cleared Fultz for duty on each occasion prior to Rite Aid sending Fultz to Dr. Krumholz, Dr. Rowekamp, Dr. Dillen and P.A. Lewis. On several occasions, Dr. Lesser provided specific information to Rite Aid as to what he believed may have caused the seizures and never did he opine that Fultz' condition was out of control.[22] The EEOC's Guidance on Medical Examinations

[22] *See generally* Lesser Clinic Notes, SMF Ex. 14.

recognizes that an employee's treating physician is an important source of information, recommending that "[t]he employer also should consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a health care professional of its choice." EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 7, 2007) ¶11. An employer actually concerned with the fitness of an employee would have reached out to Lesser, invited him to the workplace, and explored the reasons for his opinions. However, no one at Rite Aid ever spoke to Lesser at any point in Fultz' career. SMF Ex. 23 at No. 9. Nor did Rite Aid ever instruct any of its hired doctors to consult with Lesser. Lazor Dep. at 84.

Indeed, Rite Aid responded to any work release by ignoring the results, seeking to change the results, or ordering Fultz to see another doctor of its choice. The following illustrates the actions taken by Rite Aid after Fultz received work releases:

- 12/29/06 Cleared by Lesser ⇨ 3/30/07 Sent to Krumholz
- 3/30/07 Cleared by Krumholz ⇨ No action for 5 months
- 10/29/07 Cleared by Lesser ⇨ 12/6/07 Sent to Rowekamp
- 2/15/08 Cleared by Lesser ⇨ No action
- 2/25/08 Cleared by Lesser ⇨ No action for 4 months, then 7/2/08 Sent to P.A. Lewis
- 7/11/08 Cleared by Lewis ⇨ Sent to Dillen
- 8/4/08 Cleared by Dillen ⇨ No action for two months
- 9/30/08 EEOC files lawsuit ⇨ 10/3/08 Fultz offered return to work.

Rite Aid has never explained why Lesser's opinions were disregarded. Rather, Rite Aid engaged in its campaign of doctor-shopping until it could find one that would adopt the results it desired – to restrict Fultz and later put him out of the workplace.[23] When Rite Aid obtained an opinion which explicitly rejected its desires, it hounded that doctor to change his opinions. Krumholz Dep. at 216-217. Thus, a reasonable jury could determine that Rite Aid's flat refusal to consider the opinions of Lesser, let alone consult with him, and instead subject Fultz to repeated fitness for duties with its hand-picked, less qualified medical professionals, not always neurologists or physicians, invalidates any purported business reason for sending Fultz to Krumholz, Rowekamp, Lewis and Dillen. *See, e.g., Gordon v. Gerard Treatment Programs*, 390 F. Supp.2d 839 (N.D. Iowa 2005) (pretext suggested where employer refused to accept certification by employee's doctor and could not explain why second exam was needed.).

Furthermore, a fitness for duty examination that is required for discriminatory or retaliatory reasons is not "job related" or consistent with "job necessity." *See Davis v. Ashcroft*, 355 F. Supp.2d 330, 355 (D.D.C. 2005) (Because evidence suggested that the exam was ordered for discriminatory reasons, summary judgment was denied on plaintiff's Rehabilitation Act claim of unlawful medical exam). In other words, if the true reason for the exam is retaliation, then an exam is not job related or consistent with business necessity. A jury could conclude that Rite Aid did not actually seek to determine whether Fultz was fit to carry out his job, but rather sought a finding that he was *unfit* in order to provide cover for the discriminatory denial of promotions and the retaliatory decision to remove him from the workplace. Given the chain of events leading up to the medical examinations,

[23] The EEOC Guidance for Medical Examinations warns that an employer should be cautious about relying solely on the opinion of its own health care professional when it conflicts with the employee's treating physician. EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 7, 2007) ¶12.

the temporal proximity of Fultz' protected activity, and Rite Aid's response to the fitness for duty results, a reasonable jury could determine that each of the medical examinations was motivated by retaliation and discrimination and thus in violation of the ADA. 42 U.S.C. § 12112(d)(1); § 12112(d)(4)(A).

1. Krumholz Fitness for Duty

A reasonable jury could conclude that Rite Aid sent Fultz to Krumholz because Fultz engaged in protected activity and the company manipulated the examination process in an effort to cover up discrimination and retaliation. The timeline of events is compelling:

- October 6, 2006, Rite Aid receives Fultz' Charge of Discrimination. SMF Ex. 1.
- January 8, 2007, Fultz complains of discrimination to Rite Aid's Vice President of HR. SMF Ex. 35.
- The very same day, Rite Aid initiates the process to send Fultz for a fitness for duty. *Id.*
- March 30, 2007, Fultz sent to Krumholz and Krumholz opines that Fultz is fit for duty and does not need a height restriction. C. Fultz Dep. at 254-255; Krumholz Dep. at 174; SMF Ex. 40. Rite Aid disregards the opinion of its hired Neurologist who specializes in Epilepsy.[24]
- August 20, 2007, EEOC finds reason to believe Rite Aid has discriminated against Fultz. SMF Ex. 42.
- September 14, 2007, counsel for Rite Aid contacts Krumholz to pressure him to change his opinion. SMF Ex. 43.

No legitimate business reason can explain this chain of events. The timing of the exam, coupled with Rite Aid's efforts to force Krumholz to change his opinion, strongly suggests that the examination was a pretext for retaliation. *See Erbe v. Potter*, 2010 WL 1643568 (evidence of

[24] Even after receiving the report, Rite Aid had no serious discussions about whether or not to lift the height restriction. Lazor Dep. at 219.

discrimination and retaliation where employer subtly conveyed its preferred outcome to employer-retained doctor before conclusion of fitness for duty exam).

2. Rowekamp Fitness for Duty

The circumstances surrounding the Rowekamp exam equally suggest that Rite Aid was motivated by retaliation when it required Fultz to see Rowekamp in December 2007 after it failed to convince Krumholz to change his opinion in the wake of the EEOC's cause determination. As explained in above in section III, *infra* and Plaintiffs' Joint Statement of Undisputed Facts at 19-29, genuine issues of material fact exist as to whether Fultz was sent to Rowecamp in retaliation for his earlier complaints.

3. Lewis/Dillen Fitness for Duty

Rite Aid subjected Fultz to a fourth fitness for duty exam on July 2, 2008. SMF Ex. 68; Lazor Dep at 279. After rejecting three releases from Fultz' renowned neurologist, Rite Aid selected a Physician's Assistant, Bruce Lewis, to perform the exam. *Id.* Rite Aid claims the examination was legitimate, but a jury could find the timing and choice of professional beyond suspicious.

On June 18, 2008, Rite Aid learned of the failure of Conciliation of Fultz' charge, meaning that Fultz would be receiving a right to sue letter and litigation would likely commence. SMF Ex. 65. Just one week later, Rite Aid asked PA Lewis to come to the Distribution Center to discuss a fitness for duty examination of Fultz.[25] SMF Ex. 67. This behavior is unfathomable in light of all the efforts Fultz had made to try to return to work for four months.

After Lewis performed the exam on July 2, 2008, he cleared Fultz to return to work on July 11, 2008. SMF Ex. 68; Lazor Dep at 279. Yet, Rite Aid took no action to offer Fultz his job back.

[25]Lewis had no involvement in this matter prior to this point.

Instead, obviously unsatisfied with the outcome of the Lewis exam, Rite Aid hired a second medical professional. A jury could find Rite Aid wanted a different opinion. Dr. Dillen rubber-stamped Lewis' findings on August 4, 2008. SMF Ex. 70. Yet Rite Aid *still* refused to offer Fultz his position back. Rite Aid has provided no explanation for why it failed to re-hire Fultz in August 2008. A jury could find that Rite Aid ignored the results of the Lewis and Dillen exams because those exams were only sought out of a desire to obtain ammunition for an impending lawsuit and not out of any sincere desire to determine whether Fultz was fit for duty. As such, a jury could find the exams inconsistent with business necessity, not job related, and strong evidence of pretext for retaliation.

V. Rite Aid Denied Fultz Reasonable Accommodations, Failed to Consider Accommodations Prior to Placing Fultz on Administrative Leave, and Removed him Because of his Requests for Accommodation.

Fultz requested several accommodations during his employment at Rite Aid which were denied. Later, Rite Aid intentionally misrepresented Fultz' requests to the medical examiner to justify his removal. Moreover, Rite Aid failed to engage in any interactive process with Fultz or his doctor and did not consider any reasonable accommodations which would have allowed Fultz to continue his employment at Rite Aid.

To make a prima facie case of failure-to-accommodate under the ADA, the plaintiff must show "(1) that he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of his disability; (3) that with reasonable accommodation he could perform the essential functions of the position . . .; and (4) that the [employer] refused to make such accommodations." *Rhoads v. Fed. Deposit Ins. Corp.*, 257 F.3d 373, 387 n.11 (4th Cir. 2001)

(alterations in original) (internal quotation marks omitted); 42 U.S.C. § 12112.[26] Fultz can satisfy each of these elements.

A. Rite Aid Denied Fultz' Request for Access to the Cage Door and Used his ADA Request to Justify his Removal.

Rite Aid claims that Fultz was provided a reasonable accommodation in the form of an electronic passcode to enter and exit the area known as the "Cage," in February 2008. Def. Mem. at 13. This assertion is false and undermined by Rite Aid's admission that Fultz was *not* provided a passcode to the Cage at anytime prior to the end of his employment at Rite Aid. SMF Ex. 23 at No. 21. This factual dispute alone requires a trial.

The undisputed facts establish that, as of November 2007, Rite Aid had received all the necessary clearances needed in order to provide Fultz passcode. *Id.* at Nos. 17-20. Yet, Fultz was never provided a passcode. *Id.* at No. 21. As Fultz' Manager explained, "[i]t was just one of those things that fell through the cracks ... I don't think I followed through with it." Brown Dep. at 94-95. *See also* Brown Dep. at 99-100 (stating she did not ask anyone to follow up on Fultz' request for reasonable accommodation.). Instead of providing Fultz a passcode, Rite Aid removed him from the workplace on the false grounds that he could not work in the Cage. On these callous actions, a reasonable jury could find Fultz was denied a reasonable accommodation.

During Fultz' employment, employees who were not directly assigned to the Cage, including Fultz, needed to be signed in and out of the Cage by another employee in order to enter and exit the Cage. Brown Dep. at 82; Fultz Dep. at 158. On July 17, 2007, Fultz requested that Rite Aid permit him electronic access to the Cage so that he could enter and depart on his own when working in the

[26] The Maryland Code equally makes it unlawful for an employer to "fail or refuse to make a reasonable accommodation for the known disability of an otherwise qualified employee." Md. State Gov. Code 20-606(a)(4); Code of Maryland Regulations 14.03.02.05. Fultz is considered to have a disability under Maryland law and therefore has a right to accommodation. *See* MD State Gov. Code 20-601(b)(1)(i)(1)(defining disability to include epilepsy).

Cage, due to his epilepsy, so he could engage in stress management as recommended by his Doctor. SMF Ex. 23 at No. 17; SMF Ex. 14 (Feb. 11, 2008). RX Manager Brown understood Fultz' request to be a request for an accommodation under the ADA. Brown Dep. at 99.[27] Fultz requested the accommodation so that he could enter and depart the Cage on his own in the event that he had a seizure aura and needed to visit the men's room as a precaution to prevent the onset of a seizure. Fultz Dep. at 287; SMF Ex. 19, No. 15, at 21. Rowekamp's correspondence of January indicated that Fultz was not fit for duty, in part, because he could not work "in isolated areas where ingress/egress is tightly controlled by touchpad." SMF Ex. 53. Yet, Rite Aid never informed Rowekamp that Fultz had requested electronic access to the cage. Rowekamp Dep. at 156-158. This adverse action taken against Fultz further underscores Rite Aid's complete disregard for Fultz' request.

The long delay in providing the accommodation further demonstrates that Rite Aid had no intention of following through. Nearly seven months passed from the time Fultz first made his request -- July 17, 2007 -- to the time he was terminated--February 8, 2008. SMF Ex. 23 at Nos. 17-21. When Fultz was cleared in November, the final step, required only an email from the Rite Aid DEA Coordinator to Rite Aid Loss Prevention and a visit from Fultz to the Loss Prevention contact to obtain the pass code. Brown Dep. at 94-96. This "fairly simple" step never happened and Rite Aid never provided Fultz with this reasonable accommodation which was required by law. *Id.*

The absence of good faith with regard to the interactive process, including unreasonable delays caused by an employer, can serve as evidence of an ADA violation. *Pantazes*, 366 F. Supp.2d at 70 (D.D.C. 2005) (Thus, as is the case here, "... if a jury could conclude that [the employer] failed to engage in good faith in the interactive process, and that failure led to defendant not according

[27]"I believed Chris wanted an exception made for him because of his condition," "the fact he has seizures" and "needs to be able to exit out of the cage, I guess immediately." *Id.*

reasonable accommodations [to the employee] in a timely manner, summary judgment cannot be granted."). *See, e.g, Cohen v. Montgomery County HHS*, 149 Md. App. 578, 594-95 (Md. Ct. Spec. App. 2003); *Merry v. A. Sullka & Co.*, 953 F. Supp. 922, 927-28 (N.D. Ill. 1997); *Krocka v. Riegler*, 958 F. Supp. 1333, 1342 (N.D. Ill. 1997).

B. Fultz Was Removed Without Any Consideration of Reasonable Accommodations and Rite Aid Failed to Permit Fultz to Return to Work Following Placement on Administrative Leave.

As explained in the Section II(E), *infra*, Rite Aid removed Fultz without considering any accommodations that could have mitigated the supposed concerns. The failure to consider accommodations as part of an employer's direct threat analysis violates the ADA because a direct threat is a "significant risk to the health or safety of others that *cannot be eliminated by reasonable accommodation*." 42 U.S.C. § 12111(3) (emphasis added).

After placing Fultz on administrative leave on February 8, 2008, Rite Aid refused to accommodate Fultz by permitting him to return to work. Fultz' requests were supported by Lesser's contemporaneous releases and Fultz was never re-examined by Rowekamp. As also explained in Section II(E), *infra*, Rite Aid was required to base its removal of Fultz upon, "reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r); *Browning-Ferris, Inc.*, 262 F. Supp. 2d at 587. Rather than consider Lesser's input, which was undisputably the most current medical information regarding Fultz' seizure condition, Rite Aid continued to rely upon Dr. Rowekamp's findings based on his December 6, 2007 fitness for duty examination, well into 2008. This failure to consider and engage in the interactive process in order to obtain the "most current objective medical knowledge and/or the best available objective evidence" means that Rite Aid failed to accommodate Fultz.

Implicit in the reasonable accommodation analysis is the requirement that "the employer and employee engage in an interactive process to identify a reasonable accommodation." 29 C.F.R. § 1630.2(o)(3); *Haneke*, 131 Fed. Appx. at 400. When an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA. *Id.* As explained in Section IV(B)(3), *infra*, Rite Aid unreasonably failed to bring Fultz back into the workplace after he had been cleared by its own professionals for at least two months.

C. Rite Aid Failed to Engage in the Interactive Process With Regard to Fultz' Cooler Accommodation Request.

Once the need for accommodation is established, the proper accommodation may be so obvious that no further inquiry is necessary. *Bryant v. Better Business Bureau of Greater Maryland*, 923 F. Supp. 720, 737 (D. Md. 1996) (*quoting* 29 C.F.R. § 1630.9). However, when this is not the case, "... the employer must make a reasonable effort to determine the appropriate accommodation." *Id*. Specifically, the employer must engage in an interactive process with the employee to identify a reasonable accommodation. *Haneke,* 131 Fed. Appx. at 400. The interactive process necessitates "a great deal of communication between the employee and employer." *Bultemeyer v. Fort Wayne Cmt'y Sch*., 100 F.3d 1281, 1285 (7th Cir. Ind. 1996).

In the fall of 2007, Fultz requested that Rite Aid permit him to leave the cooler door cracked open when he was working inside. Fultz Dep. at 291. Rite Aid contends Fultz was provided this accommodation, Def. Mem. at 12, but in reality the door was consistently closed and Rite Aid failed to take any action to prevent this from occurring. Def. Ex. 45 at 23. Fultz' request may not have been the most appropriate accommodation under the circumstances, but it effectively triggered the ADA's

"interactive process," which requires a flexible exchange of information between the employer and employee to identify an appropriate accommodation. No such interactive process occurred.

Had Rite Aid instituted an interactive process, an appropriate accommodation, taking into consideration the work space requirements, could have been identified which would have permitted Fultz to continue working in the cage. For example, Plaintiff's expert Daniel Rappucci toured the Cooler work space in the Distribution Center and was able to identify a potential accommodation for the Cooler situation. Rappucci identified the BrickHouse Alert System: "that automatically alerts monitoring personnel who would be able to contact any of three previously provided telephone numbers for co-workers/supervisors or outside emergency treatment personnel if necessary. The monitoring system costs approximately $40 a month." Vocational Analysis at 13, Ex. 1.[28]

Just a few months after Fultz' request, Rite Aid mischaracterized Fultz' request and told Rowekamp that Fultz could not work in the cooler alone, or if he was alone, the door needed to be kept **open**. SMF Ex. 53. Fultz was declared unfit for duty on this basis. *Id.* Yet, Rite Aid never raised any issue with Rowekamp regarding the accuracy of the depiction of Fultz' request to "crack" the Cooler door. Lazor Dep. at 263.

VI. Rite Aid Denied Fultz Promotions Because of his Epilepsy.

In 2006 and 2007, Plaintiff was denied promotions to a Lead position because of his epilepsy. Despite the existence of direct evidence of discrimination, Rite Aid claims Fultz was not promoted for reasons unrelated to his epilepsy, *i.e.* legitimate non-discriminatory reasons. In addition to providing direct evidence of discrimination, a plaintiff alleging a failure to promote can prove pretext

[28] Rappucci also identified numerous other potential accommodations which would have alleviated Rite Aid's exaggerated concerns about Fultz working on the second level, and even more importantly, kept Fultz employed at Rite Aid. *See* Vocational Analysis at 12-14, Ex. 1.

by "amassing circumstantial evidence that otherwise undermines the credibility of the employer's stated reasons." *Dennis v. Columbia Colleton Med. Ctr., Inc*., 290 F.3d 639, 648-49 & n.4 (4th Cir. 2002).

A. Fultz Was Denied a Promotion in 2006 Because of his Epilepsy.

In 2006, Rite Aid bluntly informed Fultz that he would not be promoted due to a reasons directly related to his epilepsy. SMF Ex. 19, No. 7 at 6. Simply put, Fultz applied for a promotion to a Lead position and was found "eligible." SMF Ex. 25 at RA949, RA993. Wood, the Rite Aid Manager who interviewed Fultz, told Fultz he would not be promoted because he was restricted to the first floor. SMF Ex. 19, No. 7 at 6. Wood knew at the time that Rite Aid had restricted Fultz to the first floor because of his epilepsy. *Id.* However, Rite Aid maintained Lead positions which did not require work on the second floor. SMF Ex. 26. Fultz was "eligible," was interviewed, but the company denied his promotion on account of his epilepsy and the company-imposed first floor restriction. Thus a jury could easily conclude that Rite Aid denied Fultz the promotion due to his disability.

Moreover, Fultz sought for years to have the height restriction lifted, Dr. Lesser and Dr. Krumholz (the neurologist hired by Rite Aid), having reviewed photographs of the second level, concluded that the restriction was unnecessary. See SMF Ex. 14; SMF Ex. 40. Yet, Rite Aid refused to lift the restriction, each time deferring to the 2004 restriction. Wood was interviewed by EEOC Investigator Carol Glace on June 21, 2007 and informed Glace that a Lead needed to be able to work in all areas of the Department.[29] Wood Dep. at 188-189.[29] Wood also said Fultz could not be a lead

[29] Fultz was restricted from working on the second level in November 2004 by Dr. Rowekamp. In 2004, Fultz had a seizure which consisted of Fultz lying on the floor and seizing, followed by him walking around the picking area. Fultz Dep. at 191-192. Fultz was nowhere near the "Pick-up and Delivery" ("P&D") areas, where full pallets are deposited from the first-floor by forklifts. Hunter Dep. at 62:14-17. Although Fultz knows where he wants to go in the post-seizing state and had previously safely descended the Pharmacy Department steps during a complex partial seizure, his co-

because if he were "the only Lead there and someone needed assistance on the second level ... if he's restricted to the first level, then he wouldn't be able to go up to assist them." Wood Dep. at 191. The focus on Fultz' epilepsy as a reason for the non-promotion is consistent with Fultz' recollection that during his interview, Wood stated, "Chris, I don't know why you put in for this job, you know you can't go upstairs." SMF Ex. 19, No. 7 at 6. Wood's own testimony, which corroborates with Fultz' recollection, shows that the real reason Fultz was not promoted was because of his disability.

Despite Fultz's direct evidence of discrimination, Rite Aid contends Fultz was not selected for the position because he received "fair to inadequate ratings on his interview score sheet." Def. Mem. 13. The selecting official, Wood identified the following reasons for why Mr. Fultz was not selected: 1) focus on the whole building as a team; 2) work out issues at your level;[30] and 3) show sense of urgency consistently. SMF Ex. 25. As explained below, a jury could find these reasons to be false and a mask to hide discrimination.

With regard to Fultz' alleged failure to focus on the "whole building as a team," Wood stated that Fultz "did not think we should help out other departments, send them help, or move people around." Wood Dep. at 108. In reality, Fultz expressed no such opinion. Fultz did request that

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workers tried "herding" him away from the stairs and away from the P&D areas where full pallets are deposited from the first-floor by forklifts. Fultz Dep. at 182-183; *see also* Fultz Dep. at 193 ("That was part of the misconception that I was fighting at Rite Aid, that I was going to leap off of the second floor.")("[T]hey didn't understand epilepsy and they were afraid that I was going to fall."); *Id*. at 225("I'm not going to fall out of P&D. … I would have to run on my hands and knees…."). Because of Fultz' coworker's fears and misconceptions, panic ensued, when, in fact, Fultz was never in danger of falling. *See* Williams Dep. at 59-60 (employees were "screaming").

[29] Fultz also applied for and was interviewed for a Lead position in 2007 by Manager Kim Brown. Brown Dep. at 8, 64. Fultz was not selected. Brown conducted a performance appraisal of Fultz on June 27, 2007. SMF Ex. 9, 2007 Performance Appraisal for Christopher Fultz performed by Kim Brown; Brown Dep. at 78:7-11. Brown rated Fultz as "meeting expectations" in the following categories: Customer Service, Associate Relations, Commitment to Excellence, and Communication Skills. SMF Ex. 9.

[30] Wood was unable to articulate any factual basis for this claim. Wood Dep. at 109. This unfounded explanation raises another issue of material fact as to the true reason for Rite Aid's rejection of Fultz.

management inform the department he was going to be transferred to that he was restricted from working at heights, so he would not be required to explain that he had epilepsy. Wood Dep. at 113; Fultz Dep. at 358. This was unrelated to any alleged failure to focus on the building as a whole. Indeed, Wood conceded that it was her "fault that I didn't call ahead to let them know" about Rite Aid's height restrictions placed on Fultz. Wood Dep. at 201. Similarly, Wood's alleged assessment that Fultz needed to consistently show a sense of urgency, Wood explained, "for the most part, Chris would be, you know, really gung ho and want to get work done. And there were times where he – would just mope because he was afraid of getting done too early because he didn't want to leave the Department." Wood Dep. at 109-110.[31] Wood's alleged assessments are further undermined by Fultz' contemporaneous Performance Appraisal, completed one before the non-selection.[32] SMF Ex. 9 at 2006 Performance Appraisal.

B. Fultz was Denied a Promotion in 2007 Because of his Epilepsy.

Fultz also applied for a Lead position in 2007 and Manager Kim Brown conducted the interview. Brown Dep. at 8; 64. Rite Aid contends that Brown did not select Fultz for this Lead position because of his negativity and poor behavior. Def. Mem. 14. Rite Aid has failed to produce the materials for Fultz' application, without explanation. Plaintiffs requested production of the documents related to the non-selection of Fultz and these documents were never produced in discovery. Brown Dep. at 66; Rite Aid's Response to Fultz' Third Set of Requests for Production, No. 5, Feb. 2, 2010, Ex. 4. Such documents are regularly maintained as a matter of business practice

[31]Wood's assessment of Fultz being "gung ho" and wanting "to get work done" is consistent with her assessment of Fultz' greatest strength as his overall knowledge of Pharmacy Department. SMF Ex. 25 at RA 0950. Fultz, "knew the picking process, the replenishment process, the cooler process, he knew how to wave replan, he knew the system." Wood Dep. at 107.

[32]While she did not perform the appraisal she testified that in July 2006, approximately one month prior to his non-selection, she would have agreed with the wholly positive assessments of Fultz' performance under her supervision as Manager. Wood Dep. at 95-98.

at Rite Aid. Brown Dep. at 64-66. Rite Aid's failure to produce these documents should permit a jury to infer that these documents undermine the defense. Matters involving the spoliation of evidence should be presented to a jury. *Vodusek v. Bayliner Marine Corp*., 71 F.3d 148, 157 (4th Cir. 1995).

Additionally Brown's post-hoc explanations for Fultz' non-selection are entirely subjective and undermined by her very positive contemporaneous Performance Appraisal of Fultz. SMF Ex. 9 at 2007 Performance Appraisal. Pretext can be ordinarily inferred "when the criteria on which the employers ultimately rely are *entirely* subjective in nature." *Jones v. Barnhart,* 349 F.3d 1260, 1267-68 (10th Cir. 2003) (emphasis added). Nor is there anything in Fultz' performance appraisal which indicates that Brown felt Fultz was either negative or had a bad attitude. SMF Ex. 9 at 2007 Performance Appraisal; Brown Dep. at 78-80.

The direct evidence of discrimination, Rite Aid's failure to produce the relevant documents, and the contradictions undermining the stated reasons for the non-selections create a genuine issue of material fact as to whether Rite Aid subjected Fultz to disparate treatment because of his disability.

VII. Rite Aid Subjected Fultz to a Hostile Work Environment and Failed to Prevent or Correct the Hostility.

Fultz' epilepsy manifested itself in the workplace early in his career and episodes continued to occur because of the chronic nature of Fultz' condition. As a result, Fultz was regularly subjected to hostile treatment because of his epilepsy. Yet, Rite Aid failed to implement any corrective measures and failed to provide any training to its staff. Williams Dep. at 25-26; Lazor Dep. at 38, 40, 117-118, 182-183; McDaniel Dep. at 45-46.

Both the ADA and Maryland law prohibit subjecting an employee to a hostile work environment because of a disability. *Fox v. GMC*, 247 F.3d 169, 176 (4th Cir. 2001)(ADA); MD State

Gov. Code, §20-606 (listing unlawful employment practices). Rite Aid created a hostile work environment by both engaging in and permitting the following hostile conduct:

- Rite Aid's security guard announced that he hoped he didn't have to "go out there and throw [Fultz] to the ground" while Fultz was having a seizure.[33] Warren Dep. at 40-41. Fultz reported the comment, but no action or investigation was undertaken. SMF Ex. 31; SMF Ex. 19, No. 15, at 19-20.

- Rite Aid's HR Training Manager Gail Boyle was instructed by HR Manager Dan McDaniel to photograph Fultz in his boxer shorts while he was having a seizure. Warren Dep. at 33.

- Rite Aid blamed Fultz for having seizures and assumed that he must not be following his doctor's orders if he was having seizures. McDaniel Dep. at 123, 130-132, 135. HR Director McDaniel ordered employees to investigate whether Fultz was not following his doctor's orders. *Id*. Fultz complained about this and was sent for a fitness for duty exam. *See* SMF at 13-14.

- Per McDaniel's order, while Fultz was having a seizure, Safety Manager Williams got in Fultz' face and repeatedly questioned Fultz about whether he had consumed alcohol the evening prior to the seizure. Warren Dep. at 39; Pfiefly Dep. at 166-167. Fultz reported this, but no action was taken. SMF Ex. 31.

- Fultz was physically held down on the floor and in a chair as he was experiencing seizures. Fultz Dep. at 243, 245, 250; Warren Dep. at 23.

- In 2004, Rite Aid restricted Fultz' movement throughout the facility and insisted on maintaining the restriction through 2008, despite Fultz' neurologist and Rite Aid's neurologist's opinions to the contrary. SMF Ex. 40; SMF 14 Lesser Clinic Notes at (July 19, 2006), (Sept. 13, 2006); (Jan. 16, 2008); (Feb. 11, 2008); (Feb. 25, 2008).

- Rite Aid occasionally sent Fultz to other Departments where he could not work because of Rite Aid's height restriction. Wood Dep. at 201; Brown Dep. at 167-168. Fultz was humiliated to the point of tears when he had to explain why he could not go upstairs. Fultz Dep. at 358.

- Rite Aid demanded Fultz provide a doctor's guarantee that he would have no more seizures before he would be permitted to go to the second floor. Wood Dep. at 148-149.

A. The Harassment Was Unwelcome and Subjectively Severe and Pervasive.

[33] Warren relayed this threat to Fultz. Warren Dep. at 43.

Fultz' repeated complaints to management of the harassment sufficiently establishes the unwelcomeness requirement for a hostile work environment. *EEOC v. Sunbelt Rentals, Inc*., 521 F.3d 306, 314 (4th Cir. 2008). Rite Aid contends, without citation to any authority, that because Fultz was unaware of the harassment, until, in some instances, the following day, this somehow lessens the level of hostility. Def. Mem. at 42. With the sole exception of one incident, each action complained of was directed toward Fultz personally. That Fultz was experiencing a seizure when the actions were taken does not make the conduct any less offensive, in fact, a reasonable juror could determine it actually makes them more offensive. Moreover, all incidents, even if not directed at Fultz, are relevant to Fultz' claim as the challenges the environment. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 696 (4th Cir. 2007); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001).

B. The Harassment Was Objectively Severe and Pervasive**.**

"[L]ooking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance, " Rite Aid's harassment of Fultz was severe and pervasive. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); *Fox,* 247 F.3d at 178-79. Viewed in their totality, Rite Aid's actions rise to the level of a hostile and abusive environment. *Sunbelt Rentals, Inc*., 521 F.3d at 318.

A threat of physical force can reasonably be viewed as an attempt to "'intimidate,' thereby creating an abusive atmosphere.'" *EEOC v. Central Wholesalers, Inc*., 573 F.3d 167, 176 (4th Cir. 2009); *SunBelt Rentals, Inc.*, at 318. Here, Rite Aid physically restrained Fultz and employees threatened him with physical harm. Additionally, Rite Aid's request for a written guarantee that Fultz *never* have another seizure before he would be permitted to go to the second level undoubtedly

interfered with Fultz' work performance, as it prevent him from being promoted. *See* Section VI, *infra*.

Finally, the fact that Rite Aid's HR Training Manager, at the behest of Rite Aid's HR Manager, had the audacity to take photographs of Fultz while he was having a seizure and was in his underwear was objectively humiliating to Fultz, as it would be to any reasonable person.

VIII. Fultz has Exhausted his Administrative Remedies with Regard to his Claim for Compensatory Damages.

Defendant also claims Fultz failed to exhaust his administrative remedies with regard to his claims for compensatory damages. Def. Mem. at 43-44. Defendant fails to cite any authority from this Circuit and relies upon two factually distinct decisions involving federal employees, who are subject to entirely different exhaustion requirements than those applicable to Fultz' claims in this litigation. *Compare* 29 C.F.R. § 1601 *et seq*.[34] (setting forth private sector EEOC procedural requirements) *with* 29 C.F.R. § 1614 *et seq*. (setting forth public sector EEO procedural requirements).

Notably, if a complaining federal employee "refuses to accept an offer that has been certified as an offer of 'full relief,' the employing agency must dismiss the employee's complaint. *Fitzgerald v. Secretary, U.S. Dept. Veterans Affairs*, 121 F.3d 203, 206 (5th Cir. 1997). Following dismissal, if the federal employee institutes suit in federal court, and "the district court also concludes that the agency's offer constitute full relief, then the court must dismiss the complaint for failure to exhaust administrative remedies." *Id*. The cases relied upon by Defendant involve interpretations of circumstances where the federal agency asserted that it offered the complaining federal employee "full

[34] *See also* 29 CFR § 1601.12 ("a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of").

relief," thus subjecting the complaint to dismissal, pursuant to federal sector EEO Regulations and are thus inapplicable to Fultz' claims.

In *Fitzgerald,* the Fifth Circuit held that a federal employee had failed to exhaust his administrative remedies with regard to his claim for compensatory damages and dismissed the case. The Court dismissed the claim, finding that the Agency had indeed offered the employee "full relief" for the claim asserted and the employee had rejected the offer. *Id*. at 209. For the same reasons, Defendant's reliance upon *Dawson v. U.S.*, 549 F. Supp. 2d 736 (Dist. S.C. 2008) is equally misplaced.

Conclusion

For the reasons stated herein, as well as in Plaintiffs' Joint Statement of Disputed Facts in Support of Opposition to Rite Aid's Motion for Summary Judgment, Plaintiffs respectfully request this Honorable Court deny the Motion for Summary Judgment in full.

Respectfully submitted,

/s/
Bruce A. Fredrickson #02839
Cedar P. Carlton # 16411
Jeremy P. Monteiro # 17459
Webster, Fredrickson, Correia & Puth, PLLC
1775 K Street, N.W., Suite 600
Washington, D.C. 20006
(202) 659-8510
(202) 659-4082 (fax)

Counsel for Christopher Fultz

/s/
Maria Luisa Morocco
U.S. Equal Employment Opportunity Commission
City Crescent Bldg
10 S. Howard St. Third Fl

Baltimore, MD 21201
(410) 209-2730
(410) 962-4270 (fax)

Counsel for the EEOC

CERTIFICATE OF SERVICE

I hereby certify that on the **10th day of June 2010,** a copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment was filed electronically. Notice of this electronic filing will be electronically mailed and served to the following:

James A. Rothschild
Anderson, Coe & King, LLP
201 N. Charles St., Suite 2000
Baltimore, MD 21201
(410) 752-1630
(410) 752-0085 (fax)
rothschild@acklaw.com

/s/
Maria Luisa Morocco
U.S. Equal Employment Opportunity Commission
City Crescent Bldg
10 S. Howard St. Third Fl
Baltimore, MD 21201
(410) 209-2730
(410) 962-4270 (fax)

Counsel for the EEOC